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TRACKING THE EVOLUTION OF THE NORM OF REFUGEE PROTECTION

**A minor dissertation submitted in partial fulfillment of the requirements for the
award of the degree of**

MASTERS OF SOCIAL SCIENCE IN INTERNATIONAL RELATIONS

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2012

COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature:

Signed by candidate

 Date: 04 October 2012

*“Do not fear to be eccentric in opinion,
for every opinion now accepted was once eccentric.”*

Bertrand Russell
Author, Mathematician, & Philosopher (1872 - 1970)

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LIST OF ABBREVIATIONS

GGN	Global Governance Network
HMAS	Her Majesty's Australian Ship
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IGO	Inter-Governmental Organisation
NGO	Non-Governmental Organisation
OAU	Organisation of African Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
US	United States (of America)
VCLT	Vienna Convention on the Law of Treaties

ABSTRACT

2011 marked the 60th anniversary of the adoption of the Convention Relating to the Status of Refugees. This international legal instrument marked the first time a global permanent regime was established for the purpose of providing a set of guidelines to states in their relations with displaced persons or refugees, particularly those who found themselves in that state after the Second World War. The Convention Relating to the Status of Refugees not only, it is argued in this paper, established the international refugee regime with a strong relation to human rights, but also laid the groundwork for the establishment of a norm of refugee protection as a standard of appropriate behaviour toward refugees. The paper aims to prove this first assertion by employing the Constructivist-based norm life-cycle theoretical framework advanced by Martha Finnemore and Kathryn Sikkink. This paper will show that a norm of refugee protection was established over time but that its tenets have increasingly been ignored by states thereby eroding the initial norm of refugee protection. The second assertion with which this paper is faced therefore is that the intensity of the erosion of this norm of refugee protection is such that its continued existence is questionable. The norm death-series theoretical framework proposed by Ryder McKeown will be employed to assist in showing the level of erosion of the norm of refugee protection. The outcome of this latter enquiry, it is suggested, shows that the norm of refugee protection is in the midst of expiration owing to the adverse practices of states, particularly democracies such as Australia and the United States of America but not limited to them. The seeming expiration of the norm of refugee protection has given rise to the possibility of the emergence of a new norm, which unlike the initial norm identified by the norm life-cycle, is not founded in human rights discourse but rather in one of security and deterrence. This latter assertion can be conducted with a second application of the norm life-cycle theoretical framework.

CHAPTER 1

INTRODUCTION

1.1. Overview

2011 marked the 60th anniversary of the adoption of the Convention Relating to the Status of Refugees.¹ The initiation of the 1951 Refugee Convention was prompted by events occurring during a particularly turbulent period in history marked by two world wars, the devastating impact of which had never before been witnessed in living memory. This violent period, roughly stretching over a period of 31 years from 1914 to 1945, destabilised human society, particularly in Europe, and resulted in large-scale displacement of people outside the borders of their respective countries of origin.² It is a conceivable argument that drafters of the 1951 Refugee Convention sought to develop an international regime, to direct and simultaneously regulate the response of states towards displaced persons, the origin of which stemmed largely from the effects of the preceding tumultuous period in human history. The eventual realisation of this regulative framework, however, was initially constrained in application, and resulted in a narrow application of protection for people who would otherwise qualify as a refugee except for these limitations placed on their recognition. The persons who were fortunate to receive the protection promised under the framework introduced by the 1951 Refugee Convention were those persons who found themselves outside the borders of their countries, only European countries as categorised at the time, before 1 January 1951.³ Only persons who fulfilled these two criteria were to receive protection from persecution that prompted these displaced persons to flee their homes in the first instance.⁴ These persons were and still are termed “refugees.”⁵

¹ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [1951 Refugee Convention].

² Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime” (2002) 14 (2–3) *International Journal of Refugee Law* 238 at 243 [Barnett].

³ *1951 Refugee Convention*, *supra* note 1, art. 1(A)–1(B). Art. 1B(1) did initially allow states party to declare whether they would accept obligations towards refugees that emanated beyond Europe.

⁴ *Ibid.*

⁵ *1951 Refugee Convention*, *supra* note 1, art. 1(A)(2).

The 1951 Refugee Convention and its provisions were heavily influenced by the provisions of the then newly minted human rights paradigm that rose to international prominence with the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948 by member states of the United Nations General Assembly.^{6,7} It is important to note, however, that the problem of displaced persons was not a new phenomenon by any stretch of the imagination at that time.⁸ The 1951 Refugee Convention was, however, the first major concerted effort by states to provide refugee protection that comported with acceptable standards of human dignity and other human rights as perceived within the human rights paradigm formulated until the time when the 1951 Refugee Convention came to fruition.⁹

This emerging awareness of human rights and the responsibility to protect was a viewpoint prominent among states and non-states entities who participated in the initial drafting of the 1951 Refugee Convention at the Conference of Plenipotentiaries in 1950.¹⁰ The initial limited application of the 1951 Refugee Convention notwithstanding, an increasing number of states outside of Western Europe, the area to whom the provisions of the 1951 Refugee Convention

⁶ *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR].

⁷ 50 member states participated in the final draft which was a substantial amount considering that decolonisation in Africa and Asia had not yet begun in earnest. See: “The Universal Declaration of Human Rights: History of the Document”, online: United Nations <http://www.un.org/en/documents/udhr/history.shtml> [UDHR: History]; Justice A.M. North & Nehal Bhuta, “The Future of Protection – The Role of the Judge” (2000-2001) 15 *Georgetown Immigration Law Journal* 479 at 486.

⁸ An example of prior movements of displaced people is that of the French Huguenots in 1685 when the French King revoked the Edict of Nantes that had previously granted religious freedom to all French citizens. The ground for persecution in this instance was therefore religious. See Barnett, *supra* note 2 at 239; Alexander Betts & Gil Loescher, “Refugees in International Relations” in Alexander Betts & Gil Loescher, eds., *Refugee in International Relations* (New York: Oxford University Press, 2011) at 7 [Betts & Loescher]; Erika Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come” (2006) 18(3-4) *International Journal of Refugee Law* 509 at 510 [Feller].

⁹ A large proportion of the rights contained in the 1951 Refugee Convention are commensurate with the rights contained in the International Bill of Human Rights, including the right to equal treatment, freedom of religion, and freedom of association. The International Bill of Human Rights is an unofficial grouping of human rights-based international legal instruments meant to shape the global human rights paradigm. The instruments are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See: *UDHR*, *supra* note 6; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 [ICCPR]; *International Covenant on Economic, Social and Cultural Rights* 16 December 1966, 993 U.N.T.S.3 [ICESCR].

¹⁰ The Conference of Plenipotentiaries was held from 2 – 25 July 1951 on the instruction of the UN General Assembly who passed a resolution to draft an international convention that would deal with the question of the status of refugees. See: *1951 Refugee Convention*, *supra* note 1, Preamble; Feller, *supra* note 8 at 524; *Draft Convention Relating to the Status of Refugees*, GA Res. 429(V), UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 (1950) 48.

was largely to apply,¹¹ sporadically began to adopt the 1951 Refugee Convention before 1967, particularly states in Latin America and the newly decolonised states in Africa at the time.^{12, 13}

The passage of the Protocol Relating to the Status of Refugees in 1967,¹⁴ however, removed the temporal and geographical limitations superimposed onto the original 1951 Refugee Convention.¹⁵ Even more states subsequently began to accept either one or both of the two central international law instruments as a guide to the provision of protection to refugees.¹⁶ Some states also pursued adherence to regional instruments such as the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama,¹⁷ in Latin America and the Organisation of African Unity's (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa,¹⁸ both of which provides for the protection of refugees along similar lines as the 1951 Refugee Convention and the 1967 Protocol thereto.¹⁹

¹¹ *1951 Refugee Convention*, *supra* note 1, art. 1(A).

¹² States such as Algeria, Benin, Cameroon, the Democratic Republic of the Congo and Cote D'Ivoire in Africa and Argentina, Brazil, Colombia and Ecuador in Latin America all signed and ratified or acceded to the 1951 Refugee Convention before 1967. See: List of States Party to the 1951 Refugee Convention and 1967 Protocol, online: United Nations Treaty Collection <<http://treaties.un.org>> [List of States Party to the 1951 Refugee Convention and 1967 Protocol].

¹³ For a state to become a party to an international treaty such as the 1951 Refugee Convention it must either sign and later ratify its intention to be bound by the principles contained in the Convention or it must accede to the Convention's principles where signature and ratification are thought to take place simultaneously. See: D.J. Harris, *Cases and Materials on International Law*, 7th ed. (London: Sweet & Maxwell, 2010) [Harris]; John Dugard, *International Law: A South African Perspective*, 3rd ed. (Lansdowne, South Africa: Juta, 2005) [Dugard]; Ian Brownlie, *Principles of Public International Law*, 6th ed. (New York: Oxford University Press, 2003) [Brownlie].

¹⁴ *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967) [1967 Protocol].

¹⁵ It should be noted that art. 1(3) of the 1967 Protocol allows for states party to the 1951 Refugee Convention who previously accepted the provisions of art. 1(B)(1)(a) of that Convention to be immune from the effects of art. 1(2) of the 1967 Protocol. See: *Ibid.* at art. 1(3); *1951 Refugee Convention*, *supra* note 1, art. 1(B)(1)(a).

¹⁶ *List of States Party to the 1951 Refugee Convention and 1967 Protocol*, *supra* note 12.

¹⁷ *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, online: <http://www.unhcr.org/refworld/> [Cartagena Declaration]; Barnett, *supra* note 2 at 248; Feller, *supra* note 8 at 524.

¹⁸ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 100 U.N.T.S. 45 (entered into force 20 June 1974) [OAU Convention]; Feller, *supra* note 8 at 524.

¹⁹ The OAU Convention, in fact, expanded upon the grounds that could be raised to incur a state's obligations towards refugees. See: *OAU Convention*, *supra* note 18 at art. 1(1).

The passage of time has not left the foundations of the refugee regime, and more specifically the 1951 Refugee Convention and the 1967 Protocol thereto, untouched by the political sphere, both domestically and internationally. The refugees under the original 1951 Refugee Convention generally shared an ethnic affinity with host states as the focus of the 1951 Refugee Convention fell on displaced persons within Europe.²⁰ Host states were also faced with tremendous economic and social developmental challenges that would benefit from an additional source of human capital after the devastation wrought by the Second World War.²¹ The United States of America (US), however, initially catered their domestic laws towards only recognising refugees emanating from either the Middle East or known Communist states,²² the wider-ranging provisions of the 1951 Refugee Convention and the later 1967 Protocol thereto notwithstanding.²³ In fact, refugees from the Communist Bloc were welcomed and their acceptance was lauded as an ideological victory over Communism.²⁴ The international refugee regime arguably therefore became a politically charged playground in contrast to a seemingly idealistically envisaged altruistic community of genuinely concerned states.²⁵

After the end of the Cold War, the world bore witness to increasing numbers of displaced people in most parts of the world. These displaced people included those caused by continued ethnic conflict in decolonised Africa.²⁶ The 1990s also saw the mass movement of refugees from the

²⁰The exception created by art. 1(B)(1)(b), however, is apposite to remember here. This does not, however, detract from the fact that the creation of a new international refugee regime was brought about as a response to the devastating consequences of the Second World War as they applied to displaced persons in Europe. See: *1951 Refugee Convention, supra* note 1.

²¹Janina W. Dacyl, "A Time for Perestroika (Restructuring) in the International Refugee Regime?" (1990) 3(1) *Journal of Refugee Studies* 26 at 38 [Dacyl].

²²The Refugee-Escape Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; Hart-Cellar Act, INS, Act of 1965, Pub.L. 89-236, 79 Stat. 911 [Immigration and Nationality Act of 1965]; Marc R. Rosenblum & Idean Salehyan, "Norms and Interests in US Asylum Enforcement" (2004) 41(6) *Journal of Peace Research* 677 at 683 [Rosenblum & Salehyan].

²³The Communist and Middle East specification was removed by the Refugee Act of 1980. See: Michael J. Parrish, "Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection" (2000) 22 *Cardozo Law Review* 223 at 235 [Parrish]; Idean Salehyan & Marc R. Rosenblum, "International Relations, Domestic Politics, and Asylum Admissions in the United States" (2008) 61(1) *Political Research Quarterly* 104 at 106 [Salehyan & Rosenblum].

²⁴Ahilan T. Arulanantham, "Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System" (2000) 22(1) *Human Rights Quarterly* 1 at 12 [Arulanantham].

²⁵*Ibid.*

²⁶The genocide in Rwanda in 1994 is apposite to mention here. Ethnic conflict has, however, also been rife in the general Great Lakes region too. See: Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (New Jersey: Princeton University Press, 2002).

Balkans, precipitated by amongst other reasons, ethnic-based persecution in the area.²⁷ This era also saw increasing numbers of persons in “refugee-like” situations, that is, persons who find themselves in situations similar to those of recognised refugees but for the lack of legal recognition for their condition.²⁸ The plight of refugees and those displaced persons in “refugee-like” situations has remained in the forefront of international consciousness, including since the end of the Cold War. The pressing nature of the refugee problem notwithstanding, “compassion fatigue” has nevertheless been identified over time in the responses of states towards displaced persons.²⁹

It is suggested that compassion fatigue, amongst other factors, has been responsible for facilitating an ever-more prominent tendency among numerous states party to the international refugee regime to question the regime’s prescriptive framework and to challenge the nature and scope of the 1951 Refugee Convention, particularly its central tenant of refugee protection.³⁰ The practices of states arguably therefore began to stretch, the bounds of good faith interpretation of the 1951 Refugee Convention’s provisions and its objects and purposes.³¹ Deviations included the enactment of increasingly restrictive measures in the form of pernicious domestic laws that stretched the limits of acceptable interpretations of the provisions of the 1951 Refugee Convention and the 1967 Protocol thereto.³² These domestic laws sanctioned the creation of often insurmountable barriers to entry into possible host states.³³ People claiming asylum have also been detained in various states around the world, arguably beyond

²⁷ Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York: Oxford University Press: 1993) at 1 [Loescher(a)]; Michael A. Sells, *The Bridge Betrayed: Religion and Genocide in Bosnia* (Los Angeles, California: University of California Press, 1998).

²⁸ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (New York, Oxford University Press, 2001) at 153 [Loescher(b)].

²⁹ Dacyl, *supra* note 21 at 37; Barnett, *supra* note 2 at 261.

³⁰ The focus on national security and the passage of national legislation that skirts on the edge of classifying legitimate refugees as criminals in the post 9/11 era, particularly in the United States are examples of such challenges. See Chapter 4 *infra*.

³¹ Even if states are not party to the Vienna Convention on the Law of Treaties that enjoins good faith interpretation, some of the treaty’s provisions are considered a codification of customary international law. See: *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), art. 31 [VCLT]; *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgement of 12 November 1991, [1991] I.C.J. Rep. 53 at para 48; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgement of 25 September 1997, [1997] I.C.J. Rep. 7 at para 46.

³² Betts & Loescher, *supra* note 8.

³³ Sadako Ogata, “Upholding international refugee protection principles today” (Address to the Law Association for Asia and the Pacific 18th Conference, delivered at Tokyo, Japan, September 2003), online: http://www.unhcr.or.jp/protect/pdf/sept03ms_ogata.pdf [Ogata].

reasonable measure as implored by the provisions of the 1951 Refugee Convention and the 1967 Protocol thereto, pending their successful application for refugee status.³⁴ Most important of all, states have engaged in practices that flagrantly violate the principle of non-refoulement, a central tenet of refugee protection.³⁵ Examples of these practices include interdiction at sea and direct return, practices that may also amount to chain refoulement.³⁶

The clearly discernable contradictory nature of instances of state practice notwithstanding, the United Nations General Assembly passed a Resolution to celebrate the occasion of the 50th anniversary of the 1951 Refugee Convention's adoption which reaffirmed the commitment of member states to the provisions of the 1951 Refugee Convention and the 1967 Protocol thereto.³⁷ The sincerity of this Resolution is, however, questionable when juxtaposed with state practice both prior and subsequent to the passage of this Resolution by the United Nations General Assembly.

The first decade of the 21st century in particular has borne witness to ever-increasing violations of the provisions of the refugee regime most prominently as it pertains to states that ought to comport with recognised human rights standards.³⁸ The dilution of refugee protection by way of its subversion to state security interests at the cost of genuine refugee protection in particular has been brought about by the response of states to the atrocities of the 9/11 terrorist attacks.³⁹ This latter trend is still evident in the continued state practices aimed at deterring displaced

³⁴ 1951 Refugee Convention, *supra* note 1, art. 31(1); Chapter 4, *infra*.

³⁵ 1951 Refugee Convention, *supra* note 1, art. 33(1).

³⁶ Penelope Mathew, "Australian Refugee Protection in the Wake of the *Tampa*" (2002) 96 American Journal of International Law 661 at 666 [Mathew]; Letter from Bill Frelick, Refugee Program Director for Human Rights Watch and Brad Adams, Asia Division Executive Director to António Guterres, United Nations High Commissioner for Refugees (13 June 2011) online: <http://www.hrw.org/news/2011/06/13/letter-unhcr-regarding-refugeeasylum-seeker-exchange-agreement-between-australia-and>; Choe Sang-Hun, "China Should Not Repatriate North Korean Refugees, Seoul Says" *The New York Times* (22 February 2012), online: <http://www.nytimes.com/2012/02/23/world/asia/seoul-urges-china-to-not-return-north-korean-refugees.html> [Sang-Hun].

³⁷ UN GAOR, 57th Sess., U.N. Doc. A/57/187 (2002) [UNGA Resolution].

³⁸ See Chapter 4 *infra*.

³⁹ Andrew I. Schoenholtz, "Refugee Protection in the United States Post-September 11" (2004-2005) 36 Columbia Human Rights Law Review 323 [Schoenholtz].

persons and arguably legitimate refugees from claiming asylum and commensurate protection from possible host states.⁴⁰

1.2. Research Aims

Taking due cognisance of the state of the international refugee regime as it developed from the inception of the 1951 Refugee Convention and the eventual passage of the 1967 Protocol thereto, all related international, domestic and regional human rights-centred instruments,⁴¹ and the state of the current regime, this research paper broadly aims to track the evolution of a norm of refugee protection particularly commencing in the post-Second World War period until the present day amid the ever-increasing complexity of the international legal and political landscape.

The stated aim provides four broad-based categories of consideration. First, the concept of tracking would imply that the existence of a certain phenomenon is to be followed over a period of time. Second, evolution implies the presence of change over time within the content of the phenomenon.⁴² Evolution therefore implies at the very least, it is suggested, that something did exist at the advent of the enquiry so as to realistically realize the process of evolution. Third, the entity or phenomenon at the centre of the enquiry is the norm of refugee protection. Evolution of this norm therefore implies that a norm or some form thereof, although perhaps not officially realised as such, existed at the commencement of the enquiry but that the content of the norm has changed over time. Given the crucial goal of proving the existence of a norm, its content comes under close scrutiny as a means to prove the actual existence of a norm. Fourth, the content of refugee protection is a crucial consideration to effectively prove the existence of the norm of refugee protection and the changing nature of its content over time as it evolves in response to actions taken by role players, including states.

⁴⁰ See Chapter 4 *infra*.

⁴¹ *ICCPR*, *supra* note 9; *ICESCR*, *supra* note 9; *UDHR*, *supra* note 6; *OAU Convention*, *supra* note 18; *African (Banjul) Charter on Human and Peoples' Rights*, 27 June 1981, 21 I.L.M. 58 (entered into force 21 October 1986).

⁴² Ann Florini, "The Evolution of International Norms" (1996) 40 *International Studies Quarterly* 363 [Florini].

In the light of the intended purpose of this research paper, therefore, the following interrelated hypotheses will be advanced: (1) an initial norm of refugee protection developed under the international refugee law regime; (2) state practice began to deviate from this norm and facilitated the erosion of the initial norm of refugee protection whose establishment is advanced in (1); (3) the development of an alternate norm of refugee protection, increasingly disconnected from its human rights roots, has subsequently been initiated.

1.3. Theoretical Framework

To realise the overarching aim of the research paper, the paper will first analyse the international refugee regime and the practice of states, particularly those party to the respective legal instruments concerned, through the lens of Martha Finnemore and Kathryn Sikkink's norm life-cycle and its various stages of norm development, including norm emergence, norm cascade and norm internalisation.⁴³ In the second instance, the practice of states will be observed through the tenets of the norm death-series, a comparatively new and untested framework advanced by Ryder McKeown,⁴⁴ so as to determine whether the norm of refugee protection as initially advanced under the norm life-cycle is subject to expiration under the three stages of the norm death-series. These three stages are the revisionist challenge, the reverse cascade and norm expiration respectively.⁴⁵ A second, brief application of the norm life-cycle will be undertaken to consider the possible emergence of a new norm of refugee protection, one which is not wholly commensurate with the intended purposes of the refugee regime. The purpose of these exercises in application of theoretical frameworks is to track the evolution of a norm of refugee protection in the early stages of the 1951 Refugee Convention's existence to the present day. A further consideration of these theoretical frameworks will be presented in chapter 2 of this research.

⁴³ Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 (4) *International Organization* 887 [Finnemore & Sikkink].

⁴⁴ Ryder McKeown, "Norm Regress: US Revisionism and the Slow Death of the Torture Norm" (2009) 23(1) *International Relations* 5 [McKeown].

⁴⁵ *Ibid.*

1.4. Methodology

To fulfill the research aims of this paper, both primary and secondary literary sources will be assessed. Primary sources include, but are not necessarily limited to, international and regional legal instruments such as the 1951 Refugee Convention, the 1967 Protocol thereto, the United Nations Charter,⁴⁶ the outcomes of domestic court cases and legislation, press releases and letters. Secondary sources include journal articles, books, working papers and newspaper articles. The information pulled from these sources will be employed according to the applicable theoretical framework as laid out under the theoretical framework section.⁴⁷

The case studies presented in Chapter 4 of this paper, although seemingly comparative in nature, serve not as a means of direct comparison between the two countries employed, the US and Australia, but rather as two evident examples that serve to highlight the array of practices that have proliferated over time on the part of states in an attempt to challenge, both directly and indirectly, the intended effect of the standards governing the international refugee regime. The choice of using the US as a case study in relation to this field is a logical one given the pre-eminent nature of its international stature, taking into account its power relationships and the sheer number of people who seek to access its protective network under the auspices of refugee protection. Although the justification of employing Australia as a case study in this paper is somewhat more questionable, three factors nevertheless suggest the effectiveness of considering the brief Australian case study. These three factors include: the strategic geographical placement of Australia in relation to the refugee-producing South-East Asian region, the democratic nature of the Australian state and therefore its seemingly human rights character and, somewhat contradictory to the prior factor, Australia's creative and well-publicised practices to evade responsibility under the international refugee regime in recent times. Although European states such as Germany may present an equally justifiable case study, its ties with the complex regional superstructure, the European Union, requires perhaps a greater array of theoretical consideration beyond the Constructivist nature of this paper. This latter task is beyond the scope of this paper.

⁴⁶ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [UN Charter].

⁴⁷ See Chapter 1, section 1.3 *supra*.

1.5. Limitations

The international refugee regime is a contentious field of operation, both in practice and academically. As to the latter point, the issue of refugee protection therefore provides many avenues of potentially fruitful academic investigation. A consideration of the validity of the contentious refugee definition as contained in Article 1(A) of the 1951 Refugee Convention and as incorporated in the 1967 Protocol thereto,⁴⁸ however, is beyond the scope of this paper's consideration. Furthermore, persons in "refugee-like" situations such as internally displaced persons,⁴⁹ although falling within the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR),⁵⁰ is therefore also beyond the scope of this paper.

Additionally, this paper will not undertake a consideration of the varied status determination procedures commensurate with being recognised as a refugee. Similarly, this paper will not investigate the contours of solutions to the refugee problem once a person has either been recognised as a refugee or been rejected from such classification.

The paper will also not undertake an expanded consideration of the role of the UNHCR within the refugee regime. This research paper is also limited to the temporal period beginning around the time of the adoption of the 1951 Refugee Convention until the present day. Reference to earlier time periods is limited to a historical timeline and is not central to the aim of this thesis but merely meant as background information for the development of arguments pertaining to the refugee regime from 1951 until the present day.

1.6. Chapter Outline

Finally, to realise the research aims of this paper and the hypotheses advanced in conjunction thereto, the paper will be structured into four chapters in addition to this introductory overview chapter. The second chapter is structured into two main sections. The first part will provide an

⁴⁸ *1951 Refugee Convention*, *supra* note 1; *1967 Protocol*, *supra* note 14.

⁴⁹ For further reading see: *UNHCR Guiding Principles on Internal Displacement*, UNCHROR, 54th Sess., Annex, Agenda Item 9(d), UN Doc. E/CN.4/1998/53/Add.2 (1998) at para 2.

⁵⁰ Loescher(a), *supra* note 27 at 84; Loescher(b), *supra* note 28 at 279.

overview of Finnemore and Sikkink's norm life-cycle to be applied in this research.⁵¹ The second part will focus on Ryder McKeown's proposed norm death-series.⁵² Both sections will also contain critical considerations as they relate to particular stages of the mentioned theoretical frameworks.

The third chapter will first define important concepts and then build on the factual overview provided in the introductory chapter. It will be argued that a norm of refugee protection as advocated in its original conception did in fact develop. To achieve this end the norm life-cycle will be applied in its various constitutive stages.

The fourth chapter will similarly commence with a factual overview of state practice particularly pertaining to the latter part of the 20th and early 21st century. Particular focus will be given to state practice in Australia and the United States. The chapter will then move to an application of McKeown's norm death-series to support the argument that the initial norm of refugee protection as argued for in chapter three has been severely eroded and expiration is seemingly a feasible endpoint. A subsequent, second application of Finnemore and Sikkink's norm life-cycle will follow with the purpose of highlighting the possible emergence of a new norm of refugee protection the content of which is largely inconsistent with the initial norm of refugee protection, particularly as it relates to the human rights paradigm.

The final chapter will conclude by presenting the cumulative findings of the research undertaken in conjunction with its aims and will propose areas in which further research ought to be conducted to develop a dynamic approach to the international refugee regime and state practice.

⁵¹ Finnemore & Sikkink, *supra* note 43.

⁵² McKeown, *supra* note 44.

CHAPTER 2

THEORETICAL FRAMEWORK

2.1. Overview

In order to fulfill the research aims of this paper laid out in the preceding introductory chapter, the theoretical framework of Finnemore and Sikkink's norm life-cycle will be employed.⁵³ This theoretical framework will provide a basis through which to consider whether or not an initial norm of refugee protection has indeed been formulated and established. The norm life-cycle framework is, however, not the only framework through which to consider the initial development and changing nature of norms.

Recent scholarship has focused on the possibility of norm regression in opposition to the norm progress propagated by Finnemore and Sikkink's norm life-cycle model. Ryder McKeown has framed a particular incarnation of this norm regression research as the norm death-series.⁵⁴ This framework proposes a mechanism through which to track the regression of an existing norm until its ultimate expiration or "death."⁵⁵ This relatively new and untested framework provides an opportunity to track the regression of a norm and in so doing it can open up space for the development of a new norm along the path prescribed by the norm life-cycle. The two frameworks are therefore arguably complementary and will be outlined hereunder.⁵⁶ Some points of contention with regards to the precepts of each stage of both the norm life-cycle and norm death-series will be considered.

⁵³ Finnemore & Sikkink, *supra* note 43.

⁵⁴ McKeown, *supra* note 44.

⁵⁵ *Ibid.* at 11.

⁵⁶ *Ibid.*

2.2. Conceptualisation

The norm-life cycle draws its antecedents from the social theory of Constructivism where Constructivism is broadly centred on the importance of norms as determinants of state identity and interests and ultimately state behaviour.⁵⁷ It follows that norms are therefore endogenous to state behaviour. The focus of Constructivism generally is therefore on ideational factors as opposed to the realist and liberalist schools. These latter theories regard norms as exogenous to state behaviour and rather pins the determination of state behaviour on considerations of power, whether hard or soft, and subsequent interests to achieve a favourable balance of power relationship.⁵⁸

Given these considerations, the norm life-cycle, contrary to the overwhelming focus on power by the theories cited above, is a model that propagates change or evolution in the international system through its consideration of changing norms. Norms as implicated within the context of the norm life-cycle facilitates change through a change in intersubjectively-held meanings within a community thereby influencing the nature of its consequent behaviour within the international community of states.⁵⁹ This normative turn reflects the Constructivist nature of the norm life-cycle.

Any further consideration of the norm life-cycle framework propagated by Finnemore and Sikkink first requires a closer consideration of the definitional contours of a **norm**. A norm is most generally and briefly defined as a standard of appropriate behaviour.⁶⁰ The “appropriate” label is afforded to the actions of a state by the perceptions of the community within which the norm operates.⁶¹ A norm therefore implicates a certain behavioural logic shared within a community.⁶²

⁵⁷ Finnemore & Sikkink, *supra* note 43 at 902.

⁵⁸ Alexander Wendt, “Anarchy is What States Make of It: The Social Construction of Power Politics” (1992) 46(2) *International Organization* 391 at 391-392.

⁵⁹ Finnemore & Sikkink, *supra* note 43 at 888.

⁶⁰ Christine Ingebritsen, “Norm Entrepreneurs: Scandinavia’s Role in World Politics” (2002) 37(1) *Cooperation and Conflict* 11 at 12 [Ingebritsen]; Finnemore & Sikkink, *supra* note 43 at 891.

⁶¹ Finnemore & Sikkink, *supra* note 43 at 891 - 892.

⁶² Finnemore & Sikkink, *supra* note 43 at 897.

In this regard, the logic of appropriateness refers to the pursuit of behaviour that conforms to the standards of a community and will ultimately give rise to legitimate action.⁶³ Behaviour arising from this logic may arguably not always ascribe to standards of rationality, a state of affairs more commonly associated with the logic of consequence where the costs and benefits of a certain strand of action is analysed before it is undertaken.⁶⁴ Behaviour resulting from this consideration generally aims to maximise the utility of the actor undertaking the action, the possible lack of legitimacy of subsequent actions notwithstanding.⁶⁵

The operation of the respective behavioural logics, as briefly considered above, is not necessarily mutually exclusive, a fact borne out by rational-constructivism.⁶⁶ Rational-constructivism provides some space for consideration of costs and benefits attendant on the actions of an actor, here the state, in the initial stages of determining whether a certain norm ought to be followed, that is, rationales as to the usefulness of adherence to the norm as a means to solve a perceived problem is considered.⁶⁷ A consideration of material consequences is therefore undertaken and accords with the suggestion by Finnemore and Sikkink that “rationality cannot be separated from any politically significant episode of...normative change.”⁶⁸ Considerations of rationality can therefore arguably influence the formation of a norm.⁶⁹

The abovementioned behavioural logics notwithstanding, an additional characteristic of a norm that bears consideration is its prescriptive nature,⁷⁰ in that it prescribes what ought to occur as opposed to what is occurring, but this does not arguably entail the moral goodness of the norm's character. In fact, the content of a norm may be decidedly immoral if the community within which it operates approves of its existence as being appropriate, that is, the intersubjective meaning ascribed to the norm also imbues the norm at hand with its consequent degree of moral goodness. This possible immoral grounding of a norm is borne out through the example

⁶³ James G. March & Johan P. Olsen, “The Institutional Dynamics of International Political Orders” (1998) 52(4) *International Organization* 943 at 952.

⁶⁴ *Ibid.* at 950.

⁶⁵ *Ibid.*

⁶⁶ Scott Fitzsimmons, “A Rational-Constructivist Explanation for the Evolution and Decline of the Norm against Mercenarism” (2009) 11(4) *Journal of Military and Strategic Studies* 1 at 3 [Fitzsimmons].

⁶⁷ *Ibid.* at 5.

⁶⁸ Finnemore & Sikkink, *supra* note 43 at 888; Fitzsimmons, *supra* note 66 at 5.

⁶⁹ Fitzsimmons, *supra* note 66 at 6.

⁷⁰ Finnemore & Sikkink, *supra* note 43 at 892.

of Nazi Germany and the acceptance of Hitler's view of superiority of the Arian race and hence the subsequent programme of eradicating so-called unacceptable deviations from this racial grouping.⁷¹ It is therefore arguable that the logic of appropriateness which informs the Constructivist normative paradigm does not necessarily require a morally just foundation but rather an amoral one in the sense of being morally neutral. This paper will therefore not render a judgment on the moral justness of the norms which it seeks to identify.

A final factor that ought to be placed under consideration to prevent possible future confusion is the delineation between international and domestic norms. The central focus of this study is on international norms, a feature commensurate with the prescriptions of the norm life-cycle.⁷² However, while international norms are those norms that operate in the international society of states, it is still prudent to recognise that these international norms may derive some of their content from domestic norms held within the domestic community of various states. A change in a domestic norm may therefore eventually exert some influence and facilitate subsequent change in an international norm. This latter point is commensurate with the suggestion by McKeown, in his exposition of the norm death-series, that a domestic crisis of legitimacy as it relates to a norm precedes an international crisis of legitimacy as it may be held within the international community of states.⁷³ Cumulatively, it is therefore important to recognise that a causal link may exist between international and domestic norms, not in the way that they are constructed but rather in their content.

Additionally, the focus on the development of international norms within the international political system highlights the centrality of the state as the most prevalent unit of analysis in this instance. As such the international norms propagated under the strand of research dealing with the norm life-cycle can be deemed to be held by states. A state's views are generally represented by its ruling governmental elite. The influence of non-state actors such as non-governmental organisations (NGOs) should not, however, be discounted as they have in recent times become increasingly more prominent players on the international stage.⁷⁴ It is therefore

⁷¹ David Nicholls, *Adolf Hitler: A Biographical Companion* (California: ABC-CLIO Inc., 2000) at 211 [Nicholls].

⁷² Finnemore & Sikkink, *supra* note 43 at 893.

⁷³ McKeown, *supra* note 44 at 11.

⁷⁴ Jessica T. Mathews, "Power Shift" (1997) 76(1) *Foreign Affairs* 50 at 50.

not completely illogical to ascribe a role to non-state actors such as NGOs, particularly prominent trans-national NGOs who are well-organised and well-funded, in the establishment of international norms, particularly at the early stages of a norm's development.

Given the varied conceptual considerations posited in the immediately preceding sections, an outline of the norm life-cycle propagated by Finnemore and Sikkink is now apposite followed by a consideration of the main tenets of the norm death-series as propagated by Ryder McKeown.

2.3. Norm Life-Cycle

Finnemore and Sikkink posit that the development of a norm can be tracked within the parameters of three particular consecutive stages of development: norm emergence, norm cascade and norm internalization.⁷⁵ It is further argued that norms do not come into existence in a vacuum but rather competes with other norms to obtain relative influence.⁷⁶ The three stage construction of the norm life-cycle also allows one to consider aspects of change within international politics.⁷⁷ The question as to how norms change is therefore central in the norm life-cycle framework and is of central importance for the realisation of the aims laid out for this research paper. The three stages propagated by Finnemore and Sikkink are laid out below (Figure 1).⁷⁸

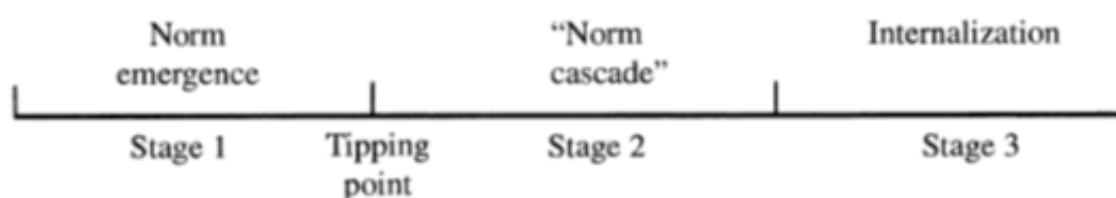


Figure 1: Norm Life-Cycle

⁷⁵ Finnemore & Sikkink, *supra* note 43 at 895. See Figure 1.

⁷⁶ *Ibid* at 897.

⁷⁷ *Ibid.* at 888.

⁷⁸ For earlier considerations of change and the role of norms therein see: Florini, *supra* note 42.

2.3.1. Norm Emergence

The initial stage of the framework concerns itself with norm emergence. This stage is arguably the most critical and determinative of all three stages in terms of the form and content of the norm. Norm entrepreneurs are the most prominent actors during this stage and initially frame an issue in the face of a host of competing ones.⁷⁹ These issues can be deemed important for a varied array of purposes including those of “empathy, altruism or ideational conviction”.⁸⁰ Norm entrepreneurs regard the issues they propagate as standards of appropriate behaviour which the broader public or society of states ought to adhere to so as to address a problem they have identified.⁸¹ Norm entrepreneurs consequently lobby and persuade states to adopt their crafted issues as a norm by advancing particular rationales to states that casts adherence to the this tentative norm in a favourable light relative to other, competing emergent norms.⁸²

Norm entrepreneurs are most often non-state actors such as NGOs but are arguably not limited to this grouping.⁸³ States, through their elected or appointed representatives such as ministers, their deputies or other high-level bureaucrats, have been known to fulfill the functions of a norm entrepreneur.⁸⁴ This is particularly evident in the case of Scandinavian countries such as Norway and Sweden who have, for example, undertaken the task of advancing peaceful resolution to disputes and adherence to a norm of peace and provision of developmental aid.⁸⁵ These countries have undertaken this role as they exert relatively little influence in other areas within the international system.⁸⁶

⁷⁹ Finnemore & Sikkink, *supra* note 43 at 897.

⁸⁰ *Ibid.* at 898.

⁸¹ Richard Prince, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” (1998) 52(3) *International Organization* 613 at 622 [Prince]; Fitzsimmons, *supra* note 66 at 9.

⁸² Fitzsimmons, *supra* note 66 at 9; Finnemore & Sikkink, *supra* note 43 at 897.

⁸³ J.A. Sandy Irvine, “Canadian Refugee Policy: Understanding the Role of International Bureaucratic Networks in Domestic Paradigm Change” (Paper presented to the Canadian Political Science Association Annual Meeting, Wilfrid Laurier University, 16-18 May 2011) at 2 [forthcoming in Grace Skogstad, ed., *Policy Paradigms, Transnationalism and Domestic Politics* (Canada: UTP, 2011) [Sandy Irvine].

⁸⁴ *Ibid.*

⁸⁵ Ingebritsen, *supra* note 60 at 13.

⁸⁶ *Ibid.*

Norm entrepreneurs, furthermore, utilise certain organisational platforms through which they can propagate adherence to their respective norms.⁸⁷ Organisational platforms are understood as pre-existing bases from which a norm entrepreneur can proceed to persuade states that their norm is preferable to adoption relative to other competing norms.⁸⁸ Platforms are not all the same and provide different tools to assist norm entrepreneurs in the realisation of their respective mandates.⁸⁹ Organisational platforms for such purposes are generally provided by inter-governmental organisations (IGOs) and NGOs such as the United Nations (UN) and Amnesty International respectively.⁹⁰ However, it is arguable that Global Governance Networks (GGNs) such as those advanced by Anne-Marie Slaughter can also constitute a relevant organisational platform through which the desired influence can be exerted by bureaucrats as both state representatives and norm entrepreneurs so as to generate growing compliance with and adherence to the norm being peddled.⁹¹

GGNs are described by Slaughter as being a community of bureaucrats from various state jurisdictions that come together and share ideas and experiences amongst each other, often on an informal basis.⁹² This gathering of bureaucrats provides a platform through which its members are socialised into particular international norms.⁹³ As such, these networks also serve as a useful mechanism through which international norms can become internalised within the domestic realm of states.⁹⁴ Bureaucrats as the administrative arm of the government are generally “uniquely positioned” within the policy-making process within a state and can arguably bring their influence to bear in favour of adopting the norm to which they had previously been exposed through their membership and participation in a GGN.⁹⁵

Similar power dynamics may however operate within a GGN as those dynamics that operate within the global power structure as a whole. Consequently, bureaucrats from states that wield

⁸⁷ Finnemore & Sikkink, *supra* note 43 at 899.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 900.

⁹⁰ Sandy Irvine, *supra* note 83 at 2.

⁹¹ Anne-Marie Slaughter, “Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks” (2004) 39(2) *Government and Opposition* 159 [Slaughter].

⁹² Sandy Irvine, *supra* note 83 at 2, 8; Slaughter, *supra* note 91 at 163.

⁹³ Sandy Irvine, *supra* note 83 at 2 - 3.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

relatively more power may be able to influence other members even if such powerful bureaucrats peddle a norm which is not necessarily in the best interests of the adopting state. The method of inculcation employed may therefore be one of coercion in addition to the more subtle avenues of persuasion.⁹⁶

The process of the norm life-cycle further asserts that norm entrepreneurs continue the pursuit of their mandate until a critical mass of states⁹⁷ has come to adopt the norm as an appropriate standard of behaviour, that is, norm entrepreneurs have been successful in “crafting a coherent rationale in support of...[the proposed] norm”.⁹⁸ When a critical mass of states has come to adhere to the norm concerned, a tipping point is reached.⁹⁹ This tipping point lies on the border of the initial stage of norm emergence and the subsequent second stage of norm cascade.¹⁰⁰ Once the tipping point has therefore been realised, a norm cascade is underway towards the third stage of eventual internalisation.¹⁰¹

The definition of critical mass is, however, open to contestation and can attract two broad conceptions, one in terms of quantity and the other in terms of quality. Finnemore and Sikkink propose that generally a critical mass of states entail that roughly a third of all states should have adopted the norm as a standard of appropriate behaviour.¹⁰² This conception of quantity may arguably not always be determinative of critical mass as certain issues with which norm entrepreneurs are concerned may not affect particular states at all or may affect them in a disproportionate manner, that is, the relative bearing and influence of a state in an issue area may be more weighty than for other states.¹⁰³ The quality measure in this context can arguably refer to the phenomenon of adherence by critical states or norm champions or what is otherwise referred to as specially affected states.¹⁰⁴ States that fall into this category are those that have

⁹⁶ *Ibid.* at 4.

⁹⁷ Finnemore & Sikkink, *supra* note 43 at 895, 901.

⁹⁸ Fitzsimmons, *supra* note 66 at 11-12.

⁹⁹ Finnemore & Sikkink, *supra* note 43 at 895, 901.

¹⁰⁰ See Figure 1.

¹⁰¹ Finnemore & Sikkink, *supra* note 43 at 895.

¹⁰² Finnemore & Sikkink, *supra* note 43 at 901.

¹⁰³ *Ibid.*

¹⁰⁴ The term “specially affected state” is an international law concept that speaks to the formation of customary international law. Customary international law is a set of laws that are formulated through requisite state practice and the identification of *opinio juris* on the part of states. All states are bound to obey the tenets of customary international law irrespective of their possible absence in approving

particular vested interests within an issue area marked by certain norms.¹⁰⁵ Given these arguments, quality as a measure of critical mass may therefore be a viable alternative measure.

Regardless of the definition ascribed to critical mass, once it has been reached, a tipping point occurs.¹⁰⁶ Employing the metaphor of a weighing balance scale, the tipping point refers to the moment when a sufficient amount of weight has been placed upon one side of the scale such that it tips to that side. Once this moment occurs, the norm can be said to have cascaded and the second stage of norm development has been entered.

2.3.2. Norm Cascade

A norm cascade is marked by the large-scale acceptance and adherence to the norm being peddled by norm entrepreneurs in the first stage of development.¹⁰⁷ This means that the rationales advanced by norm entrepreneurs in the norm emergence stage are increasingly accepted as valid bases for action.¹⁰⁸ At the beginning of the norm cascade only a relatively small number of states may, however, ascribe to the tenets of the norm under consideration. This arguably depends on whether so-called critical states adhere to the norm or whether the sheer number of states is sufficient for a critical mass and a consequent tipping point to occur. This intricacy notwithstanding, the norm cascade stage is marked by the continued socialisation of states into acceptance of and adherence to the norm being peddled, where socialisation can be defined as the means through which states are “induced to change their behaviour by adopting those norms preferred by an international society of states”.¹⁰⁹ This socialisation is conducted by norm champion states – states that are considered as norm leaders in this stage.¹¹⁰

applicable international legal instruments; however, specially affected states may present a case as to why such laws ought not to apply to them. See: Harris, *supra* note 13; Dugard, *supra* note 13; Brownlie, *supra* note 13.

¹⁰⁵ *Ibid.*

¹⁰⁶ Finnemore & Sikkink, *supra* note 43 at 901.

¹⁰⁷ *Ibid.* at 902.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

Motivation for succumbing to socialisation can be found in the pursuit of legitimacy, esteem and more often than not a morally cognisant reputation within the eyes of the international community.¹¹¹ This connects with the logic of appropriateness associated with normative frameworks relative to the behavioural logic of consequence.

Apart from the motivation for succumbing to socialisation, there are also various means through which states can arguably be induced to align their behaviour to that required by the norm. Finnemore and Sikkink suggest that norm leaders' positive experience with the norm ought to facilitate socialisation, albeit with these leaders' active knowledge of assuming that mantle or not.¹¹² In other words, socialisation may therefore occur through the process of emulation whereby the states have observed the adoption of the norm by a relevant state and have witnessed the advantageous effects drawn from such norm acceptance and adherence.¹¹³ These states have therefore undertaken a period of vicarious experience, successful completion of which entails their adoption of the norm. Such states therefore bandwagon with the states that carry initial persuasive normative weight, albeit unwittingly.¹¹⁴ This process lies squarely within the wisdom purportedly propagated by the late German Chancellor Otto von Bismarck when he stated that "fools learn by experience; wise men learn by other people's experience".¹¹⁵

Additionally, however, states that are already adherents to the propagated norm may also be able to expose the gap that sometimes appears between as yet non-adherent states' rhetoric and state practice in relation to the norm. This exposure is commensurate with naming-and-shaming practices and may allow seemingly less powerful states the ability to censure the actions of states that are at cross-purposes with the actions sanctioned as appropriate under the relevant norm.¹¹⁶ This naming-and-shaming ability is not, however, limited to states that genuinely adhere to the norm, and practice what they preach. Furthermore, NGOs like Human Rights Watch and Amnesty International and IGOs such as the United Nations may be able to

¹¹¹ *Ibid.*

¹¹² Fitzsimmons, *supra* note 66 at 12; Florini, *supra* note 42 at 375.

¹¹³ Fitzsimmons, *supra* note 66 at 12.

¹¹⁴ Finnemore & Sikkink, *supra* note 43 at 893.

¹¹⁵ Florini, *supra* note 42 at 379.

¹¹⁶ McKeown, *supra* note 44 at 10. Also see: Margaret E. Finnemore & Kathryn Sikkink, "Transnational Advocacy Networks in International and Regional Politics" (1999) 51(159) *International Social Science Journal* 89 – 101.

point out the failure of states to bring their practice in line with their professed rhetoric of adherence. Censure of this nature, together with a desire to attain legitimacy, esteem and a positive reputation, may prompt such non-complying states to start complying with the norm being peddled of their own volition, although begrudgingly in some cases.¹¹⁷

Although the motivation for succumbing to socialisation may lie in the pursuit of legitimacy, esteem and reputation, the means by which this is achieved may not solely lie with the demonstrably positive effect of adherence to the norm by norm leaders or the ability to name-and-shame. Coercion and persuasion by norm leaders in this stage as a means to achieve socialisation is apposite to consider here since it would arguably simply be different methods through which to achieve socialisation. It should not be confined to the norm emergence stage for use by norm entrepreneurs. Coercion is not situated within the paradigm of violence but rather through methods such as economic sanctions since the legitimate use of force for purpose other than instances of self-defense has been outlawed under international law.¹¹⁸ Persuasion could also conceivably proceed through less overt means such as acceptance of the norm as a precondition to the granting of aid.¹¹⁹ States that are not receptive to these methods may be labeled as rogue or pariah states and their stature within the international community of states may receive a severe blow that may have knock-on effects in that state's international relations particularly within the economic and trade structure.¹²⁰

¹¹⁷ Finnemore & Sikkink, *supra* note 43 at 903.

¹¹⁸ *UN Charter*, *supra* note 46, art. 2(4).

¹¹⁹ The use of both persuasion and coercion in this manner to achieve a desired outcome has been employed by states, particularly by the United States in its relations with North Korea and Myanmar. The former example is concerned with the United States withholding food aid to North Korea until that state's nuclear programme is deactivated. The latter example is concerned with the promise of lifting sanctions imposed against Myanmar years ago if they are to comply with certain preconditions such as adherence to democracy instead of the military dictatorship which had previously ruled the state. See: "US 'ties North Korea food aid to nuclear progress'" *BBC News* (29 February 2012), online: *BBC News* <http://www.bbc.co.uk/news/world-asia-17201046>; Andrew Quinn, "U.S. readies food aid for North Korea, with conditions" *Reuters* (29 February 2012), online: *Reuters* <http://www.reuters.com/article/2012/03/01/us-korea-north-food-idUSTRE81S2EY20120301>; Hu Yinan, "Myanmar set to regain international aid" *China Daily* (6 April 2012), online: *China Daily* http://usa.chinadaily.com.cn/world/2012-04/06/content_14991615.htm.

¹²⁰ This consequence is relevant only where the outcome being sought is necessarily a morally defensible one and not one that offends the precepts of human rights, for example.

Overall, however, it must be mentioned that there have been instances in the past where states, despite incurring the sanction of other states within the international community, have opted for continued failure to adhere to a norm, particularly one based within the human rights context. In fact, the United States is such an example within the context of the declaration of war on Iraq and the use of torture as a purportedly legitimate interrogation technique in the post 9/11 era.¹²¹ Censure for such norm violating actions may not always have a demonstrable impact on the rogue state as they are either too powerful, particularly economically, or other considerations enter into the equation that has no apparent connection to the issue under the spotlight but rather may sour relations between the two states to the detriment of the country not guilty of violating the relevant norm concerned. This particular situation therefore poses a conundrum and ought to be investigated further. However, this endeavour ought to take place at another juncture as such research aims lie beyond the scope of this paper.

A last point that requires some close consideration is the likelihood of a norm being accepted by an ever-increasing number of states. It is arguable that the form and content of the norm exerts some level of influence on the likelihood of a norm being accepted by states in general. Finnemore and Sikkink contend that the content, clarity and specificity of a norm have a bearing on the likelihood of a norm being adopted into the international system.¹²² However, specificity in particular is often an elusive pursuit within the international law and indeed the wider diplomatic arena as international agreements are often formulated in broad strokes so as to attract the adherence of a greater number of states. This broad strokes approach has arguably encouraged the proliferation of a multitude of sometimes dubious of treaty provisions as one of the sources of international law. In addition, the prevailing international normative environment also has substantial bearing on the probability of a norm being adopted by states, that is, the “lens of circumstance” plays a role.¹²³ This also resonates with the contention that norms are not born into a vacuum.¹²⁴

¹²¹ McKeown, *supra* note 44 at 19.

¹²² Finnemore & Sikkink, *supra* note 43 at 906 – 907.

¹²³ Fitzsimmons, *supra* note 66 at 18; Gregory A. Raymond, “Problems and Prospects in the Study of International Norms” (1997) 41(2) *Mershon International Studies Review* 205 at 209.

¹²⁴ Finnemore & Sikkink, *supra* note 43 at 897.

2.3.3. Norm Internalisation

Norm internalisation is the final stage of the norm life-cycle.¹²⁵ It appears at the far end of the norm cascade when a particular norm becomes widely accepted within the international community as the appropriate standard of behaviour.¹²⁶ Fitzsimmons argues that internalisation of a norm occurs when a norm has continually cascaded until the rationale initially advanced by the relevant norm entrepreneurs during the norm emergence stage becomes uncontested and accepted as legitimate assumptions.¹²⁷ The norm under consideration therefore becomes part of the everyday dialogue in that its presence and implications are subsequently taken for granted not in the sense that it is ignored but rather that adherence to its precepts are taken as an unquestionable duty and is not necessarily open to deviation. Cumulatively, therefore, a norm at this stage of development within the norm life-cycle is generally considered to be both powerful and difficult to define as a result of the taken-for-granted quality identifiable with this stage of the norm life-cycle.¹²⁸ Fitzsimmons does, however, caution that “it can be extremely difficult to discern whether a norm has been truly internalised.”¹²⁹

The definition of this third stage of the norm life-cycle upon first read seems relatively simple and plausible, that is, a norm is internalised when compliance with its prescriptions are taken for granted.¹³⁰ There are, however, contentions that ought to be highlighted in this regard. It is apposite to mention here that all norms are not always equal in appeal and may not necessarily reach the third stage of norm internalisation in the norm life-cycle.¹³¹ That is, the norm may simply be too volatile or contentious to attract the level of consistent support from states commensurate with a taken-for-granted character ascribed to internalised norms in Finnemore and Sikkink’s conception thereof. Similarly, the norm’s development trajectory may be intercepted by another norm that consequently erodes state adherence and subscription to the initial norm, that is, the initial rationale for compliance may be regarded with growing skepticism.¹³² This does not necessarily imply that the norm itself has become irrelevant in the

¹²⁵ See Figure 1; Finnemore & Sikkink, *supra* note 43 at 904 – 905.

¹²⁶ Fitzsimmons, *supra* note 66 at 23.

¹²⁷ Fitzsimmons, *supra* note 66 at 23.

¹²⁸ Finnemore & Sikkink, *supra* note 43 at 904.

¹²⁹ Fitzsimmons, *supra* note 66 at 23.

¹³⁰ Finnemore & Sikkink, *supra* note 43 at 904.

¹³¹ *Ibid.* at 895.

¹³² Fitzsimmons, *supra* note 66 at 25.

larger scheme of things in that it is not further required for the achievement of human betterment, for instance, where this is required or that it is no longer held by a majority of weaker states that may have been subjected to disproportionately strong influence from other more influential states within the international community of states. It is arguable, furthermore, that this very point requires that one at least consider a norm even if it does not completely adhere to the tenets of the third stage of the norm life-cycle in that the norm may nevertheless be of cardinal importance within the international political arena not only as a single issue-area but also as one linked with other areas where there are norms that have arguably internalised. It is here that the concept of adjacent norms as mentioned by Finnemore and Sikkink becomes relevant.¹³³ For example, refugee protection may arguably not be a norm relevant in its own right but its connection with the international and domestic security regime and the international human rights regime may make its consideration a necessity nonetheless.

The second consideration, which is loosely related to the first consideration, that ought to be entertained requires some substantiation but nevertheless remains a valid. The norm life-cycle suggests that there is a convergence towards a specific norm and that it becomes entrenched within the actions of states without question.¹³⁴ Equally, norms that do not inspire such convergence can therefore arguably be considered as having failed to internalise. This assumption, however, can be fallacious, particularly within the international system as it exists today. It is highly improbable that dictates of actions will forever remain accepted; regardless of the moral acceptability such dictates may seem to carry. The world has been subjected to increased interconnectedness under the auspice of globalisation and as such a greater array of factors possesses the ability to influence the nature and pace of change within international politics. The very nature of international politics is therefore highly fluid and not as static as one would expect under the definition ascribed to internalisation under the norm life-cycle. There may never be enough time for a norm to internalise to the point of being taken for granted, especially given the emergence of competing centres of international power enshrined in

¹³³ Finnemore & Sikkink, *supra* note 43 at 908.

¹³⁴ *Ibid.* at 904.

different conceptions of culture and society and the proliferation of players that wield that power on the international stage.¹³⁵

A further argument which can generally be lodged in relation to the operation of the norm internationalisation stage suggests that the activation of the internalisation stage, although characterised by the taken-for-granted quality of the norm under consideration, may occur in a staggered fashion and in fact not in a collective sense as is arguably suggested by the linear model of the norm life-cycle.

Norm internalisation may not necessarily and in fact will arguably never achieve collective internalisation within the international community of states due to the inevitable political undertones of almost any norm that can be analysed through the application of the norm life-cycle theoretical framework. This suggests that the norm life-cycle is not as inherently linear as suggested by the three consecutive stages of the norm life-cycle. Norm internalisation can arguably, it is suggested, occur for different states at different times along the spectrum of the norm life-cycle in a staggered fashion. The states that are first persuaded by norm entrepreneurs to adopt their particular framed issue are those states that may assume the title of norm champions in the subsequent stage. This suggests that these states would have to internalise the norm so as to effectively socialise other states into adherence to the norm under consideration. This state of affairs is particularly necessary within the context of countries with a liberal democratic identity. A state may not be able to profess the salience of a norm to other states without the approval thereof by numerous national governmental institutions, be it the respective country's legislature or judiciary or both, especially in relation to norms that require the allocation of limited resources away from the domestic citizenry.¹³⁶ This would in turn implicate the necessity of support from the domestic populace particularly in instances where an issue of concern enters the international and national dialogue close to a domestic election

¹³⁵ "China and India: Contest of the Century" *The Economist* (19 August 2010), online: *The Economist* <http://www.economist.com/node/16846256>; "Asia's Balance of Power: China's military Rise" *The Economist* (7 April 2012), online: *The Economist* <http://www.economist.com/node/21552212>.

¹³⁶ An example is the control of the United States governmental budget by the Congress through powers appropriated to it by the Constitution of the United States, Article 1(8); B.S. Chimni, "Globalization, Humanitarianism and the Erosion of Refugee Protection" (2000) 13 (3) *Journal of Refugee Studies* 243 at 252 [Chimni].

cycle.¹³⁷ It is prudent to note here that the domestic citizenry implicates the domestic paradigm in relation to international norms, a situation particularly important in the age of modern foreign relations and policy where the domestic situation prominent within a country can and does have a demonstrable effect on the shape of the foreign relations and policy of a state, a policy which may ultimately contribute to the determination of which international norm is to be adopted in the first place. The above argument therefore overall suggests that internalisation can perhaps take place in a staggered fashion without initial mass convergence by states towards the acceptance of the norm as is the case within the third stage of the norm life-cycle laid out by Finnemore and Sikkink.¹³⁸

Cumulatively, the points raised under the heading of norm internalisation suggest that internalisation in the vein suggested by the norm life-cycle is somewhat parsimonious and does not adequately account for the fickle nature of international politics within which these norms are to operate. This critique does not, however, suggest that the current model is wholly inadequate and that a radically new alternative conception of internalisation ought to be considered. It simply means that greater account ought to be taken of the changing nature of the context within which norms operate.

2.4. Norm Death-Series

Scholarship concerning the development of norms has largely focused on the progress of norms towards an end point as is illustrated by Finnemore and Sikkink's norm life-cycle.¹³⁹ Even norms that are entrenched, however, and have acquired the so-called "taken-for-granted" quality professed by Finnemore and Sikkink have been challenged in recent years.¹⁴⁰ Robert McKeown has proposed a model that tracks the decline and possible death of a norm.¹⁴¹ This model is constructed along the same basic precepts as the norm life-cycle in that it is comprised of three

¹³⁷ This latter point is often characteristic of election cycles in the United States, especially at this present time in the period leading up to the presidential elections on 7 November 2012.

¹³⁸ Finnemore & Sikkink, *supra* note 43 at 904.

¹³⁹ Finnemore & Sikkink, *supra* note 43.

¹⁴⁰ For example, the continued salience of the anti-torture norm and the anti-mercenary norm has come under review in recent years. See: McKeown, *supra* note 44; Fitzsimmons, *supra* note 66.

¹⁴¹ McKeown, *supra* note 44.

stages with each stage identified by their respective actors, motivations and mechanisms. It can therefore be said that the norm death-series in some degree is the norm life-cycle “in reverse” (Figure 2).

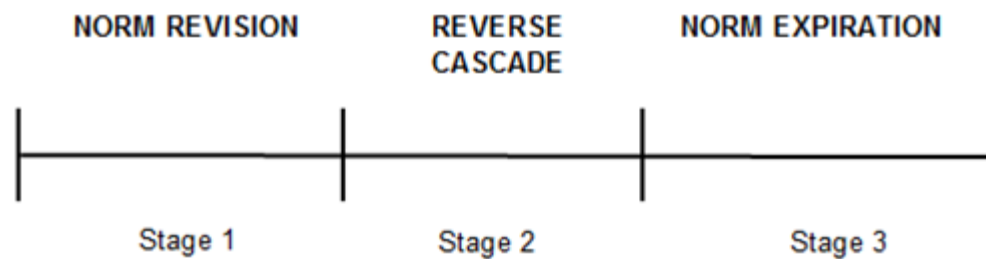


Figure 2: Norm Death-Series

Although the norm death-series suffers from the fate of paucity of scholarship it is nevertheless arguably an attractive scholarly endeavour that can, to some degree, account for the regression of a norm. One contention of the model is however problematic and it ought to be addressed first.

It is maintained by McKeown that the norm death-series only applies to norms that have reached the internalisation stage of the norm life-cycle.¹⁴² However, many norms do not necessarily reach the internalisation stage.¹⁴³ Norms that fail to reach the final stage and therefore fail to acquire the “taken-for-granted” quality ascribed to internalised norms by Finnemore and Sikkink can arguably nevertheless be subject to regression. It may be that the regression witnessed in as yet “un-internalised” norms could be explained by the insufficient number of states that have adopted the norm as a guide to appropriate and therefore legitimate behaviour relevant to the issue-area. There are, however, other avenues related to the internalisation question that are not as easily cast aside, that is, instances where internalisation of a particular norm by a particular state or a grouping of states does not necessarily occur at the third stage of the norm life-cycle as is most prominently advanced by Finnemore and

¹⁴² McKeown, *supra* note 44 at 6.

¹⁴³ Finnemore & Sikkink, *supra* note 43 at 895.

Sikkink.¹⁴⁴ The case of norm leaders that have previously internalised the norms themselves into which they have subsequently socialised other states come to mind as discussed in the previous section under the third stage of norm internalisation.¹⁴⁵ Internalisation in this latter instance can, amongst other methods, come on the heels of the institutionalisation of the norm in international law instruments such as treaties, or domestic legislation, and thus arguably approval by the citizenry through their representatives, that grants approval for expenditure of funds where this is relevant.

Another closely associated example to the one immediately above that can be raised, although be it in a round-a-bout way, is that of adjacent norms to the one whose development is under consideration.¹⁴⁶ An illustration of this point can be found in the group of liberal democratic states that have internalised human rights norms as part of the very identity of “liberal democratic” states¹⁴⁷ and its adjacency to refugee protection, a point that will be addressed in subsequent chapters. It may be that states who have internalised one norm that serves as a foundation to another norm may internalise and come to accept the subsequent norm by virtue of their identity before other states have done so on a large enough scale to collectively implicate the third stage of the norm life-cycle. The human rights example mentioned is particularly apposite since the norm is arguably being peddled to states beyond the core liberal democratic group of states so as to expand the reach of democratically-based norms and values around the world.

Internalisation therefore arguably, as stated previously in this research, can occur in a staggered nature with a particular state’s stage of internalisation being determined by factors such as its position or not as a norm leader and a state’s inherent characteristics. Regression of a norm relevant to particular states (such as those within the liberal democratic paradigm), caused by these states’ own volition, is a cause for concern as it challenges the very foundational identity of this grouping. The norm death-series therefore arguably offers a feasible model of tracking this regression even in the absence of the level of intensity of internalisation

¹⁴⁴ *Ibid.* at 900.

¹⁴⁵ See Chapter 2, section 2.3.3.

¹⁴⁶ Finnemore & Sikkink, *supra* note 43 at 908.

¹⁴⁷ Fareed Zakaria, “The Rise of Illiberal Democracy” (1997) November/ December Foreign Affairs [Zakaria].

prescribed by the third stage of the norm life-cycle. A further consideration of the norm death-series is therefore now apposite.

2.4.1. Revisionist Challenge

The first stage of the norm death series is marked by the presence of norm revisionists (or agents of norm regression) who undertake the task of reframing the norm concerned and presenting a new rationale that facilitates violation of the preceding norm.¹⁴⁸ A new standard of appropriate behaviour or norm to which a state's actions ought to accord is therefore the result. This role is reminiscent of the one identified with norm entrepreneurs under the norm life-cycle.¹⁴⁹ McKeown tested his proposed norm death series with the anti-torture norm as example and found that the norm was reframed from a humanitarian paradigm towards a security paradigm, most prominently after the harrowing events in the United States of America on 11 September, 2001.¹⁵⁰ Reframing of the anti-torture norm has led to its current state of continued erosion and the beginning of the ascent of a new, acceptable behaviour that would previously not have held much ground under the humanitarian paradigm with its human rights character.¹⁵¹ It is highly probable that this scenario can feasibly play itself out with other norms at the centre of consideration, including the proposed norm of refugee protection that is the focus of this research.

The identity of norm revisionists is arguably similar to that of norm entrepreneurs and can include entities such as individuals, NGOs, IGOs and states. All these entities have become more prominent players on the international stage in recent times, shunning the traditional role reserved for states. Once these norm revisionists have revised the content of the norm to a sufficiently convincing standard among domestic and international concerns, the challenge resonance generated would arguably precipitate the advent of the second stage of the norm death series, a reverse cascade.¹⁵²

¹⁴⁸ McKeown, *supra* note 44 at 10 – 11.

¹⁴⁹ Finnemore & Sikkink, *supra* note 43 at 897; McKeown, *supra* note 44 at 11.

¹⁵⁰ McKeown, *supra* note 44 at 10.

¹⁵¹ McKeown, *supra* note 44 at 20.

¹⁵² McKeown, *supra* note 44 at 11.

2.4.2. Reverse Cascade

McKeown posits that the reverse cascade stage is marked by two sub-stages, namely initial domestic legitimacy crises within states followed by an international legitimacy crisis.¹⁵³ This concern with legitimacy is echoed within the norm cascade stage of the norm life-cycle.¹⁵⁴ Domestic legitimacy crises in general may refer to the erosion of the normative weight of a norm and its consequent ability to demand obedience from persons that ought to operate within its confines, that is, the extent of the crisis is such that the norm at hand comes to a critical turning point in its continued salience.¹⁵⁵ Similarly, an international legitimacy crisis may refer to the instance where a norm's ability to demand adherence by a varied band of actors on the international stage, including but not limited to states, is at a critical turning point.¹⁵⁶ An international legitimacy crisis therefore ensues when the rightfulness of continued adherence or the salience of the norm under consideration is questioned.¹⁵⁷

The reverse cascade stage is marked by the continued contestation between norm revisionists and initial norm entrepreneurs who engage each other over the continued salience of the norm in its original format.¹⁵⁸ Engagement over the continued salience of the norm may occur within public discourse and in the halls of a state's Legislature and its Courts.¹⁵⁹ If the normative debate proffered by norm revisionists gain enough traction within the domestic populace and is supported by policy and state rhetoric then a domestic legitimacy crisis is realised.¹⁶⁰ An international legitimacy crisis may also subsequently ensue if other states-at-large and other non-state institutions emulate the contrary action after having borne witness, where this may occur, to the diminished or lack of public sanction that accrues to actions that break the precepts of the initial norm.¹⁶¹ There may, however, be other entities, particularly non-state entities, that continue to acknowledge the legitimacy of the norm under consideration. It could

¹⁵³ *Ibid.*

¹⁵⁴ Finnemore & Sikkink, *supra* note 43 at 903.

¹⁵⁵ Christian Reus-Smit, "International Crises of Legitimacy" (2007) 44 *International Politics* 157 at 166-167 [Reus-Smit].

¹⁵⁶ *Ibid.*

¹⁵⁷ Andrew P. Cortell & James W. Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda" (2000) 2(1) *International Studies Review* 65 at 69; McKeown, *supra* note 44 at 12.

¹⁵⁸ McKeown, *supra* note 44 at 12

¹⁵⁹ McKeown, *supra* note 44 at 11.

¹⁶⁰ Reus-Smit, *supra* note 155 at 161.

¹⁶¹ McKeown, *supra* note 44 at 11.

be, however, that the ability of such entities to inflict norm compliance is, however, of questionable strength due to the lack of international sanctions against non-compliant states or the impotency thereof in relation to the relative strength of domestically-instituted sanctions. Furthermore, it may be that later domestic legitimacy crises may draw steam from earlier, similar crises in other countries, and would eventually result in a cumulative international legitimacy crisis where adherence to the norm is no longer considered necessary by states.

The identity of the states who initially contravene the dictates of the norm and the nature of the norm concerned may have substantial bearing on the intensity of damage inflicted upon the continued salience of the norm.¹⁶² Consideration of an example illustrates this contention. If a liberal democratic state were to violate a human rights norm then it would have a considerable impact on the continued salience of the norm as opposed to the instance of pariah states that may generally violate human rights norms.¹⁶³ Countries such as China and North Korea in context of human rights violations come to mind for the latter point.¹⁶⁴ Additionally, if one liberal democratic state, especially one with substantial normative weight or perhaps persuasive clout were to violate the precepts of a human rights norm then it is highly likely that other states that ascribe to the liberal democratic identity would perpetrate the same violation thereby pushing the existence of the norm to the brink of extinction.¹⁶⁵ This possibility connects with the concept of specially affected states and the argument laid out in the section concerned with the norm life-cycle in relation to the quality as opposed to the quantity of states that are required to bring about a norm cascade. The realisation of an international legitimacy crisis and a concomitant reverse cascade as such can therefore lead into the final stage of the norm death-series, that is, the norm expiration stage which will be addressed hereunder.

¹⁶² *Ibid.* at 11 – 12.

¹⁶³ *Ibid.*

¹⁶⁴ Human Rights Watch, *World Report 2012: China*, online: Human Rights Watch <http://www.hrw.org/world-report-2012/world-report-2012-china>; Human Rights Watch, *World Reports 2012: North Korea*, online: Human Rights Watch <http://www.hrw.org/world-report-2012/world-report-2012-north-korea>.

¹⁶⁵ McKeown, *supra* note 44 at 20.

2.4.3. Norm Expiration

The final stage of the norm death series is concerned with the expiration of the norm through sustained challenge as to the norm's continued salience, both in the domestic and international realms.¹⁶⁶ In this stage the foundation has been laid for the normalisation of the action taken to violate the initial norm.¹⁶⁷ It is possible that a new norm can therefore be said to emerge from the ashes. The emergence of a new norm is, however, only arguably viable if the initial norm did not simply erode to a prior state of incarnation. An alternative norm should exist to take its place.¹⁶⁸ This latter point as it pertains to what can be called back-tracking of the norm is somewhat dubious and requires further consideration.

It can be deduced from McKeown's suggestions that if a norm were to erode to a prior state of existence then it would fail to precipitate the formation of a new norm.¹⁶⁹ This argument can be refuted if one considers the nature of the international political arena over time by means of an example norm. Fitzsimmons considers in his article the formation and eventual decay of the norm against the use of mercenary armies in the service of states.¹⁷⁰ He rightly states that in his book, *The Prince*,¹⁷¹ Machiavelli spoke out against the use of such armies as their loyalty could not be trusted. This theme has echoed throughout the world for many years, yet a reversion to the use of mercenary armies in the form of private security contractors in the continuing conflict in both Afghanistan and Iraq has since materialised.¹⁷² The emergence of the norm of using mercenary armies is not necessarily a reversion on the same spectrum as the norm existed before and during Machiavelli's time. The international system of states is not static. The fundamental players and the distribution of power have since changed exponentially. The influence of globalisation and the concomitant spread of human rights centred-regimes have also crafted a world different from the one in which mercenary armies were common place.

¹⁶⁶ McKeown, *supra* note 44 at 12.

¹⁶⁷ *Ibid.*

¹⁶⁸ McKeown, *supra* note 44 at 20.

¹⁶⁹ *Ibid.* at 20 – 21.

¹⁷⁰ Fitzsimmons, *supra* note 66.

¹⁷¹ Niccolo Machiavelli, *The Prince*, trans. by Harvey C. Mansfield (Chicago, IL: University of Chicago Press, 1985) at 48 - 53 pp. 48-53; Fitzsimmons, *supra* note 66 at 8.

¹⁷² Fitzsimmons, *supra* note 66 at 22.

The logic of the above argument suggests that a new norm can develop along the model provided by the norm life-cycle after the expiration of the norm under the circumstances suggested by the norm death-series and not simply back-track to a prior incarnation thereof even though the new norm may be similar in nature to a previously existing norm. This is possible since the context of a norm's existence can arguably never be duplicated exactly as it existed in a previous era. It is also pertinent to mention that the factors prominent in the erosion of the initial norm may arguably feed into the formation of a new norm, that is, arguments raised in favour of the decline of a norm may also herald and support the rise of a new norm.

2.5. Conclusion

This chapter has considered both the theoretical model of the norm life-cycle presented by Finnemore and Sikkink and McKeown's proposed theoretical model of the norm death-series. Cumulatively, this chapter also exposed both models to some critical considerations. Nevertheless, the norm life-cycle model, taking due cognisance of some criticisms perhaps, will be employed in chapter 3 so as to consider the development of a norm of refugee protection. Chapter 4 will consider the erosion of the norm of refugee protection whose existence is proposed in chapter 3. The implications of the erosion will also be considered in context of whether an alternate, new norm is developing.

CHAPTER 3

DEVELOPMENT OF A NORM OF REFUGEE PROTECTION?

3.1. Overview

A discussion of the substantive factors surrounding refugee protection is first necessary to facilitate the application of the stages of the norm life-cycle, the theoretical framework presented in the first part of chapter 2 of this research. The application section of this chapter will then subsequently present a contention that refugee protection did indeed crystallise into a norm within the framework of the Constructivist-based norm life-cycle, criticism of the norm-cycle as raised in chapter 2 notwithstanding.

This chapter will therefore first seek show the gradual development of an initial norm of refugee protection around the time when the 1951 Refugee Convention came into force on 22 April 1954 and the subsequent 1967 Protocol to the Refugee Convention which came into effect on 4 October 1967.¹⁷³ The development of this purported initial norm will be considered within the human rights context surrounding the initial motivation behind the adoption of the 1951 Refugee Convention. This human rights infusion is supported by the multitude of other international and regional-based legal instruments which have come to fruition in particular since the adoption of the UDHR.¹⁷⁴

The second part of this chapter will superimpose the stages of Finnemore and Sikkink's norm life-cycle on the immediately preceding substantive overview.¹⁷⁵ It will become clear that the norm emergence and norm cascade stages are realised whereas the norm internalisation stage is arguably, but not conclusively, realised within the context proffered by the third stage of the norm life-cycle.

¹⁷³ 1951 *Refugee Convention*, *supra* note 1; 1967 *Protocol*, *supra* note 14.

¹⁷⁴ See sources at *supra* note 9; *supra* note 41.

¹⁷⁵ Finnemore & Sikkink, *supra* note 43.

3.2. A Brief History of Refugees

The movement of people from place to place is not an uncommon phenomenon in the annals of history.¹⁷⁶ The large-scale migration of people has been necessitated by numerous causes including intentional violence prompted by human intolerance and harsh environmental realities. People that fell subject to these realities were and still are understood to be displaced persons or more accurately “refugees” as they are not able to remain within their original place of habitation and had to seek refuge elsewhere. The use of the term “refugee”, first thought to have been used around 1685,¹⁷⁷ has however gradually been circumscribed to a finite category of displaced people within the official parlance of international relations and international law with the imposition of more formalised regimes concerned with the plight of refugees.¹⁷⁸

These formalised regimes came into existence in the 1900s with prior times marked by large-scale migration of people across the world. The United States of America in particular attracted dissident Europeans in the 1700 and 1800s, a fact commemorated by the Statue of Liberty situated in New York and the words that have become synonymous with the search for freedom by these European dissidents: “Give me your tired, your poor, your huddled masses yearning to breathe free”.¹⁷⁹ The 1900s marked the ascent of aversion to a free-for-all migration of people, whether voluntarily or forcibly, across international borders.¹⁸⁰ Numerous bodies concerned with the refugee question were therefore established to address the concerns of affected states, particularly receiving or host states.

The High Commission for Refugees was set up in 1921 under the auspices of the League of Nations with the Norwegian, Fridthof Nansen as its High Commissioner.¹⁸¹ The High Commission for Refugees was afforded the mandate to deal with Russian refugees emanating from the Russian Revolution and the effects of the First World War (the Great War) and

¹⁷⁶ Barnett, *supra* note 2 at 239; Betts & Loescher, *supra* note 8 at 7.

¹⁷⁷ Apparently the term “refugee” was used for the first time in 1798 to describe people other than the French Huguenots from the period around 1685. See: Barnett, *supra* note 2 at 240.

¹⁷⁸ 1951 *Refugee Convention*, *supra* note 1; 1967 *Protocol*, *supra* note 14.

¹⁷⁹ Stacy Huber, “Refugees in the U.S.: Protected from Persecution, or Vulnerable to Unjust Removal” (2005) 20(1) *St. John’s Journal of Legal Commentary* 199 at 200 [Huber].

¹⁸⁰ Loescher(a), *supra* note 27 at 9.

¹⁸¹ Barnett, *supra* note 2 at 242; Loescher(b), *supra* note 28 at 1.

subsequent Armenian refugees.¹⁸² The High Commission's limited mandate reflects similar subsequent trends. The High Commission was followed in existence by bodies such as the United Nations Relief and Rehabilitation Administration (UNRRA) that was in operation from its establishment on 9 November 1943 until 1947 when UNRRA's mandate expired,¹⁸³ and the International Refugee Organisation (IRO) was set up as a temporary specialised agency of the United Nations from 1946 to 1952.¹⁸⁴ The initial efforts by states to institutionalise operational responses to the plight of refugees culminated in the establishment of the Office of the United Nations High Commissioner for Refugees (UNHCR) which became operational on 1 January 1951.¹⁸⁵ The UNHCR's mission was, and still is, informed by the provisions of the Statute of the Office of the United Nations High Commissioner for Refugees¹⁸⁶ and the 1951 Refugee Convention.¹⁸⁷ Some of the provisions of the 1951 Refugee Convention, however, were subsequently neutered by the passage of the 1967 Protocol to the 1951 Refugee Convention, that is, the 1967 Protocol saw the removal of the temporal and geographic limitation attached to the 1951 Refugee Convention.¹⁸⁸ The 1951 Refugee Convention was initially only applicable to refugees "created" before 1 January 1951 who were outside the borders of their respective states within Europe.¹⁸⁹ This does not, however, mean that a refugee problem as such was non-existent in other parts of the world outside Europe.¹⁹⁰

3.3. The 1951 Refugee Convention and the 1967 Protocol

The 1951 Refugee Convention was most poignantly a response to the horrific events that occurred during the Second World War, particularly as they pertain to the plight of European Jews and the nomadic Roma people who sought to escape the persecution visited on them by the Nazi regime that existed in Germany in the years leading up to and during the Second World

¹⁸² *Ibid.*

¹⁸³ Barnett, *supra* note 2 at 244.

¹⁸⁴ Loescher(b), *supra* note 28 at 38.

¹⁸⁵ *Ibid.* at 6.

¹⁸⁶ *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res. 428(V), UN GAOR, UN Doc. A/RES/428(V) (1950).

¹⁸⁷ *1951 Refugee Convention*, *supra* note 1; Loescher(b), *supra* note 28 at 5.

¹⁸⁸ *Supra* note 3; *List of States Party to the 1951 Refugee Convention and 1967 Protocol*, *supra* note 12.

¹⁸⁹ *1951 Refugee Convention*, *supra* note 1, art. 1(A); Barnett, *supra* note 2 at 246.

¹⁹⁰ An example of refugees in other areas includes refugees who fled China in the midst of the Nationalist-Communist Civil War in the 1950s. See: Agnes S. Ku, "Immigration Policies, Discourses, and the Politics of Local Belonging in Hong Kong (1950-1980)" (2004) 30(3) *Modern China* 326 – 360.

War.¹⁹¹ These groups of people, amongst others, generally sought to escape the growing inhospitable conditions marked most generally by racial and religious intolerance within their respective countries of origin by travelling to safer neighbouring countries or to the borders of countries further removed and outside Europe and subsequently seeking protection from these countries. These people were, in particular the German Jews aboard the St. Louis, largely refused assistance in the form of protection against persecution and were sent back to their countries of origin to face an uncertain future.¹⁹² An overwhelming majority of these people most likely perished in the ghettos and concentration camps, especially in Germany and Poland that became synonymous with the Nazi regime during the Second World War.¹⁹³ What is now a clear and apparent violation of human rights was not as pertinent and present in discourse at the time. These and other numerous atrocities witnessed immediately prior to and during the Second World War from 1939 - 1945 prompted a renewed fervour for human rights reminiscent of the collection of rights propagated around the time of the French Revolution in 1789 in the Declaration of the Rights of Man and the Citizen.¹⁹⁴

The UDHR passed by the United Nations General Assembly on 10 December 1948, became the first international legal instrument to recognise the universal human rights attributable to all persons by virtue of their humanity.¹⁹⁵ The provisions of the UDHR have arguably become entrenched in customary international law.¹⁹⁶ This newly-established focus on human rights was arguably bound to affect, if not only partially but significantly, the content of the 1951 Refugee Convention. The human rights character of the 1951 Refugee Convention, and by extension the 1967 Protocol, have been widely acknowledged, in particular by Sadako Ogata, the UNHCR for the period 1991 – 2001.¹⁹⁷ In fact, the Preamble of the 1951 Refugee Convention references the import of the UDHR.¹⁹⁸ To date the 1951 Refugee Convention and the 1967 Protocol have been

¹⁹¹ Morten Kjaerum, "Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?" (2002) 24(2) *Human Rights Quarterly* 513 at 514 [Kjaerum].

¹⁹² Carol Bohmer & Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (New York: Routledge, 2008) at 1; James C. Hathaway, *The Rights of Refugees Under International Law* (New York: Cambridge University Press, 2005) at 279 – 280 [Hathaway]; Barnett, *supra* note 2 at 243.

¹⁹³ Hathaway, *supra* note 192.

¹⁹⁴ Vincent Robert Johnson, "The French Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris" (1990) 13(1) *Boston College International and Comparative Law Review* 1 -45.

¹⁹⁵ *UDHR*, *supra* note 6.

¹⁹⁶ Parrish, *supra* note 23 at 258.

¹⁹⁷ Ogata, *supra* note 33; Kjaerum, *supra* note 191 at 513.

¹⁹⁸ *1951 Refugee Convention*, *supra* note 1, preamble.

signed, ratified or acceded to by over 140 states each. Currently, the 1951 Refugee Convention has 145 States Parties and the 1967 Protocol has 146 States Parties.¹⁹⁹

The provisions of both the 1951 Refugee Convention and the 1967 Protocol provide key mechanisms that recognise the plight of a specific category of displaced persons under the term “refugee”. These provisions are aimed at providing the requisite protection to persons who qualify as refugees under the provisions of Article 1A of the 1951 Refugee Convention.²⁰⁰ These rights are in addition to those afforded to refugees by virtue of their identity as human beings through instruments such as the UDHR and any additional rights granted to de facto refugees or asylum-seekers by contracting parties to the 1951 Refugee Convention and the 1967 Protocol thereto enunciated within these respective international legal instruments.²⁰¹

The humanitarian context of the 1951 Refugee Convention notwithstanding, the advent of the Cold War period after the conclusion of the Second World War arguably also coloured the context of the 1951 Refugee Convention and the motivation for action by states party to the 1951 Refugee Convention. It has been argued that the admission of refugees from the Communist, Soviet Union by the Western, capitalist-oriented world was deemed a political victory.²⁰² The period after the Cold War also brought about demonstrable effects in terms of adherence to and proper application of the provisions of both the 1951 Refugee Convention and the 1967 Protocol thereto.²⁰³

3.4. Refugee Protection

Refugee protection is a composite term whose meaning can be extrapolated from numerous provisions such as non-refoulement and asylum contained in the 1951 Refugee Convention and the 1967 Protocol thereto. Article 1A(2) of the 1951 Refugee Convention and the 1967 Protocol

¹⁹⁹ List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

²⁰⁰ 1951 Refugee Convention, *supra* note 1.

²⁰¹ *Ibid.* at art. 5: “...nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”

²⁰² Arulanantham, *supra* note 24.

²⁰³ See Chapter 4 *infra*.

thereto considers the situation of a person who is unable or unwilling to avail him or herself of the protection of their respective state of origin and consequently flees its jurisdiction in search of such protection elsewhere. Such protection can be deemed to exist particularly through the provisions of non-refoulement and the granting of asylum. The principle of non-refoulement as encapsulated in Article 33(1) of the 1951 Refugee Convention and the attached status of asylum, indirectly prompted by Article 14(1) of the UDHR will now be considered.

3.4.1. Asylum

Asylum as it pertains to refugee law refers to the granting by a host state of a particular status to persons seeking protection from persecution.²⁰⁴ Once the ascription of this status to a person is realised, it requires that a host state uphold certain rights afforded to such a person who has been granted asylum under the relevant instruments, that is, the host state should protect the concerned individual from persecution and other forms of exploitation.²⁰⁵ There are also certain duties placed upon persons who have received asylum.²⁰⁶

There is no direct ascription of a right to asylum in the 1951 Refugee Convention or the 1967 Protocol thereto.²⁰⁷ By virtue of Article 5 of the 1951 Refugee Convention, states party to the 1951 Refugee Convention and by virtue of Article 1(1) of the 1967 Protocol, states party to the 1967 Protocol, may not impair the rights afforded to refugees by virtue of the contracting state's enjoyment to any other Convention or international legal instrument.²⁰⁸ This possibly allows for the importation of Article 14(1) of the UDHR which provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."²⁰⁹ This provision is arguably not meant to be read as a right to be granted asylum, however. It is rather suggested to mean the enshrinement of the right of persons to seek and apply for asylum, free from pernicious

²⁰⁴ Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (New York: Cambridge University Press, 2009) at 17.

²⁰⁵ *1951 Refugee Convention*, *supra* note 1, art. 3,4.

²⁰⁶ *Ibid.* at art. 2.

²⁰⁷ Barnett, *supra* note 2 at 245; Pierre Bertrand, "An Operational Approach to International Refugee Protection" (1993) 26 *Cornell International Law Journal* 495 at 496 [Bertrand].

²⁰⁸ *1951 Refugee Convention*, *supra* note 1, art. 5.

²⁰⁹ *UDHR*, *supra* note 6, art. 14(1).

government prevention of achieving this goal, and where it is granted it should be allowed in full without subsequent curtailment without justification.

This discussion of asylum and its invocation by asylum-seekers is important for the argument laid out in chapter 4 of this research pertaining to the practice of states in relation to the development of a new norm of refugee protection which is in contention with the norm of refugee protection that is advanced by this current chapter.

3.4.2. Non-Refoulement

The principle of non-refoulement is an international law mechanism that prohibits host states from returning asylum seekers and refugees to their country of origin if they have a well-founded fear of persecution if they were to return.²¹⁰ This principle is not, however, unique to the 1951 Refugee Convention and the 1967 Protocol thereto, a factor that speaks to its broad-based salience.²¹¹ Examples of other instruments include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²¹² Non-refoulement is also considered to be a part of customary international law and no reservation can be entered against its applicability in terms of the 1951 Refugee Convention.²¹³

The principle of non-refoulement as contained in Article 33 (1) of the 1951 Refugee Convention provides that:

²¹⁰ 1951 Refugee Convention, *supra* note 1, art. 33(1).

²¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987), art. 3 [*Anti-Torture Convention*]; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, Dec. 20, 1988, 28 I.L.M. 497 (entered into force 11 November 1990), art. 6(6); Joan Fitzpatrick, "Revitalizing the 1951 Refugee Convention" (1996) 9 Harvard Human Rights Journal 229 at 236 [Fitzpatrick].

²¹² *Ibid.*

²¹³ No reservation can be entered against the operation of the principle of non-refoulement. See: 1951 Refugee Convention, *supra* note 1, art. 42; Kay Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking" (1985) 26 Virginia Journal of International Law 857; Guy S. Goodwin-Gill, "Commentary: Non-Refoulement and the New Asylum Seekers" (1985) 26 Virginia Journal of International Law 897.

“No Contracting State shall expel or return...a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

A cursory reading of the provision makes it clear that states are not allowed to return any persons who qualify as a refugee under the requisite provisions of Article 1(A) of the 1951 Refugee Convention to their state of origin or any other state where they will be subject to any form of persecution, including but not limited to cruel and inhuman treatment. This provision is further supplemented by Article 1(A) which considers a well-founded fear of persecution as opposed to the actual occurrence of persecution as grounds for the recognition of refugee status. This could therefore facilitate a reading of Article 33(1) to include a well-founded fear and not only actual occurrence of threat to a person’s life or freedom for the listed categories.

There has been some discontent as to the exact meaning attributable to Article 33(1).²¹⁴ A more in-depth consideration of the contents of the principle of non-refoulement is therefore in order also for the additional purpose to lay bare, in chapter 4 of this research, subsequent state practice that is inconsistent with the provisions of the principle of non-refoulement. This will assist in the application of the norm life-cycle and the norm death-series to track the evolution of the norm of refugee protection, the initial incarnation of the norm which is propagated in this chapter.

The UNHCR has advanced the contention in its procedural guide that a refugee as referred to in Article 33(1) refers to both those persons who have officially been accorded refugee status and those who have applied to the requisite authorities to be recognised as such.²¹⁵ The latter group is more commonly known as asylum-seekers. This inclusive interpretation of who is termed a refugee in terms of the Article 33(1) provision prevents a legal absurdity from arising in that if

²¹⁴ Andrew G. Pizor, “Sale v. Haitian Centers Council: The Return of Haitian Refugees” (1993) 17(4) Fordham International Law Journal 1062 [Pizor].

²¹⁵ UN High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees*, January 1992, HCR/IP/4/Eng/REV.1, online: UNHCR <http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf> at para 28 [UNHCR Handbook].

the provision where to be interpreted to refer only to those persons who already enjoy official recognition, a state's authorities could arguably arbitrarily remove persons who have not yet been afforded the official refugee label from their territory, even in the event that they have applied for a hearing to determine their refugee status. This generous, inclusive interpretation therefore is preferable and is commensurate with recognition of official refugee status merely being of a declaratory as opposed to a constitutive nature.²¹⁶ This means that if a person who is fleeing persecution fulfills the criteria of a refugee before being officially recognised as such they are able to be afforded the label of refugee, albeit de facto, and should arguably therefore also fall subject to the non-refoulement principle enunciated therein.

An additional contentious point of interpretation lies with the territoriality of the provision of non-refoulement. An ordinary-meaning interpretation, as enjoined by Article 31 of the Vienna Convention on the Law of Treaties (VCLT),²¹⁷ lends credence to the interpretation that the operation of the principle of non-refoulement is limited in application to persons who are present on the territory of the state concerned, that is, the state from whom these persons seek asylum. This is commensurate with the interpretation provided by the United States Supreme Court in the case of *Sale v. Haitian Centers Council, Inc.*²¹⁸

An advisory opinion commissioned by the Geneva-based UNHCR in 2007, however, has advanced an alternate interpretation of extra-territoriality in line with the objects, purpose and spirit advanced by the 1951 Refugee Convention and the 1967 Protocol in conjunction with its human rights supporting base.²¹⁹ This interpretation advances the contention that Article 33(1) applies to persons not yet present on the territory of the state concerned but who is rather subject to the effective control or authority of the particular state.²²⁰ Effective control is not concisely defined in this advisory opinion or elsewhere but it is maintained that it is not

²¹⁶ *Ibid.* at para 28.

²¹⁷ VCLT, *supra* note 31.

²¹⁸ *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993); Pizor, *supra* note 214 at 1064-1065.

²¹⁹ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, online: UNHCR <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search>. [*Advisory Opinion*].

²²⁰ *Ibid.* at para 35.

necessarily limited to a state's territory but may operate extra-territorially.²²¹ It is suggested that effective control in an extra-territorial manner can therefore plausibly proceed in places such as the frontier of a state and the high seas. The nature of effective control particularly in pursuit of interdiction at sea, it is suggested, logically extends to circumstances where the state who is seeking to interdict approaching vessels, control the movements of these vessels and sometimes board them. This latter contention is borne out by state practice, itself an important source of international law and consequent concepts such as that of effective control.²²²

If this extra-territorial application of non-refoulement were not the intention of the 1951 Refugee Convention and the 1967 Protocol thereto then the Convention would essentially not remedy instances such as those that occurred during the initial stages of the Second World War where Jewish persons were actively denied access to foreign territory to claim asylum but were rather sent back to Nazi Germany.²²³ It would, as argued by the advisory opinion, also be stated in the text if the provision were to operate only within the territory of a state.²²⁴ Furthermore, the provision of territoriality is also not a prerequisite for other incarnations of non-refoulement as contained in other international instruments.²²⁵

The importance of the divergent interpretations of this territoriality provision will become clear in chapter 4 in conjunction with state practice and the question of whether the contours of a new norm of refugee protection is identifiable subsequent to the initial norm of refugee protection whose existence is being advanced in this chapter.

The principle of non-refoulement is not absolute, however, as its operation can be curtailed by the instances outlined in Article 33(2) of the 1951 Refugee Convention, that is:

“The benefit of [Article 33(1)] may not...be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he

²²¹ *Ibid.* at paras 32 – 43.

²²² See sources at *supra* note 13.

²²³ See sources at *supra* note 192.

²²⁴ *Advisory Opinion*, *supra* note 219 at para 28.

²²⁵ *Ibid.* at para 33; *Anti-Torture Convention*, *supra* note 211.

is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”²²⁶

Overall, the principle of non-refoulement is central to the provision of refugee protection. Any violation therefore by states party to the 1951 Refugee Convention and / or the 1967 Protocol thereto constitutes a disregard for the protection of refugees and the motivation and purpose behind the original adoption of the 1951 Refugee Convention and the 1967 Protocol.

3.5. Application of the Norm Life-Cycle

The background consideration laid out in the preceding sections of this chapter will now be used as a template to which the norm life-cycle theoretical framework, the provisions of which have been laid out in chapter 2 of this research, will be applied. The intention is to identify an initial norm of refugee protection thereby seemingly proving the truth of the corresponding hypothesis advanced in the introductory chapter of this research paper

3.5.1. Norm Emergence

The level of appropriate behaviour attached to the treatment of refugees and the responsibility attendant on the international community came to the fore during the aftermath of the Second World War under the auspices of concerned states and other entities who participated in the Conference of Plenipotentiaries in 1950 where they were charged with drafting the 1951 Refugee Convention.²²⁷ The prevailing pro-human rights atmosphere of the time and the success of norm entrepreneurs in that paradigm, norm entrepreneurs such as Eleanor Roosevelt who played an important role in advocating for the rights contained in the UDHR, arguably also influenced the receptiveness for the establishment of a permanent international refugee regime informed by those rights enunciated in the UDHR.²²⁸

²²⁶ 1951 Refugee Convention, *supra* note 1, art. 33(2).

²²⁷ 1951 Refugee Convention, *supra* note 1.

²²⁸ UDHR: History, *supra* note 7.

Collectively, these people and entities arguably came to embody the role of norm entrepreneurs as they began to frame the issues prominent to the refugee paradigm in terms of newly minted human rights discourse.²²⁹ Since its formal inception in 1945, the United Nations became the organisational platform through which norm entrepreneurs of numerous norms came to work, peddling the acceptance of norms that comport with the values of peace, security and respect for human rights contained in the United Nations Charter.²³⁰ The United Nations was indeed able to supply a far-reaching channel of communication and a common ground in the ideological divided world of the Cold War era. The United Nations can in fact still be said to fulfill such a role today even though it has been somewhat diluted in recent years.

The norm entrepreneurs involved in the framing of what later became the international refugee regime arguably succeeded in persuading enough states, or a critical mass of states, of the salience and necessity of addressing the refugee question to ensure the achievement of a subsequent tipping point, the realisation of which would, and in fact did, facilitate the occurrence of a norm cascade. The identity of these states could arguably be those Western European nations who adopted the 1951 Refugee Convention early on, not surprisingly since the initial application of the 1951 Refugee Convention was largely limited to that geographical area.²³¹

The overall success of the norm entrepreneurs are, however, open to debate due to the limited number of states that participated in the Conference of Plenipotentiaries and who were charged with drafting what eventually became the 1951 Refugee Convention. In all, only 26 states actively participated in the Conference with the majority of those states situated in Western-Europe.²³² The states of Iran and Cuba only enjoyed observer status and the state of Yugoslavia was the only communist-leaning state in Europe present at the Conference. The limited participation of states, however, can be said to be of little consequence in this instance as the 1951 Refugee Convention was eventually adopted in some form, either by initial signature and ratification, or accession by numerous states within Europe during the 1950s and a large contingent of African and Latin American states by the time the 1967 Protocol was

²²⁹ *UDHR*, *supra* note 6.

²³⁰ *UN Charter*, *supra* note 46, preamble and art. 1.

²³¹ *1951 Refugee Convention*, *supra* note 1, art. 1(A).

²³² UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, online: UNHCR <http://www.unhcr.org/refworld/docid/40a8a7394.html>.

adopted.²³³ The temporal and geographical limitations attached to the operation of the 1951 Refugee Convention was therefore arguably not a severe obstacle for the acceptance of the standards laid out in the 1951 Refugee Convention as the acceptable standard of behaviour in the case of refugees, both officially recognised and those operating under a prima facie refugee status. Furthermore, subsequent to the adoption of the 1967 Protocol, the provisions laid forth by the 1951 Refugee Convention almost wholly found their way into regional legal instruments, most prominently the 1969 OAU Convention in Africa,²³⁴ and the 1984 Cartagena Declaration in Latin America.²³⁵

The identity of the states who initially contributed to the establishment of the international refugee law regime was largely democratic. These states were mostly centred in Western Europe at the time and consequently the ones most directly affected by the fallout of the human displacement caused by the atrocities of the Second World War. This point is of great importance in this instance as adherence to and most often the export of human rights practices is considered a fundamental part of the democratic state identity,²³⁶ something that is of particular relevance in this instance in light of the intimate connection between refugee law, including refugee protection, and human rights. This fact also contributes to the anointment of norm leaders in relation to the norm cascade stage which will be considered subsequently.

It must be noted, however, that the United States did not become a contracting party to the 1951 Refugee Convention or the 1967 Protocol until 1968 when the United States ratified the 1967 Protocol.²³⁷ The United States had previously operated under a system sometimes at odds with the provisions of the 1951 Refugee Convention even, when in reality, the United States accepted large amounts of people as refugees following the end of the Second World War.²³⁸ At one point, the United States only recognised refugees emanating from Communist countries

²³³ List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

²³⁴ OAU Convention, *supra* note 18; Fitzpatrick, *supra* note 211 at 233 – 234.

²³⁵ Cartagena Declaration, *supra* note 17.

²³⁶ John T. Rourke, *International Politics on the World Stage*, 12th ed. (New York: McGraw-Hill, 2008) at 81 [Rourke].

²³⁷ The United States became a party to the 1967 Protocol on 1 November 1968. See: List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

²³⁸ The United States has, in particular since 1975, welcomed around 3 million refugees to the United States. See: US State Department, *Refugee Admissions*, online: US State Department <http://www.state.gov/j/prm/ra/index.htm>; Refugee Council USA, *History of the U.S. Refugee Resettlement Program*, online: Refugee Council USA <http://www.rcusa.org/index.php?page=history>.

and countries situated in the Middle East.²³⁹ The United States was eventually prompted to accede to the 1967 Protocol and thus ascribe to the precepts of the 1951 Refugee Convention arguably by the moral pressure emanating from various human rights groups, as well as discontent from a section of the United States Legislative Branch, the United States Congress, due to the executive-led domestic refugee regime up to that point in time.²⁴⁰ The United States, however, only came to pass domestic legislation to echo the definition of refugee as contained in the 1967 Protocol in 1980 with the Refugee Act.²⁴¹

Whether the United States as a modern, liberal democratic scion can therefore be considered to have been persuaded to adopt the 1967 Protocol by norm entrepreneurs along the underlying motivations of altruism, empathy and ideological conviction indicative of the norm emergence stage of the norm life-cycle or rather have been socialised into its paradigm for purposes of maintaining its legitimacy, reputation and esteem in line with the motivations backing the norm cascade stage is therefore a debatable point.²⁴² While norm entrepreneurs were arguably not inconsequential in their efforts to persuade the United States to adopt the norm of refugee protection as witnessed by the eventual adoption by the United States of the 1967 Protocol, it is equally possible that eventual US capitulation pursued reasons or motivating factors found in the norm cascade stage, that is, to retain or in fact recover some legitimacy both internationally and domestically, and consequently reinforce its reputation of a liberal democratic state who advocates adherence to and respect for human rights both at home and abroad.²⁴³ The case of the United States is therefore a borderline case between the norm emergence and cascade stages.

The underlying motivation of the United States' adoption notwithstanding, the norm life-cycle posits that the motive behind adherence to the norm peddled by norm entrepreneurs in this initial stage of norm emergence includes that of altruism and empathy.²⁴⁴ Whether altruism is or can ever be an identifiable motivation behind the adoption of the norm is, however, questionable

²³⁹ See sources at *supra* note 22.

²⁴⁰ List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

²⁴¹ Salehyan & Rosenblum, *supra* note 23.

²⁴² Finnemore & Sikkink, *supra* note 43 at 903.

²⁴³ US State Department, *Human Rights*, online: US State Department <http://www.state.gov/> [US State Department].

²⁴⁴ Finnemore & Sikkink, *supra* note 43 at 898.

partially due to the inherent political nature of the subject matter contained within the refugee paradigm or even the global political arena-at-large and the inherently selfish nature of states.

These arguments notwithstanding, altruism as a motivating factor is arguably nevertheless a viable and evident avenue to consider in this context and time period since states, particularly those who were subjected to the aggression of the Axis powers, were arguably encouraged by the reigning optimistic human rights environment prevalent in the period immediately following the end of the Second World War to alleviate the suffering of people, if only initially within the confines of European boundaries. This reference to altruism can also be raised as a supporting argument for the presence of empathy amongst states who suffered at the hands of Axis powers' aggression, through occupation of their territory and the eradication of vast numbers of its citizens either on the battlefield or through the concentration camps erected by the Nazi regime throughout central and eastern Europe during the Second World War.²⁴⁵

In preliminary conclusion with regards to the norm emergence stage of the norm life-cycle, a norm of refugee protection, as evidenced by the focus on the principles of non-refoulement and asylum, arose after the end of the Second World War by the efforts of concerned organisations, states and people in their roles as norm entrepreneurs. This norm was adopted by a number of critical states in terms of their democratic identity, particularly within Europe itself.²⁴⁶ These European states were also the central focus of the 1951 Refugee Convention's provisions. The geographical and temporal limitation enunciated earlier did also not overtly prevent states to which the provisions of the 1951 Refugee Convention did not apply from acceding to the 1951 Refugee Convention in its limited guise. This state of affairs arguably brought about both a critical mass of states and an ultimate tipping point, perhaps in terms of quality, that are both essential events to facilitate the initiation of a norm cascade.²⁴⁷

²⁴⁵ Nicholls, *supra* note 71.

²⁴⁶ List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

²⁴⁷ Finnemore & Sikkink, *supra* note 43 at 901.

3.5.2. Norm Cascade

The presence of a tentative norm of refugee protection as initially shaped by norm entrepreneurs and other concerned entities and its initial acceptance by states arguably facilitated the crystallisation and adoption of the norm concerned. The increasing frequency of adoption of the 1951 Refugee Convention and / or the 1967 Protocol thereto arguably also therefore bears witness to the increasing acceptance of the norm of refugee protection. The 1951 Refugee Convention is after all not entitled to its claimed substance without the concomitant acceptance of the norm of refugee protection, the non-refoulement component of which cannot enjoy a reservation against its operation.²⁴⁸

As has been noted earlier in this chapter, the role of norm leader in the current instance is centred primarily on those states that have as part of their underlying identity as democratic states the inherent acceptance of human rights standards as a guide to appropriate behaviour. These states include those in Europe, particularly in Western Europe, and other liberal democratic states such as Australia and Canada. The caveat applicable to the United States as a potential norm leader is addressed elsewhere. These states were also, although perhaps not still today, relatively powerful in terms of both hard and soft power at the time of the formation of the norm of refugee protection and therefore could also carry a substantial amount of persuasive power to convince states of the salience of allowing themselves to be socialised or more precisely to change their behaviour to the standard that comports with that “preferred by the international society of states”.²⁴⁹

These norm leaders arguably began to facilitate a process of socialisation exerted upon other yet non-compliant states. This is borne out by, as mentioned earlier, the increased frequency of ratification of the 1951 Refugee Convention particularly after the 1967 Protocol thereto removed the geographical and temporal restrictions imposed on the operation of the 1951 Refugee Convention.²⁵⁰ The acceptance of the norm of refugee protection, although an international

²⁴⁸ 1951 *Refugee Convention*, *supra* note 1, art. 42.

²⁴⁹ Finnemore & Sikkink, *supra* note 43 at 902.

²⁵⁰ List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12; 1967 *Protocol*, *supra* note 14, art. 1.

norm, is also supported by the advent and acceptance of regional instruments such as the 1969 OAU Convention and the 1984 Cartagena Declaration.²⁵¹

The reasons underlying the increased frequency of adoption of the 1951 Refugee Convention at least, are conceivably numerous. Although speculative, it may not be far off to consider that newly decolonised states in Africa, in particular, may have been persuaded or subtly coerced to adopt the 1951 Refugee Convention or may have emulated norm leaders' adoption thereof. The motivation either way could lie in their need for acceptance as serious contenders on the global stage, even as newly formed states. Additionally, and this could apply to all states, the consideration of asserting at least some level of sanctioned control on the movement of displaced persons could have played a role. Overall, the reasons for adoption of at least the 1951 Refugee Convention can perhaps be seen as a rationalist calculation of cost and benefit, thereby not fully subscribing to a logic of appropriateness but rather a mid-way compromise suggested by rational-constructivism.

Given all of the above, it is not overall possible to definitively impose exact dates and times on the norm cascade of the norm of refugee protection advanced in this chapter. It is nonetheless evident from the information considered above in context of the norm life-cycle that the requisite norm leaders were present during this second stage of the norm life-cycle to facilitate the socialisation, either proactively or indirectly through emulation, persuasion or coercion and result in the ultimate achievement of norm cascade towards the latter part of the scale proposed by Finnemore and Sikkink. Internalisation as the final stage of the norm life-cycle will be considered in the section that follows.

3.5.3. Norm Internalisation

The realisation of norm internalisation in line with the definition thereof set out in chapter 2 of this research is arguable. If the hallmark of this stage is the so-called taken-for-granted quality of the norm under consideration in that the salience of the norm is no longer questioned but

²⁵¹ *Cartagena Declaration, supra note 17; OAU Convention, supra note 18.*

merely accepted as a given, then the norm of refugee protection may run into a degree of trouble. Cumulatively, the sheer number of states who have, however, become party to international legal instruments, including the 1951 Refugee Convention and / or the 1967 Protocol thereto²⁵² and additional regional instruments, and the conceivable underlying reasons therefor may counteract the concern about the perceived absence of the taken-for-granted quality of the norm of refugee protection. However, the norm life-cycle does not clearly state how many states ought to adhere to the norm in this manner so as to constitute internationalisation. It is unhelpful to suggest that every state should comply with a norm so as to generate norm internalisation as the nature of world politics is simply too contentious for everyone to agree. Rather, the nature of a state and the nature of the norm may determine whether adherence by a state is relevant or not. The norm of refugee protection and adherence of human rights-revering states are therefore more apposite to consider here as opposed to those pariah states that generally violate such tenets based on human rights.

The fact that the refugee regime is also, as mentioned, closely adjacent to the human rights regime, arguably an internalised regime, is apposite to consider in arguing for norm internalisation. If the human rights connection were not pertinent then internalisation of this norm of refugee protection may never have been realised, even in a tenuous way. Furthermore, the fact that most human rights norms and indeed also the principle of non-refoulement are considered to be part of customary international law due to the intensity and longevity of state practice in this field and the belief by many that such standards of behaviour are legally binding, can arguably further contribute to solidifying the argument in support of norm internalisation of refugee protection.

Overall, the truth is that the nature of the refugee protection norm under consideration here will frequently generate contestation since it concerns itself with contentious matters such as costs incurred by host states on non-citizens, costs that emanate from a pool of limited resources. This particular instance will most certainly attract domestic discontent and would perhaps necessitate the application of two-level game schematics to find an appropriate solution to the

²⁵² List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

conundrum posed.²⁵³ That said, however, it must be remembered that the norm under consideration here is an international one and that internal discontent within a state may not always win the day especially in a dictatorship but also in a democracy where dissent may be in the minority. Similarly, the international nature of the norm and the taken-for-granted quality of internalised norms may not require genuine intent for internalisation to occur, that is, paying lip service to the norm may also be sufficient since it is not entirely clear in the norm life-cycle framework whether it should be otherwise. Internal discontent may therefore not even matter. This point requires further research.

3.6. Conclusion

This chapter has attempted to prove the existence of a norm of refugee protection in its initial incarnation emanating from the principle of non-refoulement contained in the 1951 Refugee Convention and the related status of asylum. The existence of this norm has been argued at the hand of the three stages of the norm life-cycle proposed by Finnemore and Sikkink. Norm emergence and cascade have arguably been realised. The realisation of norm internalisation is more contentious, however, since it is unclear how many states' adherence constitutes internalisation, amongst other things. Be that as it may, the norm can conceivably have internalised.

²⁵³ Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games" (1988) 42(3) *International Organization* 427 – 460.

CHAPTER 4

REGRESSION OF THE NORM OF REFUGEE PROTECTION?

4.1. Overview

Chapter 3 advanced the contention that a norm of refugee protection developed from within the refugee protection framework that was set up under the auspices of the 1951 Refugee Convention, the 1967 Protocol thereto and other related human rights treaties and declarations. It was also stated that the norm of refugee protection is regarded as the core of the international refugee regime with the principle of non-refoulement being considered as the minimum core content of refugee protection.²⁵⁴ Asylum, although not an explicit right afforded in any international legal instrument, including the 1951 Refugee Convention and the 1967 Protocol thereto, except for Article 14(1) of the UDHR, is also part of the core of refugee protection.²⁵⁵ Furthermore, once asylum is granted to a person, s/he hence becomes an officially recognised refugee under the terms of the 1951 Refugee Convention. A set of rights enunciated within the parameters of the 1951 Refugee Convention is afforded to the refugee as such, notwithstanding the earlier consideration of de facto refugees.²⁵⁶ Whether these rights are realised by states under their obligations arising from the provisions of the 1951 Refugee Convention, however, remains uncertain. State practice and state rhetoric may and often deviates from a common purpose. International agreements may, furthermore, often be concluded and endorsed by certain key states simply to pander to critics.²⁵⁷

A further element that is closely connected to the principle of asylum is that of attaining a long-term solution to the plight of a refugee. These solutions include voluntary repatriation to their country of origin, local integration or resettlement to a third country.²⁵⁸ Each of these solutions,

²⁵⁴ Fitzpatrick, *supra* note 211 at 235; Chimni, *supra* note 136.

²⁵⁵ 1951 *Refugee Convention*, *supra* note 1; 1967 *Protocol*, *supra* note 14; *UDHR*, *supra* note 6; Bertrand, *supra* note 207.

²⁵⁶ See Chapter 3, section 3.4.2 *supra*.

²⁵⁷ This scenario is perhaps feasible in the instance of the United States' accession to the 1967 Protocol in 1968 and the eventual passage of the 1980 Refugee Act thereby incorporating the refugee definition into domestic US law.

²⁵⁸ For a more in-depth consideration of these solutions, see: Hathaway, *supra* note 192 at 913 – 990.

ideally, provides a new life to refugees, free from persecution such as that mentioned in this chapter. A consideration of these solutions, although mentioned briefly, is however beyond the scope of this enquiry.

Given this layout of the content of refugee protection in terms of non-refoulement and asylum and proposed solutions to the refugee protection problem, it is arguable that a norm of refugee protection originally arose from within the framework proffered by the 1951 Refugee Convention as supported by other international human rights treaties, declarations, regional agreements and domestic empowering legislation. This norm has, however, come under doubt due to the contrary state practice exhibited by states in their sometimes limited adherence to the principles that inform the content of the norm of refugee protection. States have variedly even undertaken practices that are aimed at deterring persons who may genuinely qualify as Convention refugees from seeking entry into their country. These deterrence practices point towards an underlying larger strategy of state evasion whereby states seek to evade the obligations imposed upon them by virtue of their acceptance of the 1951 Refugee Convention, other related legal instruments and in the case of the principle of non-refoulement, their membership in the international community of states due to the arguably customary law status of that specific principle.²⁵⁹ These evasive strategies extend beyond blatant disregard for the principle of non-refoulement to questionable asylum determination procedures and longer-term solutions to the refugee problem. Consideration of the latter two instances is, however, beyond the scope of this paper.

The propensity of states to engage in these evasive strategies is informed by, amongst a greater list of reasons, the heavy cost burden imposed on states in the event of refugees reaching their shores, the protracted nature of the refugee problem, the possibility of disrupting the existing social fabric which may be adverse to multicultural tolerance (as witnessed by bouts of xenophobia in countries around the world in recent years and declarations by prominent

²⁵⁹ See sources at *supra* note 230.

European leaders with respect to the failure in their respective countries),²⁶⁰ and finally the security concerns of countries particularly in a post 9/11 world.²⁶¹

Given the underlying presence of these evasive strategies, this chapter will advance the notion that the norm of refugee protection has come under challenge from the practice of states. The chapter will first look at general instances of state practice, focusing particularly on mechanisms of deterrence. The chapter will then consider the state practice of two states, namely Australia and the United States.²⁶² These states provide particularly poignant case studies due to their liberal democratic identity that considers human rights as a central concept, yet their practice has shown their active intent to decouple their obligations arising under the international refugee law regime from its human rights foundations, the very foundations of a liberal democratic identity.²⁶³ In addition, these countries' particular instances of state practice have proven to be creative and unique in many ways.

The chapter will then proceed to a consideration of the information offered in the first half of this chapter through the lens of theory. The norm death-series theoretical framework with its three stages of operation, namely that of the revisionist challenge, reverse cascade and norm expiration, will first be considered and it will be advanced that the original norm of refugee protection can be placed within the throes of the latter part of the norm death-series. A subsequent consideration will then be had in terms of a new norm of refugee protection in light of a second application of the norm life-cycle theoretical framework. It will then be argued in conclusion that a new norm of refugee protection is thus emerging.

²⁶⁰ John Vinocur, "For Europe, Few Hints of Tolerance" *The New York Times* (1 August 2011), online: The New York Times <http://www.nytimes.com/2011/08/02/world/europe/02iht-politicus02.html?pagewanted=all> [Vinocur].

²⁶¹ Schoenholtz, *supra* note 39.

²⁶² There are numerous countries in the world that deal with greater number of refugees and asylum-seekers than Australia. Australia's unique practice regarding excision of territory and its strategic geographic location within the Oceania region nevertheless makes it a prominent candidate for consideration in addition to the reasons preferred earlier as to its liberal democratic state identity.

²⁶³ Zakaria, *supra* note 147.

4.2. General Instances of State Practice

As has been stated in the previous chapters of this research, the refugee protection system entails the expenditure of sometimes substantial resources by states on non-citizens.²⁶⁴ This expenditure of limited resources, the prospect of no end in sight to the refugee problem as of yet and security concerns related to the presence of refugees within a host state's jurisdiction has increased the prevalence of evasive strategies implemented by states to avoid incurring additional burdens beyond that generated by its pre-existing domestic commitments. In particular, states have sought to engage in practices to deter refugees from even attempting to seek asylum from them. A closer consideration of these deterrence mechanism reveals numerous examples, including the institution of visa requirements, carries sanctions, adherence to the notion of "safe" countries of origin, the declaration of so-called "international zones", pre-screening in the event of foreign territory departures and questionable detention of persons seeking asylum. These various incarnations of deterrence mechanisms will now each be considered briefly with the exception of detention, which will be considered in the subsequent section of Australian practice.

4.2.1. Visa Requirements

Countries generally require that all foreigners seeking entry into their territory be in the possession of a valid visa and other related travel documents such as a legally-recognised passport issued by the bearer's country of citizenship.²⁶⁵ The flight of refugees from situations of persecution often, however, prevents them from obtaining the necessary travel documentation especially in the event where a government actively pursues a programme of protracted violence against its own citizens and would therefore be highly reticent to grant official documentation to citizens it may deem as "terrorists" as is the official government terminology

²⁶⁴ Chimni, *supra* note 136.

²⁶⁵ James C. Hathaway & R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection" (1997) 10 *Harvard Human Rights Journal* 115 at 120 [Hathaway & Neve]; Arthur C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (New York: Oxford University Press, 2002) at 163 [Helton]; Kjaerum, *supra* note 191 at 515.

used by the Syrian government.²⁶⁶ It is logical to conclude from this that refugees would therefore either travel without any travel documentation or seek entrance into a country of asylum with the use of fraudulent travel documentation, all in the bid to escape persecution. Additionally, refugees are in theory exempt from the institution of penalties, provided certain conditions are met, on such instances of illegality by virtue of Article 31 of the 1951 Refugee Convention.²⁶⁷ The presence of this provision and the official, rhetorical adherence to the 1951 Refugee Convention has not, however, deterred some states from imposing penalties on often legitimate refugees who enter a country with fraudulent documents.²⁶⁸

4.2.2. Carrier Sanctions

States have begun to impose penalties on airlines and shipping companies, amongst others, if they are found to be transporting persons whom do not hold in their possession the requisite travel documents such as valid passports and visas where they are so required.²⁶⁹ It is legitimately arguable that sanctions of this type are aimed at deterring complicity in committing the exploitative crime of human trafficking.²⁷⁰ The non-discerning nature of the application of this strategy can and most probably has, however, caught legitimate refugees within its net. It is arguable, but not unlikely, that states have intentionally crafted the strategy in this manner, that is, they are aware that legitimate refugees may be caught in the net of the prohibition but that this would prevent a possible host state having to expend any further resources on unwanted individuals in the event that they are able to gain access to the state. This practice, therefore, arguably utilises legitimate purpose in the guise of preventing human trafficking to disguise a questionable practice of preventing legitimate refugees from accessing the protection that they are in dire need of and under international law are entitled to claim.

²⁶⁶ “Syrian President Condemns Houla Massacre, Rejects Accusations” *CNN* (3 June 2012), online: CNN <http://edition.cnn.com/2012/06/03/world/meast/syria-unrest/index.html>.

²⁶⁷ Article 31 provides, amongst other things that, “[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees...” See: *1951 Refugee Convention*, *supra* note 1, art. 31.

²⁶⁸ Richard Dunstan, “United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention” (1998) 10(1-2) *International Journal of Refugee Law* 205 at 206; Schoenholtz, *supra* note 39 at 325.

²⁶⁹ Hathaway & Neve, *supra* note 265; Helton, *supra* note 265 at 163; Kjaerum, *supra* note 191 at 515; Sarah Collinson, “Visa Requirements, Carrier Sanctions, ‘Safe Third Countries’ and ‘Readmission’: The Development of an Asylum ‘Buffer Zone’ in Europe” (1996) 21(1) *Transactions of the Institute of British Geographers New Series* 76 at 80.

²⁷⁰ M.R. Alborzi, *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi Refugees* (Leiden: Martinus Nijhoff Publishers, 2006) at 316.

4.2.3. Safe Countries of Origin

It is evident that the political conditions (and geographic conditions if “environmental refugees” are considered) prevalent in some countries are more prone to “creating” refugees than the conditions in other countries. Some countries have taken this concept to the extreme and have declared that particular states are unable to produce refugees that is, these countries are assumed to not fall into the disarray that is commensurate with known refugee-producing countries such as the Democratic Republic of the Congo, Burundi, Afghanistan and Iraq.²⁷¹ This move, however, can have a potentially fatal impact on the case of individuals. It may be that a state does not generally harbour the conditions that are prone to facilitate the creation of refugee-producing circumstances but a person may nevertheless be subject to persecution on an individual level that is sufficient to incur the persecution label. An additional point of concern is that the inertia that is generally characteristic of particularly democratic legislative processes around the world may impede any undertaking to remove a state from that list if conditions were to arise within that country that is commensurate with persecution that would otherwise activate refugee producing conditions.

4.2.4. International Zones

Some countries, such as France, have also resorted to the practice of declaring the area within its international airports complexes as international zones to which the laws of the state does not apply.²⁷² Persons seeking asylum can arguably henceforth not claim asylum or seek protection since they are theoretically not present on the territory of the state from which they are claiming the bundle of refugee protection. The European Court of Human Rights has, however, had a say in this matter in the case of *Amuur v. France*,²⁷³ where they declared France’s attempts to establish such an international zone at its Charles De Gaulle airport as illegal. It is pertinent to note here that France is also a democratic country who in this event

²⁷¹ Hathaway, *supra* note 192 at 296; Helton, *supra* note 265 at 162-163; Kjaerum, *supra* note 191 at 515; Schoenholtz, *supra* note 39 at 325.

²⁷² Hathaway & Neve, *supra* note 265 at 122; Hathaway, *supra* note 192 at 172.

²⁷³ *Amuur v. France*, 25 June 1996, Council of Europe: European Court of Human Rights, 17/1995/523/609, online: <http://www.unhcr.org/refworld/docid/3ae6b76710.html>.

actively seeks to creatively interpret the international refugee regime and their concomitant responsibilities that they accepted thereunder and under other related human rights regimes.²⁷⁴

4.2.5. Pre-Screening at Foreign Airports of Departure

Authorities from states whom large numbers of potential asylum-seekers seek to enter are increasingly involved in pre-screening persons who board flights and other modes of transport to the authority's country of origin.²⁷⁵ This method of pre-screening takes place at the foreign airport, thus extra-territorially and is aimed at intercepting persons who may claim protection and asylum if they were otherwise to arrive on the territory of the country to which they seek entry.²⁷⁶ This practice of active prevention on the part of states evidently goes against the objects and purposes of the international refugee regime, human rights practices and in fact may also gravely stretch the bounds of human rights values held within such states that actively utilise such practices of pre-screening persons at foreign airports.

4.3. Specific Instances of State Practice

General instances of state practice within the field of refugee protection notwithstanding, a closer look at the related practices of the United States and Australia reveal a propensity by these states to creatively circumvent the ambit of their international obligations under the international refugee regime and the international human rights regime. Rather than providing an expansive review of these two states' practices and laws relating to refugee protection in particular and the wide-ranging refugee regime, the next two sections will be organised around specific instances of state practice that serves as cogent examples of general sentiments toward the plight of refugees whether unofficial (*de facto*) or officially so recognised (*de jure*). This focused approach will also be in line with McKeown's prompts that the operation of the

²⁷⁴ Amongst other instruments, France ratified the 1951 Refugee Convention on 23 June 1954. See: List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

²⁷⁵ Kjaerum, *supra* note 191 at 515; Donald Kerwin, "The Use and Misuse of 'National Security' Rationale in Crafting U.S. Refugee and Immigration Policies" (2005) 17(4) International Journal of Refugee Law 749 at 759; Schoenholtz, *supra* note 39 at 325.

²⁷⁶ See sources *ibid*.

norm death-series is initiated around the occurrence of exogenous shocks,²⁷⁷ examples of which are the specific instances of state practice that will be highlighted hereunder. It must be cautioned here that these countries are not alone in their evasive practices but merely represent a snapshot of wider-ranging state practice, a particularly poignant set of snapshots given the democratic character of their respective governing institutions.

4.3.1. Australia

On the eve of the post Second World War era, Australia was heavily involved in establishing the international human rights regime that would eventually come into fruition under the UN and the subsequent UDHR.²⁷⁸ Australia was one of eight states who initially drafted the UDHR in 1948.²⁷⁹ Australia was also part of the initial group of countries that acceded to the 1951 Refugee Convention.²⁸⁰ It is also salient to prominently note that Australia is also a mature liberal democratic state. The above facts lend itself to the logical conclusion that Australia is a country identified by an entrenched human rights-based regime and would therefore also adhere to the provisions of the 1951 Refugee Convention, the content of which is closely adjacent to the international human rights regime. This latter point is, however, not a foregone conclusion through deductive reasoning. In fact, Australia has most recently come under fire for “outsourcing its international obligations” and treating the international refugee regime and its central tenet of refugee protection as both “expendable and avoidable”.²⁸¹ Australia’s actions in this field of operation is not, however, a recent venture but has been characteristic of Australian policy towards refugees most prominently since the 1970s beginning with the so-called Vietnamese “boatpeople”.²⁸² The most recent, highly publicized incident that became known as the “Tampa Affair” of 2001 reignited Australian deterrence fervour towards persons who seek to

²⁷⁷ McKeown, *supra* note 44 at 15.

²⁷⁸ “Australia and the Universal Declaration on Human Rights”, online: Australian Human Rights Commission < http://www.hreoc.gov.au/human_rights/UDHR/Australia_UDHR.html>.

²⁷⁹ *Ibid.*

²⁸⁰ Australia acceded to the 1951 Refugee Convention on 22 January 1954. See: List of States Party to the 1951 Refugee Convention and 1967 Protocol, *supra* note 12.

²⁸¹ “Australia: ‘Pacific Solution’ Redux” *Human Rights Watch* (17 August 2012), online: Human Rights Watch <http://www.hrw.org/news/2012/08/17/australia-pacific-solution-redux> [Human Rights Watch].

²⁸² Katharine Betts, “Boatpeople and Public Opinion in Australia” (2001) 9(4) *People and Place* 34 [K. Betts].

enter Australia illegally and claim asylum from the requisite authorities.²⁸³ The consequences flowing from this incident has had a far-reaching effect on the ability of displaced people to access refugee protection from Australia.

The Tampa Affair brought Australia's practice towards refugees and asylum-seekers into stark international sight. The MV Tampa was a ship under Norwegian ownership and captaincy who came to the rescue of mostly Afghan and Iraqi civilians at sea.²⁸⁴ The civilians claimed they were refugees and requested, apparently somewhat forcibly, that the captain of the Tampa take them to Australia after the Captain initially tried to return them to the boat's country of origin, Indonesia.²⁸⁵ The Tampa arrived in Australian territorial waters near Christmas Island against the wishes of the Australian government.²⁸⁶ SAS troops boarded the Tampa in the interim and the asylum-seekers on-board the Tampa were transferred to the Australian ship HMAS Manoora. The HMAS Manoora was meant to transport the claimants to Papua New-Guinea and Nauru for processing.²⁸⁷ Legal challenges against Australia's actions ensued but were eventually rejected and the asylum-seekers were thus transported to Manus Island in Papua New-Guinea, Nauru and New Zealand for processing of their claims.²⁸⁸

The asylum-seekers were to remain in detention until the status of the people's applications were reviewed.²⁸⁹ This period of time could stretch on indefinitely and although Australian law allows for automatic detention of all asylum-seekers and the 1951 Refugee Convention allows for detention in certain instances,²⁹⁰ the UNHCR has cautioned states that detention, where undertaken, should be for the shortest period possible and only in the most necessary of

²⁸³ K. Betts, *supra* note 304 at 38 – 40; Alexander Betts, "The International Relations of the 'new' extraterritorial approaches to refugee protection: explaining the policy initiatives of the UK Government and UNHCR" (2004) 22 (1) *Refuge: Canada's Periodical on Refugees* 58 at 59; Mathew, *supra* note 36 at 661; Alice Edwards, "Tampering with Refugee Protection: The Case of Australia" (2003) 15 (2) *International Journal of Refugee Law* 192 [Edwards]; Mary Crock, "In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows" (2003) 12 *Pacific Rim Journal of Law and Policy* 49 -95 [Crock]; Jessica Howard, "To Deter and Deny: Australia and the Interdiction of Asylum Seekers" (2003) 21(4) *Refuge* 35 at 37-39 [Howard].

²⁸⁴ Mathew, *supra* note 36 at 661; K. Betts, *supra* note 282 at 39; Edwards, *supra* note 283 at 193.

²⁸⁵ Mathew, *supra* note 36 at 661; K. Betts, *supra* note 282 at 39.

²⁸⁶ *Ibid.*

²⁸⁷ K. Betts, *supra* note 282 at 39.

²⁸⁸ Mathew, *supra* note 36 at 662.

²⁸⁹ See the provisions of the Migration Act of 1958. K. Betts, *supra* note 282 at 37.

²⁹⁰ *1951 Refugee Convention*, *supra* note 1, art. 31(1); K. Betts, *supra* note 282 at 37.

circumstances.²⁹¹ The length of detention aside, it is important to note that the processing centres in Nauru and Papua New Guinea were financed by the Australian government and over time drew international criticism for its inhumane conditions, especially in Nauru where the detainment camps were built on the sight of an old abandoned mine.²⁹²

The Australian government, while the Tampa incident was taking place, attempted to legislate on the issue of refugees and their access to Australian territory by allowing, amongst other measures, for the forcible removal of illegal entrants from Australian territorial waters.²⁹³ The proposed legislation was not adopted as it was considered by some, including the official opposition in Parliament at the time, to be too draconian in its scope.²⁹⁴ Beyond the Tampa incident, however, legislation was successfully introduced in the Australian Parliament in 2002. The consequent legislative scheme became known as the “Pacific Solution” and allowed for responses to asylum-seekers and other illegal immigrants that included interdiction at sea as a valid response to persons seeking to gain illegal entry into Australian territorial waters and the excision of over 3000 islands and outcroppings within Australian territory from the Australian migration zone such that persons were unable to claim asylum from the Australian authorities should they make their way to any of these excised areas.²⁹⁵ The former legislative point gave fruition to “Operation Relex”, an operation by the Australian military that saw the use of force to prevent boats from entering Australian territory.²⁹⁶

Subsequent developments in the Australian response to displaced persons include the eventual closure of the processing facilities on both Manus Island in Papua New Guinea and Nauru by

²⁹¹ UN High Commission for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 21 September 2012, online: UNHCR <http://www.unhcr.org/505b10ee9.html> at para 45.

²⁹² It is pertinent to note here that Nauru only became a party to the 1951 Refugee Convention in 2011 while Papua New Guinea already became a party in 1986. This latter event, however, has not allayed the fears of the international community since only a scant refugee regime exists domestically within Papua New Guinea and therefore its adherence to the principles of the 1951 Refugee Convention can be questionable. See: Human Rights Watch, *supra* note 281.

²⁹³ K. Betts, *supra* note 282 at 39.

²⁹⁴ *Ibid.*

²⁹⁵ Mathew, *supra* note 36 at 664.

²⁹⁶ Howard, *supra* note 283 at 35.

2008.²⁹⁷ The closure of the processing centres did not mean that Australia slackened their response towards asylum-seekers. In 2011 Australia sought to complete a swap of such asylum seekers with Malaysia in what became known as the “Malaysia Solution.”²⁹⁸ The attempt of the Australian government was, however, thwarted by an Australian High Court ruling on two grounds: that the action would contravene domestic legislation that allows for “effective procedure for asylum”²⁹⁹ and that Malaysia was not a party to the 1951 Refugee Convention and therefore had no responsibility to provide protection to the asylum seekers from Australia.³⁰⁰

The “Malaysia Solution” was short-lived as the Australian government failed to gain the support of the Parliamentary opposition to revive the deal with Malaysia. The opposition did, however, indicate their preference for offshore processing facilities in the spirit of the earlier Pacific Solution.³⁰¹ The laws that were used by the High Court to strike down the Malaysia Solution were therefore repealed.³⁰² This paved the way for the re-opening of the offshore processing facilities on Nauru and Manus Island to the great concern of the international community. In fact, the Australian Parliament passed affirmative legislation towards the realization of this goal on 16 August 2012.³⁰³ The first group of asylum-seekers were to proceed to Nauru early September 2012.³⁰⁴ Bill Frelick, director of the refugee programme for Human Rights Watch summed up the effect of Australia’s latest legislative creativity: “Australia’s new offshore processing law is a giant step backward in the treatment of refugees and asylum seekers. Australia again seeks to shunt desperate boat people to remote camps, perhaps for years, to punish them for arriving uninvited by sea.”³⁰⁵

²⁹⁷ Ariane Rummery, “Australia’s ‘Pacific Solution’ Draws to a Close” (11 February 2008), online: UNHCR < <http://www.unhcr.org/47b04d074.html>>; Human Rights Watch, *supra* note 281.

²⁹⁸ Human Rights Watch, *supra* note 281.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ “Australia to Send Asylum Seekers to Nauru this Week” *BBC News* (10 September 2012), online: BBC News <http://www.bbc.co.uk/news/world-asia-19540463>.

³⁰⁵ Human Rights Watch, *supra* note 281.

4.3.2. United States of America

Chapter 3 considered the initial lack of international compliance by the United States to the refugee regime. This section will pay closer attention to the development of adherence to the refugee regime centred on two incidents or “exogenous shocks” as termed by Ryder McKeown, that is, the incident with Haitian refugees which culminated in the Supreme Court litigation of *Sale v. Haitian Centers Council*,³⁰⁶ in 1994 and the terrorist attacks which occurred on 11 September 2001 in New York, the Pentagon and Pennsylvania.³⁰⁷ These incidents herald a time after the collapse of the Cold War.

Since the advent of the 1990s, the United States has experienced particular instances of mass influx of persons from its neighbouring regions purporting to be refugees and therefore claiming asylum. Persons from Haiti, Cuba and South American countries such as Guatemala and El Salvador have attracted particular ire from US authorities and have prompted the initiation of creative evasive strategies to prevent persons emanating from these countries from shelving additional burdens related to refugee protection onto the United States.³⁰⁸

The 1951 Refugee Convention does not directly address the issue of interdiction at sea, a practice which involves a potential host state sending naval vessels to intercept and ultimately send back persons on vessels, sometimes barely seaworthy ones, to the country from whence they came.³⁰⁹ The United States, however, has undertaken this practice particularly in relation to persons from Haiti and have either directly returned such individuals to Haiti or have entered them into protracted detention at the US base at Guantanamo Bay, Cuba.³¹⁰ This policy of direct return was not only practiced under the presidency of George W. Bush, but also during the presidencies of Bill Clinton and G.H.W. Bush.³¹¹ President Reagan, to the contrary, believed

³⁰⁶ McKeown, *supra* note 44 at 15; 509 U.S. 155 (1993).

³⁰⁷ N.R. Kleinfeld, “A Creeping Horror: Buildings Burn and Fall as Onlookers Search for Elusive Safety” *The New York Times* (12 September 2001), online: [The New York Times www.nytimes.com/2001/09/12/nyregion/12SCEN.html](http://www.nytimes.com/2001/09/12/nyregion/12SCEN.html) [Kleinfeld].

³⁰⁸ Hathaway, *supra* note 192 at 537 – 538; Loescher (b), *supra* note 28 at 219.

³⁰⁹ Stephen H. Legomsky, “The USA and the Caribbean interdiction Program” (2006) 18 *International Journal of Refugee Law* 677 at 678 [Legomsky].

³¹⁰ *Ibid.* at 678; Hathaway, *supra* note 201 at 539.

³¹¹ Legomsky, *supra* note 309 at 680.

that the status of persons applying for asylum ought to be determined before action of any kind such as that undertaken by his successors were to be applied.³¹²

The United States believes that such interdiction does not constitute a violation of its obligations under the norm of refugee protection or the broader 1951 Refugee Convention. This stance received support from the United States Supreme Court in the case of *Sale v Haitian Centres Council* when it ruled that interdiction at sea does not constitute a violation of the US's obligations as the action of interdiction does not constitute refoulement.³¹³ This ruling has been widely condemned for making a mockery of the spirit, purport and objects of the 1951 Refugee Convention.³¹⁴ In the spirit of words penned by Jeremy Bentham, although not within the same context, the US Supreme Court's interpretation of the relevant provisions is "nonsense upon stilts" that implicitly sanctions actions that were part of the very reason why the idea of an international refugee regime was initiated after the Second World War.³¹⁵ The questionable legality of the United States' practice notwithstanding, it has continued and was sanctioned by George W. Bush when he controversially stated that the Haitian people must know that they will be returned if they attempt to enter the United States in this manner.³¹⁶

The questionable treatment of Haitians by the United States is but one instance of deliberate state practice that violates the tenets of the 1951 Refugee Convention and its central consideration of refugee protection. A second, more extensive breach of this central tenet was initiated by the response of the United States after the terrorist attacks on 11 September 2001, a date that has gone down in infamy as 9/11.³¹⁷ This date saw acts of unspeakable horror that traumatised countless people, not only in the United States but around the world. This impact notwithstanding, it is the subsequent actions taken by US authorities at the highest levels and its effect on the plight of refugees and asylum-seekers alike that is of concern here.

³¹² *Ibid.* at 679.

³¹³ *Advisory Opinion*, *supra* note 219 at 12, n. 54; Hathaway, *supra* note 192 at 336.

³¹⁴ *Advisory Opinion*, *supra* note 219 at 12, n. 54.

³¹⁵ Jeremy Bentham, "Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution" in P. Schofield et al., eds., *The Collected Works of Jeremy Bentham* (Oxford, 2002) 317 – 401; See sources at *supra* note 202.

³¹⁶ Schoenholtz, *supra* note 39 at 361, n. 149.

³¹⁷ Kleinfield, *supra* note 307.

Around the time of 9/11, refugees from the Middle East were awaiting resettlement in the United States.³¹⁸ A plane carrying these refugees arrived in the United States and concerned authorities alerted then Vice-President Dick Cheney as to the situation.³¹⁹ Shortly after this notification the resettlement programme was suspended, being one of the first casualties of the post 9/11 response by the United States.³²⁰ Legislative and executive intent was not confined to this instance, however. Operation Liberty Shield was a particular instance where US authorities could legally detain persons claiming asylum for the duration of the process if they emanated from countries known to house Al Qaeda operations.³²¹ The net of legislative reach was cast even wider with the passage of excessively broad anti-terrorism legislation that necessarily bought legitimate refugees and asylum-seekers within the ambit of anti-terrorism measures.³²² This moved the focus away from providing protection to refugees and asylum-seekers towards the control of their movements and ultimate deterrence of future asylum-seekers. An increasingly security-oriented view also began to equate the refugee condition with that of criminal activity, not only in the view of the US authorities but also increasingly within the minds of the US citizenry.

The state of affairs propagated by the US authorities and the passage and implementation of far-reaching anti-terrorism legislation has created severe uncertainty within the United States as to the proper treatment of refugees and asylum-seekers.³²³ There have been some moves from certain avenues, however, that seeks to rectify the grievous deviations evident within the US refugee protection regime and its international obligations emanating from the 1951 Refugee Convention by way of its acceptance of the 1967 Protocol thereto.

Senator Patrick Leahy, a democrat from Vermont,³²⁴ introduced a bill in Congress in 2010, the passage of which would bring US legislative practice closer towards its international

³¹⁸ Schoenholtz, *supra* note 39 at 323.

³¹⁹ *Ibid.* at 324.

³²⁰ *Ibid.*

³²¹ *Ibid.* at 330.

³²² Feller, *supra* note 8 at 518–519.

³²³ Maryellen Fullerton, “Terrorism, Torture and Refugee Protection in the United States” (2010) 29 (4) *Refugee Survey Quarterly* 4 at 8-10 [Fullerton].

³²⁴ Official Website, *Senator Patrick Leahy: United States Senator for Vermont*, online: <http://www.leahy.senate.gov/>.

obligations.³²⁵ The bill was forwarded to the relevant congressional committee in 2010.³²⁶ The bill has not, however, moved beyond this stage of consideration and it is unlikely that it will enjoy any attention before the adjournment of the current congressional term. The bill would most likely, therefore, have to be re-introduced at a later date.

The state of the United States' commitment to refugee protection is uncertain judging from its actions, notwithstanding its rhetoric surrounding the necessity of compliance with human rights (of which refugee protection is an adjacent field) both at home and by other countries.³²⁷ Judge Weinstein said it best when he stated that: "the United States cannot expect to reap the benefits of internationally recognised human rights...without able willing to adhere to them itself. As a moral leader of the world, the United States has obligated itself not to disregard rights uniformly recognised by other nations."³²⁸ The Judge further cautioned that "this nation's [US] credibility would be weakened by non-compliance with treaty obligations or with international norms."³²⁹

It is clear from even the sparse discussion of the US refugee regime above that there are very evidently persistent lacunae in the US's domestic structure of refugee protection. These lacunae and failed attempts to ameliorate this adverse position can and most likely has prompted other states to follow suite and disregard their respective obligations towards refugees and asylum-seekers thereby also challenging the intended content of the norm of refugee protection.

4.4. Application of the Norm Death-Series

The preceding overview of state practice, both in general and specific contexts provide a canvas upon which to impose the norm death-series theoretical framework as proposed by McKeown.³³⁰ The following section will consider each of the framework's three stages in light of

³²⁵ "Leahy Introduces Landmark Refugee Protection Act" (15 March 2010), online: *Senator Patrick Leahy: United States Senator for Vermont* <http://www.leahy.senate.gov/press/leahy-introduces-landmark-refugee-protection-act> [Leahy]; Fullerton, *supra* note 323 at 28-29.

³²⁶ *Ibid.*

³²⁷ US State Department, *supra* note 243.

³²⁸ Huber, *supra* note 179 at 136-137, n. 200.

³²⁹ *Ibid.*

³³⁰ McKeown, *supra* note 44.

the information about state practice given in the preceding sections. It is important to note, however, that the actions of Australia and the United States are not necessarily the absolute trigger of other subsequent violations of the norm by other countries – it could rather be said that the actions of one such country is continually re-enforced by the actions of other states. Mutual re-enforcement is therefore the operational standard in the midst of a lack of strong, fervent sanctions issued by one state against another state of similar democratic ilk in particular for fear of, most arguably, being labeled as hypocritical and espousing the virtue of double standards.

4.4.1. Revisionist Challenge

This stage marks the onset of the norm death-series and is most often initiated and driven by the occurrence of an exogenous shock to the system.³³¹ There have been multiple shocks of this nature as it concerns the norm of refugee protection. Revisionists, the key actors in this stage of the norm death-series, respond to such exogenous shocks by re-framing existing norms accordingly. The exact contours of what constitutes an exogenous shock are not clearly defined. It can logically, however, be reasoned that an exogenous shock is an event which occurs that is out of the ordinary and challenges the continuation of the status quo, here adherence to the original norm of refugee protection. Certain exogenous shocks have been identified in the preceding sections, with the end of the Cold War being the first for the time period concerned. The Tampa affair involving Australia is the second such exogenous shock. The events of 9/11 and subsequently in Madrid on 11 March 2004,³³² and in London on 7 July 2005,³³³ is the third set of major events that has placed severe strain on the continuation of the intended refugee protection system as envisaged by the 1951 Refugee Convention and the 1967 Protocol thereto. The focus here will fall on the latter two sets of events with additional consideration of the general instances of state practice as mentioned earlier.

³³¹ *Ibid.* at 15.

³³² Elaine Sciolino, “Spain Struggles to Absorb Worst Terrorist Attack in Its History” *The New York Times* (11 March 2004), online: The New York Times <http://www.nytimes.com/2004/03/11/international/europe/11CND-TRAI.html> [Sciolino].

³³³ Alan Cowell, “After Coordinated Bombs, London Is Stunned, Bloodied and Stoic” *The New York Times* (7 July 2005), online: The New York Times http://www.nytimes.com/2005/07/07/international/europe/07cnd-explosion.html?_r=0&pagewanted=all [Cowell].

Security has certainly been a longstanding concern for all states within the international community, especially in the wake of the Cold War that raged from the 1950s to the end of the 1980s.³³⁴ The events of 9/11, however, shone a blinding light on the shortcomings in state security, most prominently in the United States. The response to the events on this day was for norm-revisionists to re-frame the issue of refugee protection in the context of security interests away from the intended human rights framework.³³⁵ The consequence was that the norm of refugee protection that was always meant to be closely adjacent to the human rights paradigm was no longer one centred on extending assistance to those persons in need of protection by the mere fact of their human identity, but one centred on control of access, deterrence and security. Re-framing an issue in this manner can and indeed did ultimately result in the focus of concerned legislation and state practice, certainly within the United States and other closely allied states, to turn to securing themselves against future security breaches at the cost of extending its humanitarian assistance to persecuted individuals.³³⁶

The identity of the norm revisionists responsible for re-framing the context of the refugee protection norm concerned can vary and includes in this instance, but is not limited to, first and foremost the state itself as represented by governmental authorities. These norm revisionists, in light of fear of foreigners and that they may be of the same ilk as those that perpetrated the 9/11 attacks, arguably fed on and exploited the fear and anger of the broader citizenry to pass questionable legislation that served to, amongst other things, subject legitimate refugees and asylum-seekers to harsh sanctions and procedures wholly inconsistent with the international framework laid out for the realisation of refugee protection thereby effectively criminalising otherwise legitimate refugees.³³⁷ The xenophobia-factor arguably also played a considerable part in the norm revisionist stage and undoubtedly also facilitated the willingness of the US citizenry to sanction the actions taken by their government in response to the 9/11 attacks, including suspending the resettlement programme, instituting Operation Liberty Shield³³⁸ and passing an array of overbroad anti-terrorism legislation.³³⁹ Trust in the government and the president in the United States in the immediate aftermath of the 9/11 attacks was at an all-time

³³⁴ Tim Dunne, "Fundamental Hum Rights in Crisis after 9/11" (2007) 44 *International Politics* 269 at 272.

³³⁵ Schoenholtz, *supra* note 39 at 330; *Ibid.* at 276.

³³⁶ Scott D. Watson, *The Securitization of Humanitarian Migration: Digging Moats and Sinking Boats* (New York: Routledge, 2009).

³³⁷ Fullerton, *supra* note 323 at 8; Mathew, *supra* note 305 at 664.

³³⁸ Schoenholtz, *supra* note 40 at 330.

³³⁹ Fullerton, *supra* note 323 at 8–10.

high thereby allowing far-reaching executive actions in addition to the legislative agenda alluded to above.³⁴⁰

The concern with state security subsequent to the events of 9/11 and others such as the Madrid attacks in 2004 and the London attacks in 2005, does not, however, provide the only impetus for re-envisioning the content of the norm of refugee protection.³⁴¹ This latter point is witnessed by the practices perpetrated by Australia in the wake of the Tampa Affair.³⁴² The Australian experience is crucial to mention at this stage of the norm death-series since it gives credence to the warning issued by McKeown in that the possible impact of democratic states' actions in relation to human rights based norms may logically have a far greater impact on the international system than would the actions of a pariah state in the same human rights paradigm.³⁴³ This point arguably places Australia within the norm revisionist camp as the treatment it has extended and is currently extending towards persons seeking asylum, challenges the foundation of democratic state identity – the respect for human rights.

The nature of the detention that Australia has and plans to institute again against asylum seekers that arrive in its territory illegally can be considered, and indeed is by some, as amounting to cruel and inhumane punishment and arbitrary detainment – the very values that are entrenched in a democratic state's identity. This criticism draws its motivation from the indefinite period of time that persons may be detained and has been detained in the past in questionable circumstances on Nauru and Manus Islands.³⁴⁴ The practice of interdiction at sea, in the similar vein as that practiced by the United States, also suggests that Australia is proactively seeking to redefine refugee protection in ways that detach it from its human rights foundations. This unquestionably makes both the United States and Australia guilty of violating the principle of non-refoulement, a central tenet of refugee protection.

³⁴⁰Gallup, "Presidential Approval Ratings -- George W. Bush", online: Gallup <<http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>>.

³⁴¹ Sciolino, *supra* note 332; Cowell, *supra* note 333.

³⁴² See sources at *supra* note 283.

³⁴³ McKeown, *supra* note 44.

³⁴⁴ Human Rights Watch, *supra* note 281.

Cumulatively, since both the United States and Australia are mature liberal democracies, their creative practices in recent times in particular have served to stimulate a reconsideration of the norm of refugee protection in light of security and deterrence instead of its initial human rights-based foundations. This conclusion does not categorically mean that there are no other norm revisionists. The United States and Australia do, however, serve as strong examples even in the midst of criticism from prominent human rights NGOs such as Amnesty International and Human Rights' Watch. The criticism leveled against such norm revisionists as the United States and Australia, although legitimate, has not been overtly successful in changing state practices of these states who merely continue in their practices unabated.³⁴⁵ This state of affairs is reminiscent of McKeown's assertion, in the context of the anti-torture norm, that exposing state practices that do not comport with international and domestic standards of appropriateness was not successful in curbing state practice that violated the initial norm of anti-torture and subsequently eroded its content.³⁴⁶

4.4.2. Reverse Cascade

It has been established earlier in this research that the reverse cascade stage is comprised of two consecutive stages; domestic and international legitimacy crises. Both sub-stages are evident in the abounding practices contrary to the initial norm of refugee protection.

Norm revisionist arguably achieved a victory in re-framing the context of the norm of refugee protection to the extent that a reverse cascade was initiated, first in terms of a domestic crisis of legitimacy, not only in the United States and Australia but further afield in other democratic countries especially in Europe, and then in an international crisis of legitimacy. The domestic crisis of legitimacy was initiated and maintained by the initial norm of refugee protection losing salience amongst domestic role-players.

³⁴⁵ Both Australia and the United States are still invested in the programmes of interdiction at sea and the excision of island territories in the case of Australia.

³⁴⁶ McKeown, *supra* note 44 at 10.

The occurrence of a domestic crisis of legitimacy is not difficult to envision within the US context in light of the support from a large portion of the citizenry, fuelled by fervent feelings of patriotism and xenophobia in some instance not only in relation to the 9/11 attacks but also in the context of the long-standing hot button issue of immigration that always plays a central role in election debates. The support made the passage of pernicious legislation and executive orders commensurately easier. The extent of the challenge posed to the original norm of refugee protection in light of the vast amounts of support for actions taken in the post-9/11 era drowned-out the new set of responses' detractors. People who, during the aftermath of the 9/11 attacks, questioned governmental authority and actions, were confronted with being labelled as un-American, something supported by George W. Bush's pronouncement of "either you are with us, or you are with the terrorists".³⁴⁷ The proponents of a security-oriented policy towards foreigners of any kind therefore arguably drowned-out the voices of detractors.

The Australian government initially proposed draconian legislation to retroactively legitimise actions taken against the asylum-seekers of the Tampa. The legislation was, however, opposed by opposition parties in the country's Legislature. Subsequent actions in the Australian Legislature and public opinion polls,³⁴⁸ however, suggest that a domestic legitimacy crisis was successfully initiated and continues to this day with the newly enacted legislation, with the support of the opposition, to re-open offshore processing centres for persons that illegally arrive in Australia. Public opinion has also drifted progressively towards resentment of illegal foreign arrivals that, according to a 2012 United Nations poll, are regarded by two thirds of Australians as "queue jumpers".³⁴⁹ The changing sentiments of the Australian government and the citizenry of Australia indicate that the norm of refugee protection as a matter of human rights concern is under severe pressure and prone to a domestic crisis of legitimacy. Similar sentiments abound in other democratic countries such as France that subscribe to some of the general practices listed earlier in this chapter and even South Africa which is a relatively young democracy that

³⁴⁷ President George W. Bush, "Address to a Joint Session of Congress and the American People" (20 September 2001), online: <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

³⁴⁸ K. Betts, *supra* note 282.

³⁴⁹ Michael Gordon, "Refugees are 'Boat People' to Most, UN Survey Finds" *The Sydney Morning Herald* (18 June 2012), online: *The Sydney morning Herald* <http://www.smh.com.au/opinion/political-news/refugees-are-boat-people-to-most-un-survey-finds-20120617-20ide.html>.

saw heinous xenophobic attacks against foreigners , especially refugees from central and northern Africa.³⁵⁰

The realisation of numerous domestic crises of legitimacy does not, however, guarantee a subsequent cumulative international crisis of legitimacy.³⁵¹ The nature of the norm challenged in this research and the identity of the states who pose the challenge to the continued salience of the norm in the first place does, however, go a long way in contributing to the occurrence of an international crisis of legitimacy. McKeown cautions in his article that the anti-torture norm may, at the time of his writing, not yet be subject to an international crisis of legitimacy but that if states that carry significant normative weight in terms of their liberal democratic identity, and therefore expected adherence to the anti-torture norm, choose to emulate the United States to challenge the continued salience of the norm under consideration, an international crisis of legitimacy within the norm will most likely ensue.³⁵² This reasoning is wholly relevant to the case of the refugee protection norm and the violation of its basic tenets by states who were previously general adherents to its precepts. These states in the majority also ascribe to a liberal democratic state identity, and therefore their violation of the norm of refugee protection as originally envisioned is particularly disconcerting and exerts more influence on the continued salience of the norm than would the violation by a known pariah state who has almost never ascribed to the human rights regime, never mind the refugee regime that flows from it. If China were, for example, to violate the tenets of refugee protection, especially that of non-refoulement, as they do by returning defectors from North Korea to that country without a second thought,³⁵³ its non-adherence to the intended refugee protection framework would attract international scorn but would not necessarily carry substantial impact on the continued salience of the norm of refugee protection.

The general instances of state practice addressed earlier in this chapter also contribute to establishing a domestic crisis of legitimacy, in particular, in other liberal democratic states. This cumulatively contributes to support an ultimate international crisis of legitimacy, a crisis whose

³⁵⁰“Thousands Flee South Africa Attacks” *BBC News* (19 May 2008), online: *BBC News* <http://news.bbc.co.uk/2/hi/7407914.stm>.

³⁵¹ McKeown, *supra* note 44 at 11–12.

³⁵² *Ibid.* at 20.

³⁵³ Sang-Hun, *supra* note 36.

potency is further supported by the fact that many of these states who contribute to the new system of evasive strategies were previously adherents to the refugee regime and indeed its initiators in the case of Western European states in particular. This has arguably also spawned the emulation of non-adherence by other states. The international character of the refugee protection norm is therefore under severe strain with its continued existence in its intended form uncertain.

It is important to note here that even in the midst of states passing a Resolution in the United Nations General Assembly in 2001 upon the 50th anniversary of the existence of the 1951 Refugee Convention,³⁵⁴ the contrary practices of states continues. This would suggest a divergence between state practice and state rhetoric, an imminently dubious state of affairs that further shows the insincerity of states to uphold the human rights informed norm of refugee protection.

4.4.3. Norm Expiration

Theoretically a norm that expires ceases to exist, with a new norm taking its place. The nature of norms associated with human rights and refugee protection in particular are very contentious as shown earlier in this research. There could arguably, therefore, be parties who hold an opposing viewpoint on the continued salience of norms emanating from this field. It is therefore pertinent to mention that even though the norm of refugee protection as initially intended is more probably than not suffering the throes of expiration due to the overwhelming contrary practice of states that carry a tremendous amount of normative weight, there are still some NGOs and organised citizen groups that hold the view of the norm of refugee protection as initially established. The ability of sections of the population to still hold their views even amidst the expiration of a norm is reminiscent of the contentious character of democratic politics, an identity feature of the states most responsible for the erosion of the initial norm of refugee protection. Whether or not a norm therefore expires is a question of probabilities and cannot arguably ever be conclusively proven.

³⁵⁴ UNGA Resolution, *supra* note 37.

Overall, the fact that the norm of refugee protection still enjoys some salience amongst certain entities such as NGOs like Amnesty International and Human Rights Watch and the citizenry of various countries, speaks against its expiration. The question that should be considered here, however, is what level of impact the dissent of such entities in actual fact has on the probability of the norm expiring. States are the main purveyors of power in the international system and it has become increasingly difficult to curtail their actions, especially those who wield the most amount of power. The economic uncertainty and heightened security concerns in an ever-more hostile world and the adverse impact this has had on the willingness of states to co-operate for mutual benefit in an international organisation like the UN have all contributed to this state of affairs.

Additionally, even though there may still be some NGOs and citizenry around the world who hold the norm of refugee protection in high regard, the events that brought about the intensification of security concerns, think 9/11, and subsequent responses by states through clever use of language and legislation has arguably desensitized persons to the prominence of human rights and the norm of refugee protection. This is borne out by the question when considering torture as to whether the torture of an individual is justifiable if that means the lives of many innocent people will be saved. There is also, arguably, an innate fear and intolerance of foreigners for reasons ranging from the sense that foreigners in the ilk of refugees are necessarily terrorists or that they will disturb the existing fabric of society. This sense has also precipitated outbreaks of xenophobia. Furthermore, the acknowledgement by leaders such as Angela Merkel, Nicholas Sarkozy and David Cameron that multiculturalism has failed in their respective states serves to suggest that a welcoming nature towards foreigners is no longer prominent.³⁵⁵ Overall therefore, it is highly probable that the norm of refugee protection within a sense of human rights is fast approaching expiration for numerous and interrelated reasons.

4.5. The Emergence of a New Norm

Even though the norm of refugee protection is not necessarily fully expired, it is still prudent to consider whether a new norm of refugee protection is emerging. It is feasible that the two

³⁵⁵ Vinocur, *supra* note 260.

processes of norm expiration and norm emergence can co-exist for some time since the reasons underlying the regression of the norm sets the stage for the development of a new norm, that is, there are inter-related causes at work. This arguably reflects the fluid nature of international relations and human society both of which do not operate according to a fixed spectrum of consecutive stages of development. Deviations should therefore be accommodated.

In relation to the preceding paragraph, it has been seen from the above arguments that the norm of refugee protection with its foundations in the human rights regime is under severe strain and the mere fact that its prominent detractors emanate from within a group of countries that ought to be its main proponents suggests that the norm will not recover unless these states change their actions, which is highly unlikely given the domestic support in these states and the perceived lack of sanctions against these states that would normally adhere to actions that violate the tenets of refugee protection and human rights. Furthermore, the shift in international relations to include rising powers such as China with different conceptions of and adherence to human rights and refugee protection may contribute to perceptions that the norm will not recover but will rather be reformulated in the image of security and deterrence.³⁵⁶

Additionally, a point that ought to be considered here is whether the norm under contention is a wholly new norm or is simply adapting itself to existing circumstances. It has been seen that states are engaging in behaviour that are not appropriate according to the precepts of the initial norm of refugee protection, that together with the fact that the underlying precepts of human rights is essentially being replaced by that of security and deterrence leads one to conclude that a new norm is emerging and not simply adapting. Furthermore, the shift in international relations to include rising powers such as China, Brazil and India and strong regional and economic-based groupings suggests that different norm entrepreneurs may also come into play.³⁵⁷ Different organisational platforms may also be engaged as the efficacy of the UN has come under repeated scrutiny in recent years.

³⁵⁶ Rourke, *supra* note 236 at 81.

³⁵⁷ Patrick Worsnip, "Clinton: U.S. Must Learn from Emerging Economies" *Reuters* (14 October 2011), online: Reuters <http://www.reuters.com/article/2011/10/14/us-usa-clinton-idUSTRE79D2R520111014>.

Given this above, it is still feasible within the context of this research to propose that the norm of refugee protection as it was crafted in the context of human rights, has been placed on a new trajectory of change with norm entrepreneurs actively re-defining its context, actions which may eventually precipitate the realisation of a tipping point and a norm cascade and eventual norm internalisation in the format of the norm life-cycle theoretical framework. These latter propositions are, however yet uncertain but should certainly prompt future research.

There are some concerns relating to the continued adherence to the initial norm of refugee protection by non-state entities, including the citizenry of various states that could challenge the assertion that a trajectory of change in the sense of a new norm and not simply adaptation thereof is at play. The relative strength or potency of their ability to translate their dissent onto the international stage is apposite here since the framework used deals with international norms. However, security is a well-financed global enterprise with strong lobbies thus it is highly improbable that dissenting non-state entities will be able to effectively challenge the emerging norm centred on security and deterrence. It is for this very reason, also, that even if the norm were to be maintained by its non-state proponents that a new norm would still feasibly develop, a new norm that is not simply a reversion to a previous state but one in a different context of operation.

4.6. Conclusion

This chapter has sought to lay out the argument supporting the assertion that the norm of refugee protection that was envisaged in chapter 3 of this research is well and truly under intense pressure - pressure emanating from states that ought to be its main proponents. The norm death-series was applied to various instances of state practice, more specifically the actions of the United States and Australia, and it was subsequently asserted that the tenets of the norm death-series was and is still being fulfilled. It was further asserted that a new norm of refugee protection informed by security concerns and consequent deterrence is under construction, a norm whose content is not simply a reversion to a prior state of existence of the norm of refugee protection. A consideration of the latter, it is proposed, is possible if one accepts the simultaneous operation of norm expiration and norm emergence.

CHAPTER 5

CONCLUSION

5.1. Summary

The field of international relations and its identifying concepts are unlike definitive mathematical formulas that are able to prove the existence and character of numerous entities. The best outcome that can be hoped for within the broader social science field and indeed the sub-fields of international relations and international law is an approximation of a decisive answer or at the very least an elimination of what the answer is clearly not thereby moving one step closer to a more credible one. The truth is that however much scholars have sought to solidify concepts and seek answers within the international relations and international law fields, true answers will still most often remain elusive, that is, ultimately, answers to questions within international relations and the broader social science field will most likely, to some degree, be mutually exclusive from scenario to scenario. Answers to proposed research problems are therefore comprehensibly prisoners of context in both time and place. It is within this understanding of the quest for answers within particularly the field of international relations and equally that of international law that the conclusions of this research into the existence and evolution of a norm of refugee protection ought to be seen.

This research has presented the over-arching research aim of tracking the evolution of the norm of refugee protection. This task has required a consideration of not only theoretical models and concepts within the field of international relations but also of concepts and understandings prevalent within the field of international law. The models within the confines of international relations that were used are respectively the norm life-cycle theoretical model and the norm death-series model, both of whom are situated within the Constructivist school of thought. Definitional concepts such as refugee, protection, asylum and non-refoulement that are more prominently concepts found within international law scholarship were also crucial in addition to the concepts more commonly identified with the operational field and research agenda of international relations such as norms, socialization, and others. In many areas these two areas of scholarship provide re-enforcing elements, however, thereby making it possible for inter-

disciplinary research. In this vein, the research conducted within the confines of the research aims drew models and concepts from both fields to suggest feasible conclusions to the research aims and concomitant questions.

After a holistic consideration of the context of the over-arching research fields within which this research was conducted, a number of conclusions in relation to the research questions posed were reached that could further the research agenda on many fronts in hopes of arriving at even more well-refined conclusions than those presented collectively within this chapter. A re-affirmation of these conclusions is now apposite. Subsequent research avenues are also suggested by the conclusions presented.

The first research aim of this paper was to establish the existence of a norm of refugee protection during the early and subsequent stages of the human rights regime following the end of the Second World War in 1945. The conclusion presented in chapter 3, in due cognizance of the application of the norm life-cycle, suggested the existence of such a norm of refugee protection founded on the precepts of human rights norms.

The second research aim of this paper was to show that the norm of refugee protection as advanced under the first aim was and still is being challenged to the extent that its salience has eroded to severe levels thereby propagating the eventual death of the norm. This aim was facilitated by the application of the norm death-series, again with some criticisms against the model being kept in mind. The conclusion presented in chapter 4 suggests that the norm of refugee protection under its initial conception has been placed under severe strain by the actions of states that should in actual fact be supportive of the norm's initial conception as one based in recognition and respect for human rights. This severe strain furthermore suggests the eventual expiration of the norm of refugee protection as suggested by the norm death-series.

The third research aim of this paper was to consider whether a new norm of refugee protection, informed by a different set of values than the initial norm of refugee protection, has been initiated. It was suggested that this is indeed the case, the probable absence of the final

expiration of the initial norm of refugee protection notwithstanding, since concurrent existence for a time in the change-over period of both norm expiration and norm emergence is arguably possible. A new norm that is informed by the concepts of national security and deterrence could therefore be under development. It was also asserted that due to the fundamental change in underlying precepts and the already deviant behaviour exhibited by a large number of states that the new norm is not simply an adaptation but a fundamental change thereof.

Cumulatively, taking into regard the research aims of this paper and all the arguments and facts presented herein, the research paper does in fact undertake what the title of this research suggests. The research paper does indeed track the evolution of the norm of refugee protection over time. The process of tracking is not however a finite one and should continue beyond the purview of this paper. However, that is a task for another day.

5.2. Further Research

Cumulatively, this research paper merely represents a snapshot of an issue that ought to be investigated in much greater detail through more intense and critical consideration of the theoretical frameworks that have been applied here. The avenues here that may prove fruitful to investigate further include the perceived state-centric nature of the frameworks, the rigid application of each stage of both frameworks in consecutive and not concurrent stages, and the nature of norm internalisation. An investigation of a greater spectrum of countries and their respective practices within the context offered by the frameworks would also be helpful. A closer scrutiny of the continued salience of the international refugee regime as it is constructed under international law is also necessary for the purposes of reflecting changing beliefs within the international community. This latter point would include an investigation into the definition of a refugee, amongst other things.

If all of these suggestions were to be heeded, then an even more intensive argument may be presented in support of the aims of this research paper. Further research in this field is crucial as the phenomenon of refugees in the broadest sense of the word is unlikely to abate in the

near or far future in the midst of more and more conflicts both within and between countries. The prescribed length of this paper does not, however, allow such thorough consideration but should serve as a guide to future research.

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