

Legal Empowerment for a Dignified Life:
Fiduciary duty and human rights-based capabilities in protracted refugee situations

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Abstract

Through a critical, interdisciplinary engagement with development and legal theory, this thesis argues in favor of increased emphasis on legal empowerment as a means of protecting the dignity and securing the effective human rights of refugees caught in situations of protracted exile and encampment. Despite the existence of multiple overlapping legal regimes, more often than not refugees are excluded from the law and prevented from actively participating in the determination of their own destinies. In these situations human rights and obligations give way to at best an ethic of charity and at worst an abdication of responsibility.

Drawing on the work of Amartya Sen and Martha Nussbaum, the first part of this thesis develops a human rights-based capabilities approach which posits that the list of minimal capabilities that a state must ensure in order to legitimize its authority and to provide the basis for a dignified life is embodied in the International Bill of Rights. The duty of the state to provide these minimum capabilities to refugees is then itself translated into a legal obligation by applying the fiduciary theory of state legal authority which reconceives the relationship between refugee communities and host states as one that is fiduciary in nature. Thus the human rights-based capabilities approach can help us to address questions pertaining to law, power, governance, responsibility and accountability.

Having established that the host state has a legal obligation to provide refugees with a minimum set of human rights-based capabilities, the second part of this thesis focuses on the role that legal empowerment plays as one of those capabilities. As both a right in and of itself and as a means of securing other rights and capabilities, legal empowerment can have a meaningful impact on the distribution of power in a given situation by facilitating the exercise of individual agency and assisting in the reform of the opportunity structure in which that agency is exercised. By helping to provide refugees with the capability to participate actively in their own lives, it is argued that legal empowerment can assist in ensuring the dignity of refugees within protracted refugee situations but also in finding durable solutions to these situations.

Résumé

Grâce à un engagement interdisciplinaire critique avec la théorie du développement et la théorie juridique, cette thèse plaide en faveur d'un accent accru sur l'autonomisation juridique comme un moyen de protéger la dignité et de garantir les droits de l'homme effectifs de réfugiés pris dans des camps de réfugiés et dans des situations d'exile prolongée. Malgré l'existence de plusieurs régimes juridiques qui se chevauchent, plus souvent qu'autrement les réfugiés sont exclus de la loi et empêchés de participer activement à la détermination de leurs propres destins. Dans ces situations, les droits et obligations cèdent au mieux à une éthique de la charité et au pire à une abdication de responsabilité.

En s'inspirant des travaux d'Amartya Sen et de Martha Nussbaum, la première partie de cette thèse développe une approche par les capacités fondée sur les droits humains qui postule que la liste des capacités minimales que l'État doit garantir pour légitimer son autorité et pour fournir la base pour une vie digne est incarnée dans la Charte internationale des droits de l'homme. Le devoir de l'État de fournir ces capacités minimales pour les réfugiés est ensuite traduit en obligation juridique en appliquant la théorie fiduciaire de l'autorité de l'État qui redéfinit le rapport entre les communautés de réfugiés et les pays d'accueil comme étant de nature fiduciaire. Ainsi, l'approche par les capacités fondée sur les droits humains peut nous aider à répondre à des questions relatives à la loi, le pouvoir, la gouvernance et la responsabilité.

Après avoir établi que l'État hôte a l'obligation légale de fournir aux réfugiés un ensemble minimal de capacités fondées sur les droits humains, la deuxième partie de cette thèse se concentre sur le rôle que joue l'autonomisation juridique comme un de ces capacités. À la fois un droit en soi et un moyen d'obtenir d'autres droits et capacités, l'autonomisation juridique peut avoir un impact significatif sur la répartition du pouvoir dans une situation donnée en facilitant l'exercice de l'agence humaine et en aidant à la réforme de la structure dans laquelle cette volonté est exercée. En fournissant aux réfugiés la possibilité de participer activement à leur propre vie, il est soutenu que l'autonomisation juridique peut aider à assurer la dignité des réfugiés dans les situations de réfugiés prolongées, et aussi à trouver des solutions durables à ces situations.

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Introduction

Sixty years ago, following the end of the Second World War, the international community was faced with the first protracted refugee situation in the modern era: the widespread displacement of populations in Europe that took almost 20 years to resolve. Although the very body of law that governs refugee movements and treatment today was born out of that crisis, long-term exile has historically received little attention on the international scene. Protracted cases of hardship are far less glamorous than the emergency situations that attract the attention of the international media. Like today's child reared on video games, instant messaging and twenty second news clips, the international community has a very short attention span. It is only within the last decade, as the proportion of refugees in protracted situations rose to more than 60 per cent of the total and as we have seen a noticeable increase in the duration of refugee crises that any substantial degree of international attention has been devoted to protracted refugee situations.¹ Nevertheless, despite this increased attention, the international community's approach to protracted refugee situations can largely be characterized as a failure. There has been no marked decrease in the number of individuals concerned or the duration of these situations, there has been no significant increase in the availability of durable solutions, and there has been no substantial amelioration in the conditions of life for most refugees.

In truth, protracted refugee situations are only one manifestation of a much larger problem, namely that despite stated commitments to the inherent dignity of the human person and the equal rights of individuals, around the world states have either been unable or unwilling to take the steps necessary to live up to those commitments leaving millions of people in situations of profound indignity where their rights exist only on paper if at all. Protracted refugee situations though are distinct in that they represent a point of convergence between multiple different legal and political regimes and because their very existence challenges traditional understandings of state sovereignty and international responsibility. From a human perspective, protracted refugee situations are particular insofar as the refugees caught within them are subject

¹ UNHCR, *The State of the World's Refugees 2006: Human Displacement in the New Millennium* (Oxford: Oxford University Press, 2006) at 105 [UNHCR, *Human Displacement*]. The average length of stay in a country of asylum for refugees is now close to 20 years, up from 9 years in the early 90s. Gil Loescher & James Milner, "Understanding the Challenge" (2009) 33 *Forced Migration Rev* 9 at 9.

to multiple overlapping vulnerabilities including not only poverty and discrimination but the loss of effective citizenship, of community and of place in society.

Over the last sixty years, we have seen repeatedly how situations of vulnerability and the violation of human rights go hand in hand, both part of a vicious cycle that ensnares individuals and entire communities equally. More recently, we have witnessed how economic hardship and international and political events can combine, spurred on by a mix of political pandering and latent xenophobia, to create a toxic environment of fear and anger where the “stranger”, the refugee, the migrant, the stateless person, can be regarded as somewhat less than human and where the consequent violence and discrimination can be legitimized in the name of defending our values and society. In the face of these challenges, if the concept of inherent and universal human rights is to retain its legitimacy, it is imperative that we address the inability of so many individuals and groups to access their rights.

I. Exclusion of Refugees from the Law: Charity vs. Rights

In her well-known essay “The Decline of the Nation-State and the End of the Rights of Man”, Hannah Arendt posits that the loss of effective citizenship ultimately results in the loss of all human rights and that what we call universal and inalienable human rights are in the end neither universal, nor inalienable; that they are the rights of citizens and nothing more.² For many refugees today, caught in situations where no durable solution is feasible, to equate human rights with national rights would be to concede that they are no more than their animal selves, alive and surviving at the whim and on the charity of others with nothing more than years of abuse and deprivation to look forward to until such time as they are able to regain their effective citizenship or acquire a new one. Yet a commitment to the inherent dignity of the person requires a different conclusion; a person does not become less human simply because she crosses an international border.

While few people would deny that nationality and the fact of belonging to a polity plays an important role in the realization, if not the existence, of fundamental human rights, the argument presented here is based on the premise that the inability of refugees to access and to enjoy their human rights is not so much due to their lack of effective citizenship but due to their

² Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Books, 1968) at 267ff.

exclusion from the law. If we understand the inability of refugees to secure and enjoy their rights as being largely a function of their exclusion from the law, it then becomes possible to envision ways of moving towards a situation where refugees are able to benefit from both refugee rights and basic human rights even during exile. Thus, this dissertation proposes that a truly rights-respecting approach to protracted refugee situations, in other words one that accepts individuals as rights-bearing agents and that fully respects their inherent dignity, requires that refugees be empowered to claim their own rights through a process of legal empowerment.

Sadly, despite the existing international framework and the increased use of rights-based rhetoric in refugee policy and programming, most interventions in protracted refugee situations remain needs-focused and are justified by an ethic of charity rather than an understanding of refugees as rights-bearers.³ Refugees may enjoy the content of certain rights (food, shelter, education...) but these are more likely to be viewed as privileges bestowed at the behest of a “generous” host state or other powerful actors rather than the fulfillment of legal responsibilities by authorities and the entitlements of refugees. In this atmosphere one might as well call for the local integration of all refugees as for their legal empowerment. Faced with decades of largely ineffective initiatives aimed at addressing protracted refugee situations, we need to find an alternative way of understanding these situations and the rights and responsibilities of the parties involved in order to be able to identify and implement new and more successful strategies. In this dissertation, I present a way in which to reconceive the refugee-state relationship by combining the capabilities approach and the fiduciary theory of state legal authority. Within the conceptual framework thus created, the legal empowerment of refugees finds its place not only as good policy but as a legal obligation owed by states to refugees and as a means of facilitating the realization of other important rights so that refugees are able to live in dignity.

II. Legal Empowerment and the Human Rights-based Capabilities Approach: a New Line of Analysis

This thesis seeks to make two substantial contributions to the field of international refugee law: first, to propose a new conceptual framework through which protracted refugee situations can be understood and which will have normative implications for the development of

³ See e.g. Harrell-Bond, Barbara. “Can Humanitarian Work with Refugees be Humane?” (2002) 24 Hum Rts Q 51 [Harrell-Bond, “Humanitarian Work”].

refugee policy and programming, and second, to develop and support the position that the legal empowerment of refugees is a critical component in ensuring the effective rights and the dignity of refugees caught in protracted refugee situations and, consequently, is deserving of a much more central place in refugee policy and assistance initiatives.

In the theoretical approach developed in chapter 2, I outline and employ a modified version of Amartya Sen and Martha Nussbaum's capabilities approach. This theory, which I call the human rights-based capabilities approach, posits that the determining factor in assessing, ensuring or improving the quality of life of refugees is neither merely the rights granted under international law, nor the minimal needs outlined in traditional refugee assistance initiatives, but the capability of refugees and of refugee communities to access and to use their rights in practice to realize a life that they value. A commitment to the well-being and dignity of refugees then requires that refugee policy and programming seek to increase the human rights-based capabilities of refugees as opposed to focusing on, for example, their income-generating opportunities. Unfortunately, while providing a valuable set of political or ethical objectives around which intervention in protracted refugee situations can be structured, the capabilities approach does not establish enforceable legal obligations, as a consequence their realization is still entirely dependent upon the will of host states, donors and aid providers. To overcome this weakness, the fiduciary theory of state legal authority is employed to argue that the entitlement of refugees to the expansion of their capabilities constitutes a legal obligation that arises as a function of the fiduciary relationship that exists between refugees and the host state and is a result of the state's duty to ensure conditions of non-instrumentalization and non-domination for those subject to its power. Combined, the human rights-based capabilities approach and the fiduciary theory of state legal authority constitute an integrated theory that provides an alternative understanding of the rights and responsibilities of the state-refugee relationship.

Using the integrated theory developed in chapter 2, chapter 3 examines how the legal empowerment of refugees can be understood both as a central human rights-based capability in itself and as a key enabling mechanism for the realization of other important human rights-based capabilities. Moreover, the legal empowerment of refugees is also a fundamental legal entitlement that is a key feature of ensuring the integrity of the state-refugee fiduciary relationship by protecting refugees against instrumentalization and domination by the state. The refugee-state relationship is one that is characterized by a significant power imbalance, the

effects of which can be somewhat mitigated by enabling refugees to access and to use the law and legal mechanisms and services to protect and advance their rights and to acquire greater control over their lives.

The importance of legal empowerment in protracted refugee situations (PRS) and its potential contributions to the realization of refugee rights, the protection of refugee dignity and the resolution of PRS can best be understood by looking at its three main manifestations, each of which is examined in detail in chapter 4. To start with, legal empowerment has the potential to enhance the administration of justice within refugee situations by increasing the capacity of refugees to demand justice and by increasing the capacity of both refugee and host state justice systems to provide justice. Legal empowerment can also have an important effect on the exercise of power within protracted refugee situations by enhancing the ability of refugees to hold powerful actors accountable for their actions. By strengthening existing accountability mechanisms and by providing new avenues for accountability in part by promoting the development of specific skills and legal awareness, legal empowerment initiatives can assist refugees to claim and exercise their rights and to obtain redress for any violations or for the failure of power-holders to live up to their legal obligations. Lastly, chapter 4 also examines the way in which legal empowerment can contribute to fostering durable solutions for protracted refugee situations. In particular, legal empowerment strategies can provide refugees with knowledge and skills, as well as direct assistance, in order to increase their capacity to participate in transitional justice mechanisms and potentially in post-conflict state-building activities. Where transitional justice mechanisms are absent, those skills and capacities can still be of use given that repatriation and reintegration of refugee populations often require that legal and quasi-legal issues, such as compensation and the restitution of property, be addressed. In certain situations, legal empowerment also has the potential to facilitate the local integration of refugees by strengthening the legal bonds between the refugee and the host state and by increasing the number and depth of interactions between refugee communities and host state authorities.

One particularly important characteristic of true legal empowerment is that it is both a process and a goal. While chapter 4 outlines the potential contributions that the achievement of legal empowerment can make to the condition of refugees, chapter 5 proposes a framework that could support the process of legal empowerment within protracted refugee situations. By definition, the purpose of legal empowerment is to improve the ability of individuals and groups

to access and exercise their rights, and to increase the control that they have over their lives, which constitute the essence of human dignity as will be developed below. Adherence to the principles of human rights requires that the process of legal empowerment respects the agency and dignity of refugees. To this end, chapter 5 proposes the use of a participatory approach to legal empowerment and outlines a set of principles and characteristics that can be used as a guiding framework for the legal empowerment of refugees. Participation in the form of public deliberation and debate is reserved an important place in both the capabilities approach, as a means of establishing the appropriate form and threshold level of capabilities, and the fiduciary theory of state legal authority, as a means of insuring the individual against instrumentalization by the state. Accordingly, implementing the legal empowerment of refugees within an effective participatory framework is not only consistent with the integrated theory proposed in chapter 2 and the objectives of legal empowerment but with respect for the inherent dignity of refugees.

III. Research as a Product of Critical Choices

When conducting research, a scholar is faced with the need to make numerous choices. Some of those choices make up the very content of the research: for instance choosing the capabilities approach as opposed to an economic measure of well-being or choosing the fiduciary theory over a traditional contractual conception of state authority. These choices are examined and justified throughout the resulting account. Other choices, however, are limiting and require explanation insofar as they restrict the scope of investigation. The first of these was the choice to focus specifically on protracted refugee situations. In no way should this decision be taken to suggest that individuals caught in other types of refugee situations are not equally deserving of a dignified life or to legitimize humanitarian interventions that fail to respect and protect the rights of refugees. Nevertheless, there is a fundamental difference between emergency situations and long-term refugee situations. Whether or not it is ideal, one can envision a legitimate justification for limiting certain rights or, perhaps more accurately for not ensuring the fulfillment of certain rights, during the emergency phase of a refugee crisis when offering immediate protection and life-saving assistance is, and should be, the primary concern of all actors. No such justification is possible once the refugee situation has stabilized into one of protracted exile. The choice to focus on protracted refugee situations also reflects the reality that the majority of refugees today find

themselves in this type of situation and, as we will see, that these are the cases that present the greatest challenges to current legal regimes.

The decision to focus on refugee camps is more difficult to justify. Indeed while the camp may be the archetypal refugee situation, increasingly refugees eschew camps in favour of settling in urban areas.⁴ Nevertheless, the refugee camp provides a very concrete and focused point of reference. If substantial changes in the way in which refugee assistance is undertaken are to occur, they will likely be implemented in refugee camps first as it is far more easy to provide assistance and implement programming for refugees in a camp setting than in an urban setting where the greatest protection refugees have is their invisibility. Moreover, as a site of institutionalized rightlessness (or right-“less”-ness),⁵ the refugee camp provides an extreme example of insecurity and marginalization.

Another major limiting choice pertains to the methodology adopted. Given the stated focus on the empowerment of refugees and the importance of agency, participation and voice that is implicit in empowerment, it is at best philosophically inconsistent and at worst hypocritical that refugee voices are not more present in this research. Perhaps the best way to reconcile the limitations of this dissertation with the ethical framework for which it advocates is to view it as the first part of an incomplete diptych where the second part will put the theoretical framework and conclusions presented here to the test in the field. It is the hope of this author that she will have the financial and resource capacity in the future to conduct the field work that will allow refugee voices to be fully integrated into the theoretical framework developed in this dissertation.

In an attempt to address the absence of direct refugee voices, the author travelled to Thailand in the spring of 2011 to investigate the justice situation within the refugee camps along the Thai-Burmese border.⁶ Over the course of six weeks, the author had the opportunity to discuss the justice situation in Mae La and Umpiem camps with various stakeholders. In all, sixteen semi-structured interviews were conducted. Most of the interviewees were staff members

⁴ See UNHCR, *UNHCR Statistical Yearbook 2012*, 12th ed (UNHCR, 2013), at 53-54, online: www.unhcr.org/52a7213b9.html [UNHCR, *Statistical Yearbook 2012*].

⁵ To suggest that refugees in situations of protracted encampment do not benefit from any of their human rights is inaccurate and perhaps even unfair to the organizations and states that provide assistance to these communities. Nevertheless, the refugees in these situations do benefit from far fewer (“less”) and more restricted rights than what they are entitled to.

⁶ For a detailed analysis of the justice situation of Karen refugees in camps along the Thai-Burmese border, see Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism* (New York: Routledge, 2014).

or camp-based assistants (members of the refugee community) working with the International Rescue Committee's Legal Assistance Center project.⁷ Representatives from the camp leadership, UNHCR and The Border Consortium were also interviewed. Although the individual accounts thus gathered provided the author with valuable insight and certainly reaffirmed the need for an emphasis on justice in protracted refugee situations, this empirical study was too limited to form the basis of any additional overarching conclusions and thus has merely been used to enrich the analysis and provide relevant examples.

Given the above-mentioned limitations and the mostly theoretical nature of the arguments presented here, this dissertation is primarily the product of extensive textual or literature-based research. Nevertheless, to ground the theory in the practical realities of refugee assistance, theory-strong secondary sources from both the academic and practitioner communities have been combined with documents, research and field reports from the United Nations, non-governmental organizations and other researchers. One difficulty encountered was the lack of comprehensive academic or other research into justice and law within protracted refugee situations. What little research has been done tends to focus on the practical dimensions of access to justice either in a specific refugee situation or with respect to a particular justice issue (typically sexual and gender-based violence) as opposed to a broader analysis of the role of law and justice within the refugee context.⁸ While the literature on justice in protracted refugee situations is limited, the literature on legal empowerment in those situations is virtually non-existent. In order to address these gaps and in keeping with the objective of providing an alternative approach to protracted refugee situations that has both a strong theoretical grounding and also normative and practical implications for refugee assistance, this work adopts an interdisciplinary approach drawing primarily on sources from the legal realm but also from international development studies, refugee studies and political science.

⁷ For a description of the IRC's Legal Assistance Center project, see e.g. Joel Harding & Sheila Varadan, "A Community-Based Approach to Refugee Protection in a Protracted Refugee Situation" (March 2010) 46 Humanitarian Exchange Magazine, online: www.odihpn.org/humanitarian-exchange-magazine/issue-46/a-community-based-approach-to-refugee-protection-in-a-protracted-refugee-situation.

⁸ See e.g. Alice Farmer, "Refugee Responses, State-like Behavior, and Accountability for Human Rights Violations: A Case Study of Sexual Violence in Guinea's Refugee Camps" (2006) 9 Yale Human Rts & Dev LJ 44; Ilse Griek, "Traditional systems of Justice in Refugee Camps: The Need for Alternatives" (2006) 27:2 Refugee Reports 1; McConnachie, *supra* note 6. The most comprehensive examination of justice in refugee camps is Rosa da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice* (Geneva: UNHCR, 2006), online: www.unhcr.org/refworld/docid/4417f9a24.html [Da Costa, *Administration of Justice*].

While the choices outlined here may act to limit the scope of investigation, they do not limit the relevance of the ideas expressed herein. Choosing to focus on situations of protracted encampment of refugees provided a manageable context for the development of a new approach. That approach itself, composed of both a theoretical component (the integrated theory) and the practical manifestation of that theory (the emphasis on legal empowerment), does not suffer from any such limitation. While the practical implementation of a legal empowerment-based approach will take different forms depending upon the context, the core premises of this argument, specifically the importance of legal empowerment as a means of securing a dignified life, remain valid whether we are talking about refugees in camps, urban refugees, internally displaced persons or other national marginalized groups in vulnerable situations. Moreover, it is hoped that the adoption of an interdisciplinary approach will itself help to overcome the theoretical gaps between development, refugee assistance, human rights advocacy and international law that are all too often reproduced in international policy and programming.

IV. Foundational Concepts: Human Dignity and the Law

Already in these first pages a number of concepts have been introduced with which the reader may not be familiar or which take on a distinctive meaning depending upon the context in which they are employed, such as capabilities, fiduciary relationship, human rights, and empowerment. As we proceed through the analysis of protracted refugee situations and build the argument in favour of legal empowerment outlined briefly above, each of these terms will be explained, their content and meaning fleshed out. Two concepts, however, are deserving of immediate attention as they form the backbone of the arguments that follow: human dignity and the law.

A. Human Dignity

There is something very intuitive about the idea of human dignity; we may have difficulty ascribing specific characteristics to it and yet we all recognize its presence and, crucially, its absence. As a value, dignity transcends the divides of culture, religion, politics and history; it is at once deeply individual and inherently common to all people. At a minimum, the inherent dignity of the human person is about her worth, her freedom and her agency.

While some understanding of human dignity has existed for centuries, the concept of inherent dignity of the human person has experienced a surge in popularity since it first began to enter constitutional and international legal discourse in the first half of the 20th century and made its appearance as a founding principle in both the Charter of the United Nations and the *Universal Declaration of Human Rights*.⁹ Since that time, the inherent dignity of the individual has been reaffirmed in dozens of state constitutions or primary laws, in regional documents such as the *Treaty Establishing a Constitution for Europe* and the *Charter of the Organization of African Unity*, and in virtually every major international human rights treaty including the 1993 *Vienna Declaration and Programme of Action* which reaffirmed that “all human rights derive from the dignity and worth inherent in the human person.”¹⁰ Yet nowhere in these documents can one find a clear and consistent explanation of what human dignity is and what it entails.

In a broad analysis of the various origins and formulations of the concept of human dignity, Christopher McCrudden reached the conclusion that while the meaning of human dignity is context-specific and varies over time and place, it is still possible to identify a basic minimum core that is the subject of an overlapping consensus.¹¹ This core consists of three elements: the assumption that every human being possesses an intrinsic worth, the obligation on others to recognize and respect the inherent dignity of individuals and to treat them accordingly, and the requirement that the state (or other polity) “should be seen to exist for the sake of the individual human being, and not vice versa.”¹² These three elements can be seen as drawing inspiration from perhaps the most important secular characterization of human dignity, that of Immanuel Kant.¹³ In particular, elements 2 and 3 could be seen as a restatement of Kant’s moral philosophy as expressed in his “categorical imperative” according to which human beings should be treated “never simply as means, but always at the same time as an end.”¹⁴ Thus the instrumentalization of individuals, particularly by the state, constitutes a violation of the human dignity of the person in that it fails to respect the intrinsic worth of the individual.

⁹ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19:4 EJIL 655 at 664.

¹⁰ *Vienna Declaration and Programme of Action*, GA Res 48/121, UNGAOR, 1993, UN Doc A/CONF.157/23, preamble.

¹¹ McCrudden, *supra* note 9 at 679.

¹² *Ibid* at 679.

¹³ See e.g. Jeremy Rabkin, “What We Can Learn About Human Dignity from International Law” (2003-2004) 27 Harv JL & Pub Pol’y 145.

¹⁴ Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996) at s 38 of the Doctrine of Virtue (6:642).

In addition to this minimum universal core, human dignity is intimately linked to the concepts of autonomy and freedom. An individual's dignity rests on her ability to be an agent of her own destiny, on being able to make, and act on, personal choices about her own life.¹⁵ It follows then that the individual must have the freedom to exercise those personal options, in other words freedom from domination.¹⁶ As Mégret notes, this "freedom from" does not refer to a classic negative right conception of liberty but instead invokes "a right to be treated for what one is as opposed to simply as an instance of universal abstraction."¹⁷ In other words, each person must be treated with integrity and respect for their individual "being", not only their "doing" or "willing".¹⁸

Human dignity also has both subjective and relative dimensions. Dignity is subjective in that it refers to an inner sense of self-worth and self-respect that is specific to the individual, but it is relative in that this self-perception and the content of human dignity is substantially influenced by the social, historical and cultural context in which the individual finds herself.¹⁹ Furthermore, human dignity is a highly relational concept: "[o]ur sense of self-worth, personal development and well-being is inextricably bound up with the extent to which we are valued by others and by the society at large."²⁰ Given that human dignity is fundamentally about recognition (and respect) of our intrinsic worth by others, it is susceptible to and concerned with the relationships between people within society.²¹ Importantly, the corollary to this relational dimension of human dignity "is a collective acknowledgement that we are diminished as a society to the extent that any of our members are deprived of the opportunities to develop their basic capabilities to function as individual and social beings."²²

The relational nature of human dignity also finds expression in concern for individual responsibility. The importance of the individual's ability to exercise agency and choice

¹⁵ François Crépeau & Ranabir Samaddar, "Recognizing the Dignity of Migrants" in *Dignity: A Special Focus on Vulnerable Groups*, Frédéric Mégret & Florian Hoffman, eds (Agenda for Human Rights: A Swiss Initiative, Geneva Academy of International Humanitarian Law and Human Rights, 2009) 6 at 6; Sandra Liebenberg, "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 S Afr J on Hum Rts 1 at 7.

¹⁶ Frédéric Mégret & Florian Hoffman, eds. *Dignity: A Special Focus on Vulnerable Groups* (Agenda for Human Rights: A Swiss Initiative, Geneva Academy of International Humanitarian Law and Human Rights, 2009) at 3.

¹⁷ *Ibid.*

¹⁸ See *ibid.*; David Luban, "Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)" (2005) U Ill Rev 815 at 826.

¹⁹ Mégret & Hoffman, *supra* note 16 at 4; Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77:4 Am J Intl L 848 at 849; see generally McCrudden, *supra* note 9.

²⁰ Liebenberg, *supra* note 15 at 11.

²¹ Mégret & Hoffman, *supra* note 16 at 4; McCrudden, *supra* note 9 at 679.

²² Liebenberg, *supra* note 15 at 12.

autonomously is balanced by the recognition of the responsibilities that the individual owes to others and by an acknowledgement that the individual's ability to discharge these responsibilities is a central component of her dignity.²³ A related idea is expressed in *Dignitatis Humanae*, the Second Vatican Council's declaration on religious freedom.²⁴ In that declaration, human dignity is described as involving "enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty."²⁵ The dignity of persons must be understood as meaning that they are "beings endowed with reason and free will and therefore privileged to bear personal responsibility."²⁶ The corollary to respect for the distinct identity of each individual and their capacity to make choices and to act autonomously is the acknowledgement that each individual also bears responsibility for his or her own conduct and decisions.²⁷ Thus, human dignity involves not only accepting the autonomy of the individual but also realizing that they are an integral part of a larger collectivity.

Finally, human dignity is intimately linked to notions of justice. In particular, a commitment to inherent dignity of the human person necessarily involves a commitment to at least a minimal conception of distributive justice whereby the essential needs of every individual are satisfied.²⁸ Where essential needs are not met or where conditions of life fall below a minimum threshold, individuals are left unable to make and act on choices, to be agents of their own destiny. In those cases, individuals do not lose their inherent dignity (for as it is inherent it cannot be lost), but that dignity "is like a promissory note whose claims have not been met."²⁹ To value the inherent dignity of human beings means to treat them in a manner that is consistent with their dignity and to ensure that they are able to live a life that is worthy of that human dignity. It is important to emphasize the concept of justice here: ensuring the essential needs and a minimum standard of treatment within a humanitarian framework is inadequate, not because it fails to produce beneficial outcomes but because it fails to recognize individuals as rights-bearers

²³ Mégret & Hoffman, *supra* note 16 at 4.

²⁴ *Declaration on Religious Freedom Dignitatis Humanae on the Right of the Person and of Communities to Social and Civil Freedom in Matters of Religion* promulgated by His Holiness Pope Paul VI on December 7, 1965, online: www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

²⁵ *Ibid* at 1.

²⁶ *Ibid*.

²⁷ Schachter, *supra* note 19 at 850.

²⁸ Schachter, *supra* note 19 at 851; Mégret & Hoffman, *supra* note 16 at 3.

²⁹ Martha Nussbaum, *Creating Capabilities: The Human Development Approach*, (Cambridge, Mass: The Belknap Press of Harvard University Press, 2011) at 30.

as opposed to mere objects of charity. Human dignity can only be fully realized within a justice framework, when the equal personhood and inherent worth of every individual as a subject of rights is acknowledged and when their legitimate, or “just”, claims are recognized.³⁰

B. Law

The second dominant theme found herein is Law. Fundamentally, this research is about justice, about creating the conditions for a just society for refugees. Although often inseparable in the public psyche, law and justice should not be conflated. While access to justice, the rule of law and a functioning legal system are essential to the realization and protection of the equal rights of individuals, law can also be used as an instrument of injustice, exclusion and oppression. It is only by combining a commitment to the principle of the inherent dignity of the human person with law that we arrive at justice.

Like dignity, “law” cannot be easily or conclusively defined. Depending on the context and the intent of the speaker, “law” can take on a variety of different meanings ranging from a narrow reference to formally enacted legislation to the more amorphous concepts of moral or natural law. At its core, “law” is a system of enforceable rules that orders society and that controls or regulates behavior, including interactions with others. Whether or not law is necessarily moral is a question that legal scholars have grappled with for centuries and is far beyond the scope this analysis.

Unless otherwise stated, the understanding of law adopted in this analysis is a relatively broad, pluralistic and realistic one. This conception of law is broad in that it includes administrative processes, regulation, alternative dispute resolution processes and other quasi-judicial or quasi-legal institutions and norms as opposed to restricting its consideration to the formally enacted legislation and the state court system. This conception is pluralistic in that it recognizes that multiple different legal orders exist concurrently within a society, exercising overlapping jurisdiction, and that these systems often interact in unexpected ways.³¹ The formal state law may be the “official” law of a society and yet for any number of reasons related to

³⁰ Crépeau & Samaddar, *supra* note 15 at 7.

³¹ For a discussion of legal pluralism, see e.g. Anne Griffiths, “Legal Pluralism” in Reza Banakar & Max Travers, eds, *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) 289; Baudouin Dupret, “Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-Specification” (2007) 1 *Eur J Leg Stud*; Sally E. Merry, “Legal Pluralism” (1998) 22 *Law & Soc’y Rev* 872; International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Geneva: ICHRP, 2009).

preference or accessibility, customary, religious or informal legal orders may be given priority by individuals or communities. Indeed, in some cases the religious or customary dispute resolution processes may be far better established than the state systems. A pluralistic understanding of law acknowledges that the majority of people in the world live and interact outside of the official legal system but that the formal structures of state law and legality still occupy a position of particular prominence.

Finally, the conception of law adopted herein is realistic in that it is primarily concerned with the law as a lived experience, messy, intimidating, contradictory and unfair as it might be on occasion. Nonetheless, concern for the reality of the law does not require us to ignore the ideal of the law nor does it prevent us from making claims about what the law should or *could* be; in fact, the central focus of this dissertation is ultimately about reconciling the potential of the law with the practice or lived experience of the law. In this context, being a legal realist merely means starting from a position that does not take the value, application or implementation of the law in all its forms – both formal and informal – for granted. Being a realist also means accepting the inevitability of compromise and imperfection within the law and the legal system. It is highly unlikely that the proposals outlined in the chapters that follow will ever be adopted in their entirety or that the vicissitudes of legal practice (bias, corruption, abuse of power...) will ever be fully eliminated but that is not an argument against striving to do better; in the words of Voltaire, “le mieux est l’ennemi du bien.”³² Thus, with this conception of the law, we are treading that thin line between idealism and realism.

The claim that refugees caught in protracted situations are largely excluded from the law is in no way meant to suggest that the law is entirely absent from these situations. Indeed law, as understood above, is present within any form of community or social organization. Refugees themselves are subject to multiple overlapping legal systems including, but not limited to, the rules of the refugee camp, the informal dispute resolution and legal systems that exist within the refugee community, traditional and/or religious law and, at least in theory, the domestic law of

³² Voltaire, “La Bégueule” in *Contes et poésies diverses de M. de Voltaire* (Paris: Valade, 1780) at 119. This phrase is commonly translated as “the best is the enemy of the good” but in this case it is more appropriate to translate as “the best is the enemy of the better”. Too often, striving for the ideal situation distracts us from making the existing situation substantially (though not ideally) better. The inability to achieve complete recognition of the rights of refugees, or of establishing a perfectly just legal system should not deter us from seeking to improve on the status quo.

the host state and international law.³³ Instead, the concept of legal exclusion refers to a somewhat narrower understanding of law, specifically to the exclusion of refugees from the formal legislative, adjudicative and regulatory (and policy) processes and institutions of the state system. This exclusion takes at least two distinct forms: first, the particular voices, interests and concerns of refugee communities are almost entirely absent from the content of the relevant law, and second, refugees are absent from the practice and the institutions of the law within the state. Thus, exclusion from the law involves both invisibility and inaccessibility.

Marginalized groups and individuals are often invisible in the law and most especially in the formal law of the state. Without economic and political status and influence, they are largely unable to play a role in the design and implementation of legislation and policy within the state. Similarly, their lack of political power generally means that even if they are able to participate, their voices and opinions carry little weight with the ruling elite. Thus, the majority of laws and regulations within the state do not reflect the specific circumstances, interests and needs of the most vulnerable groups. In the case of refugees, this situation is exacerbated by the fact that refugees lack citizenship within the host state and so are generally unable to participate formally in any type of political deliberation. This lack of citizenship also means that there is little incentive for the host state to even make a pretext of heeding the interests and opinions of the refugee community. Refugees suffer from similar, if less extreme, invisibility within international law as well. Although international legal documents do exist that set out the rights of refugees, these make no mention of either refugee camps or protracted refugee situations and thus do not take into consideration the particularities of these cases. Moreover, while every individual may have international legal personality, international law is primarily created by powerful actors such as states. Perhaps the most striking example of the legal exclusion of refugees is the case of tripartite agreements concerning repatriation.³⁴ By definition, these agreements involve three parties: UNHCR, the host state and the state of origin. The refugee is the object of the agreement, not a true participant in an agreement that fundamentally affects her life and interests. Relevant guidelines do assert that UNHCR should not enter into a tripartite

³³ Da Costa, *Administration of Justice*, *supra* note 8.

³⁴ See e.g. UNHCR, *Tripartite Agreement on the Voluntary Repatriation of Burundian Refugees in Rwanda*, 18 August 2005, online: www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=44ae612dc6&skip=0&query=tripartite [*Tripartite Agreement Rwanda*]; UNHCR, *Tripartite Agreement Sudan-DRC-UNHCR for the Voluntary Repatriation of the Refugees From the Republic of Sudan Living in the Democratic Republic of Congo*, January 2006, online: www.refworld.org/docid/44044c224.html [*Tripartite Agreement DRC*].

arrangement without “due consultation with the refugee women and men concerned” and that formal representation of the refugee community “can be considered”.³⁵ Nevertheless, it is clear that refugee participation is at best peripheral to the main negotiations. As refugees have no real voice in or control over the outcomes, we can say that they suffer from invisibility not only in the final agreement but in the process as a whole.

Exclusion from the law also occurs when the processes of legislation and adjudication are inaccessible. This inaccessibility should be distinguished from the lack of access to justice. Access to justice is ultimately a more complicated and important issue that will be addressed in depth throughout this dissertation. Access to justice is distinguished by its qualitative dimension: accessing justice does not only mean accessing justice mechanisms and institutions, it also means ensuring that the outcomes of these processes are just and equitable.³⁶ At this point, in suggesting that refugees are excluded from the law, we are referring only to the first element of access to justice, to their inability to access the institutions of law, not to the value or merits of those institutions themselves. Thus access to the law as understood here is an antecedent to access to justice. The inability to access the law may be the result of specific policy choices (for example restricting access to the courts to citizens of the state), institutional factors (bias, corruption, lack of resources...), external conditions (location, cost, language...) or personal factors (fear, cultural considerations). Regardless of the cause, refugees caught in protracted refugee situations have very little presence within the formal legal and quasi-legal structures and institutions of the host state.

So long as refugees in protracted situations are excluded from the law, not to mention from justice, in the host state their ability to realize all of their human rights and a dignified life is limited. The chapters that follow outline how legal empowerment strategies can be used to overcome legal exclusion and to enable refugees to use the law, understood broadly, to achieve greater control over their lives.

³⁵ UNHCR, *Handbook Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996) at 26.

³⁶ UNDP, *Access to Justice: Practice Note* (2004), online: www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf.

Chapter 1 - The Exclusion of Long-term Refugees from the Law: Creating Situations of Protracted Right-“less”-ness

I. Protracted Refugee Situations: A Case of Legal, Political and Ethical Failures

UNHCR defines a protracted refugee situation as “one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance.”³⁷ In order to identify protracted refugee situations, UNHCR has generally defined these situations as involving refugee populations that have been in exile for five years or more after their initial displacement with no foreseeable durable solution.³⁸ According to this measurement, UNHCR estimates that over 6.4 million refugees were in a protracted refugee situation at the end of 2012. This represents approximately 61% of the total refugee population serviced by UNHCR.³⁹ Furthermore, the possibility of a durable solution for refugees has remained extremely rare in recent years. According to the 2012 UNHCR Statistical Yearbook, 525,900 refugees repatriated voluntarily during 2012 down from a high of almost 2.5 million in 2002.⁴⁰ Additionally, the number of resettlement places has remained largely unchanged while both global resettlement needs and UNHCR submissions have increased.⁴¹

Although the UNHCR definition and quantitative measure provide good indicators, they suffer from several deficiencies. UNHCR itself recognizes that its quantitative measurements,

³⁷ UNHCR, *Protracted Refugee Situations*, UNHCR ExCom Standing Committee, 30th Mtg, UN Doc EC/54/SC/CRP.14 (2004) at 1 [UNHCR, *Protracted Refugee Situations*].

³⁸ UNHCR, *Conclusion on Protracted Refugee Situations*, No. 109 (LXI)-2009, 22 December 2009, online: www.unhcr.org/4b332bca9.html [UNHCR, *Conclusion 109*]. Note that while *Conclusion 109* formally eliminated the requirement that protracted refugee situations involve a minimum of 25 000 persons of the same nationality, this requirement has persisted in other forums, including in the *Statistical Yearbook*. See *ibid* at 2; UNHCR, *Statistical Yearbook 2012*, *supra* note 4 at 23.

³⁹ UNHCR, *Statistical Yearbook 2012*, *supra* note 4 at 23. The percentage is calculated based on a total refugee population falling under UNHCR’s mandate of approximately 10.5 million persons in 2012.

⁴⁰ *Ibid* at 38.

⁴¹ UN High Commissioner for Refugees, *UNHCR Statistical Yearbook 2010: Trends in Displacement, Protection and Solutions*, 27 December 2011, at 38, online: www.unhcr.org/4ef9cc9e9.html.

including the former requirement that protracted refugee situations involve a minimum of 25 000 people, exclude some situations that otherwise fit the definition of PRS including the 19 000 Burundians in the Democratic Republic of Congo, the 16 000 Somalis in Ethiopia, the 19 000 Mauritians in Senegal and the 20 000 Rohingya who fled Myanmar to Bangladesh over 15 years ago, as well as tens of thousands of long-staying urban refugees and many refugees who do not have official registration in the host state.⁴² The UNHCR definition also implies a static, stable refugee population when, in fact, even in the context of a protracted situation, there is a constant flow of refugees in and out of a host state. The makeup of a refugee population is continuously changing as new refugees arrive from the country of origin and others depart either to return home or to travel on to a third country. Finally, this definition reinforces the perception of refugees as a passive, helpless group. Instead, it should be acknowledged that, although reliance on external assistance is characteristic of many PRS, it is not inevitable. The conditions in protracted refugee situations, including widespread dependence, are largely the manufactured results of humanitarian assistance and host state policies.⁴³

Protracted refugee situations are caused by “political action and inaction, both in the country of origin (the persecution or violence that led to flight) and in the country of asylum.”⁴⁴ These situations occur and endure because of ongoing problems in the country of origin and because of the restrictive refugee policies enacted by host states in response to refugee flows. Moreover, another major contributing factor is the failure of the international community, host states, states of origin and international organizations, to adequately address the root causes of refugee crises or to devote the political will necessary to achieving durable solutions.⁴⁵

While the definition of protracted refugee situations provided by UNHCR is useful for intimating the scope of the problem internationally, the importance of the specific number of individuals involved or the number of years that a situation has lasted should not divert attention from the fundamental nature and characteristics of protracted refugee situations, namely the lack

⁴² UNHCR, *Human Displacement*, supra note 1 at 108.

⁴³ Gil Loescher & James Milner, “Understanding the Problem of Protracted Refugee Situations” in Gil Loescher et al, eds, *Protracted Refugee Situations: Political, Human Rights and Security Implications* (Tokyo: United Nations University Press, 2008) 20 at 21.

⁴⁴ UNHCR, *Protracted Refugee Situations*, supra note 37.

⁴⁵ See generally Gil Loescher & James Milner, “Protracted Refugee Situations and State and Regional Insecurity” (2004) 4:1 Conflict, Security & Development 3 [Loescher & Milner, “State and Regional Insecurity”]; Gil Loescher et al, “Protracted Refugee Situations and the Regional Dynamics of Peacebuilding” (2007) 7:3 Conflict, Security & Development 491.

of any foreseeable durable solution, mentioned above, and the presence of consistent human rights violations, insecurity and dependence. These are the factors that make protracted refugee situations especially problematic from ethical, legal and political perspectives, and ultimately an affront to the human dignity of refugees.

Protracted refugee situations may take different forms but the focus of this analysis will be on situations involving long-term encampment which are at once the archetypal protracted refugee situation and the extreme case with regard to the question of refugee rights.⁴⁶ The implications and costs of prolonged encampment in protracted refugee situations extend far beyond merely tying up substantial amounts of international aid for indefinite periods of time.⁴⁷ These situations have a profound impact on the refugee populations directly involved, the local community, the host state and potentially even the entire geo-political region. Although a full analysis of these effects is far beyond the scope of this research, some discussion of them is necessary in order to fully understand the need for a new approach to protracted refugee situations as well as the obstacles that such an approach will encounter.

A. The Impacts of Protracted Refugee Situations and Long-term Encampment

Regardless of the context, forced displacement due to conflict and violence means the loss of home, of property, of assets, of livelihood, and of social networks and support systems. The result of these losses is an increase in human rights violations, precariousness and marginalization, as well as an increase in food insecurity, morbidity and mortality, including maternal mortality, and difficulty in accessing health services, education and other important

⁴⁶ Unless otherwise specified, the use of the term “protracted refugee situation” in this analysis will refer to instances of long-term encampment. Nevertheless, much of what is discussed here is equally true for, or can be applied to, protracted situations that do not involve refugee camps and settlements.

⁴⁷ Although there are many other effects of long-term encampment, the financial impact of this practice is substantial. Kenya hosts one of the world’s largest populations of refugees, most of who are confined to designated camps. According to UNHCR planning figures for 2014, by December 2014, it is anticipated that UNHCR will be assisting approximately 579,790 people in Kenya (primarily refugees and asylum-seekers) and that the financial requirements are expected to reach USD 229 million. (UNHCR. “2014 UNHCR Country Operations Profile – Kenya”, online: www.unhcr.org/pages/49e483a16.html.) Likewise, in 2011 the Border Consortium (formerly the Thai-Burma Border Consortium) which manages the Burmese refugee camps in Thailand spent approximately 975 million baht (roughly USD 30.2 million) providing for the needs of 119,000 refugees and asylum-seekers. (The Border Consortium (TBC), *TBC Programme Report: July-December 2013* (December 2013), at 10, online: reliefweb.int/report/myanmar/border-consortium-programme-report-july-december-2013.)

resources.⁴⁸ Negative impacts exist in all situations of forced displacement however prolonged displacement, and in particular prolonged encampment, tend to feature particularly severe consequences both for individuals and for communities.

Although refugee camps may facilitate the coordination and provision of refugee assistance by regrouping refugees in one defined location to which aid organizations can have access and may provide refugees, at least in theory, with a measure of security, most of the consequences of prolonged encampment are quite detrimental to the well-being of refugees.⁴⁹ There is a term of art often used in discussions of protracted refugee situations that can assist the reader in understanding the true implications of PRSs for refugees: “refugee warehousing”. Defined in the 2004 World Refugee Survey, refugee warehousing “is the practice of keeping refugees in protracted situations of restricted mobility, enforced idleness and dependency – their lives on indefinite hold – in violation of their basic rights under the 1951 UN Refugee Convention.”⁵⁰ As with the term protracted refugee situations, refugee warehousing may, but does not necessarily, refer to confinement in camps. More important is the assertion made that the crucial characteristic of refugee warehousing “is not so much the passage of time as the denial of rights.”⁵¹

The concept of refugee warehousing is far more evocative than “protracted refugee situations”. When one thinks of a warehouse, one envisions a vast storage space, with flickering fluorescent lights and a cold cement floor. There may be shelves lining the space and extending up to the ceiling filled with row upon row of labelled cardboard boxes. Every so often a new shipment arrives and the boxes are jostled and rearranged, pushed aside and stacked higher and once in a while some are taken away to fill an order. A warehouse is a purely utilitarian construction. Likewise, when refugees are warehoused, new refugees arrive and once in a while

⁴⁸ See generally UNHCR, *Concept Note – Transitional Solutions Initiative UNHDP and UNHCR in Collaboration with the World Bank* (October 2010) online: www.unhcr.org/4e27e2f06.html [UNHCR, *Transitional Solutions*]; Asger Christensen & Niels Harild, “Forced Displacement: The Development Challenge”, *Conflict, Crime & Violence Issue Note* (New York: Social Development Department: The World Bank, 2009), online: siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1164107274725/3182370-1164201144397/Forced_Displacement.pdf.

⁴⁹ Often however the security is only in theory. See e.g. Merrill Smith, “Warehousing Refugees: A Denial of Rights, a Waste of Humanity” in Merrill Smith ed, *World Refugee Survey 2004* (Washington DC: US Committee for Refugees and Immigrants, 2004) 38 [M Smith, “Warehousing Refugees”]; Karen Jacobsen, “The Forgotten Solution: Local Integration for Refugees in Developing Countries” (2001) UNHCR New Issues in Refugee Research, Working Paper 45 at table B, online: www.unhcr.org/3b7d24059.html.

⁵⁰ M Smith, “Warehousing Refugees”, *supra* note 49.

⁵¹ *Ibid* at 38.

a country in the global North “orders” a small number of refugees for resettlement, but ultimately, the country of immediate asylum becomes little more than a holding place where refugees are “shelved” at great physical, psychological and social cost.

The costs or negative implications of prolonged encampment take many forms. In addition to the general health and well-being consequences of forced displacement, the negative impact of protracted encampment on the mental health of refugees has been recognized as an issue of particular concern.⁵² The trauma that many refugees have suffered in fleeing their countries can be compounded by the insecurity of life in a refugee camp which in turn contributes to deteriorating mental health and high levels of depression and substance abuse.⁵³ Refugees in these situations are essentially caught in a state of limbo: they live under difficult conditions, often separated from their family and community, with few opportunities, little expectation of a durable solution, dependent upon aid organizations and the host state and with little control over their own lives.

Inextricably linked to the psychological effect of protracted refuge and encampment are important social consequences. To begin with, as noted above, there is the disruption of the communities and traditional support structures, including the family, which occurs when refugees flee their country of origin. The traditional gender roles of a society are also often disrupted by conditions within refugee camps. Aid providers frequently take over the roles traditionally occupied by men by providing protection, food and shelter, while women continue in their traditional activities or may even be encouraged to occupy more central roles within the community as many assistance programmes (education, health, micro-lending...) directly target the welfare of women. While this shift in roles may ultimately benefit women and their families, it can also be a source of conflict and tension within the society and potentially lead to increased levels of domestic violence.⁵⁴

Social cohesion may also be disrupted by the high levels of violence that characterize situations of prolonged encampment, including violence between segments of the refugee population and sexual and gender-based violence. Additionally, the uncertain legal status of

⁵² World Health Organisation. *Mental Health of Refugees, Internally Displaced Persons and Other Populations Affected by Conflict*, online: www.who.int/disasters/repo/7406.doc.

⁵³ See e.g. United for Sight, *Module 2: Mental Health in Refugee Camps and Settlements*, Refugee Health Online Course, online: www.uniteforsight.org/refugee-health/module2.

⁵⁴ M Smith, “Warehousing Refugees”, *supra* note 49 at 2. See also Da Costa, *Administration of Justice*, *supra* note 8.

many refugees and the difficult living conditions in many camps make refugees extremely vulnerable to exploitation and abuse both by external parties (aid workers, host state authorities, local population) and by members of the refugee community, especially the camp administration, and this may exacerbate their insecurity. Refugees who leave the camps illegally may find themselves being paid less than the prescribed minimum wage or not being paid at all for their work and they may be forced to pay bribes to authorities in the host state.⁵⁵ Refugee women and children are also vulnerable to sexual exploitation by aid workers, camps guards and other authorities (perhaps in exchange for rations or some other advantage).⁵⁶ Moreover, the precarious legal and social situation of refugees means that they frequently will be unable or unwilling to access accountability or redress mechanisms creating *de facto* situations of impunity.⁵⁷ Finally, another very important consequence of prolonged encampment that has both social and psychological implications is enforced idleness and the lack of opportunities for personal development which have been found to contribute to higher levels of anti-social behaviour such as alcoholism, substance abuse, criminality and violence.⁵⁸

Similarly, the presence of large, long-term refugee populations can have important consequences for the local population and the host state as well. Competition for resources, whether natural resources or government monies, and pressure on local infrastructure and services can result in tension and conflict between the refugee communities and the local population and may be exacerbated by the perceived (and often real) lack of burden-sharing by the international community.⁵⁹ Resentment within the local community may also arise in situations where the refugee community is perceived as being better off because of the international aid that is received and the services that are provided within a camp.⁶⁰ Local communities may suffer from many of the same problems that afflict refugee populations

⁵⁵ See generally Da Costa, *Administration of Justice*, *supra* note 8.

⁵⁶ See e.g. Malinda M. Schmiechen, "Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps" (2003) 22 St Louis U Pub L Rev 473 at 490.

⁵⁷ See generally Da Costa, *Administration of Justice*, *supra* note 8.

⁵⁸ *Ibid* at 5.

⁵⁹ UNHCR, *Transitional Solutions*, *supra* note 48. Although the *Refugee Convention* uses the language of burden-sharing, and indeed this is how many states view refugee assistance, the term "responsibility-sharing" is now often used in conjunction with or in place of "burden-sharing" and more accurately represents a rights-based approach to refugee protection. Refugee protection is not a burden imposed upon states but their responsibility as members of the international community. In this text, both terms will be used on occasion as appropriate in the particular context.

⁶⁰ See M Smith, "Warehousing Refugees", *supra* note 49 at 3. See also Ekuru Aukot, "It Is Better to Be a Refugee Than a Turkana in Kakuma: Revisiting the Relationship between Hosts and Refugees in Kenya" (2003) 21:3 *Refuge: Canada's Periodical on Refugees* 73.

(vulnerability to cross-border violence, drought, disease, etc.), but do not necessarily have access to comparable international aid. Increasingly, aid providers are recognizing the value of initiatives that benefit the local population as well as such assistance can offset potential conflicts between the two communities and may even set the stage for a greater degree of local integration (where possible).⁶¹ Additionally, environmental degradation and the depletion of local natural resources is another common consequence of the presence of large displaced populations and may be the result of improper camp planning or a lack of resources (firewood, building materials, etc.).⁶²

Importantly, long-term refugee crises are also increasingly recognized as not only a consequence but also potentially a cause of domestic, regional and international insecurity.⁶³ Although camps are established to provide security for refugees, they are generally characterized by insecurity and violence. Cultural, historical and political differences as well as the conditions of protracted encampment may give rise to conflict between different segments of the refugee community and/or between displaced and local populations. The presence of refugees may also aggravate existing inter-communal tensions within the host state, causing a shift in the balance of power between host state communities and being the source of grievances among the local population. When these grievances arise, refugees risk being subject to greater restrictions on their rights and freedoms within the host state, being subject to forced repatriation or refoulement or being used as scapegoats when there are breakdowns in law and order within the host state.⁶⁴

Finally, the violence that affects refugee populations can spill over into neighbouring states causing political instability and regional insecurity. Host states also risk being drawn into the conflict when refugee actors are directly engaged in armed campaigns or when cross-border aggression targets refugee camps.⁶⁵ Furthermore, where refugee camps are used as bases for

⁶¹ One example is the case in Kenya's northeastern territory where both the refugee camps and the local population were facing severe poverty and drought in 2000. This situation led UNHCR in the Dadaab camps to assist the local population by digging wells and to provide medical assistance to both the refugee population and the local community without distinction. Arthur C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (New York: Oxford University Press, 2002) at 158.

⁶² When the first Dadaab camp, Ifo, was created the land was bulldozed and levelled, destroying all of the trees. The lack of natural shade is important in such a harsh climate. *Ibid* at 159.

⁶³ See generally Loescher & Milner, "State and Regional Insecurity", *supra* note 45; Loescher et al, *supra* note 45.

⁶⁴ Loescher & Milner, "State and Regional Insecurity", *supra* note 45 at 12.

⁶⁵ These armed elements are often referred to as 'refugee warriors'. They have been a significant feature of refugee movements since the 1950s. During the Cold War, these groups were often armed and supported both materially and ideologically by the West and used as proxies. See Loescher & Milner, "State and Regional Insecurity", *supra* note 45 at 11. There may also be groups, termed 'spoilers' within the refugee population that actively seek to obstruct,

insurgent or terrorist activities there is the risk that the humanitarian aid provided to refugees will be co-opted to support the armed groups and that the large disaffected camp populations will be viewed as a potential source of new recruits.⁶⁶

Despite their predominantly negative impacts, under certain conditions long-term refugee situations do have the potential to bring some benefits to host state. First and foremost, the presence of refugees within a state may stimulate an influx of international assistance which can directly benefit both the refugee population and the local community and which can indirectly benefit the host state by strengthening and developing its infrastructure and capacity.⁶⁷

Additionally, where refugees are able to access health and education services and livelihood opportunities within the host state and to develop and employ their skills and capacities, it has been found that they are able to contribute to local development and to the local economy. For example, in the 1960s, Tibetan refugees in Nepal made carpet-making the largest foreign exchange earner in that country where there had previously been virtually no carpet industry at all.⁶⁸ Similarly, Kenya addressed a shortage of doctors and teachers in the 1980s, by allowing refugees the right to work.⁶⁹ In Zambia, the repatriation of Angolan refugees resulted in a

delay or undermine conflict resolution. The best way to address both ‘refugee warriors’ and ‘spoilers’ is by physically separating them from the general refugee population and by legally excluding them from refugee status. Unfortunately this has proven to be very difficult for international humanitarian actors to achieve. Loescher et al, *supra* note 45.

As an example of cross-border aggression, Burmese refugee camps in Thailand have had to be moved repeatedly because of cross-border attacks by the Burmese Army. Ban Mai Nai Soi camp near Mae Hong Son was attacked by the Burmese troops in December 1996 and September 1998 while Mae La camp was attacked in 1997. Two other refugee camps were relocated and consolidated into Umpiem Mai camp after being repeatedly attacked in the mid to late 1990s (one camp was almost entirely burned to the ground). The Border Consortium. “Camps in Thailand”, online: TBC www.theborderconsortium.org/where-we-work/camps-in-thailand/.

⁶⁶ Loescher & Milner, “State and Regional Insecurity”, *supra* note 45 at 4; Alexander Betts, “Development Assistance and Refugees: Towards a North-South Grand Bargain?” (2009) Refugee Studies Centre, Oxford University, Forced Migration Policy Briefing 2 at 4 [Betts, “Development Assistance”].

⁶⁷ See e.g. Sara Feldman, “Development Assisted Integration: A Viable Alternative to Long Term Residence in Refugee Camps?” (2007) 22 Praxis – The Fletcher Journal of Human Security 49 at 54. Martin Enghoff, et al, *In Search of Protection and Livelihoods: Socio-economic and Environmental Impacts of Dadaab Refugee Camps on Host Communities* (2010) report for the Royal Danish Embassy, the Republic of Kenya & the Norwegian Embassy, online: ALNAP www.alnap.org/resource/6334. See also Betts, “Development Assistance”, *supra* note 66. In addition to providing financial aid to the host state, aid providers may engage in activities such as building roads to access remote camps and providing medical services to both refugee and local populations. The presence of aid organizations can also help to stimulate the local economy by providing employment (builders, translators, local staff members, etc.) and requiring local resources.

⁶⁸ Toni Hagen, *Building bridges to the Third World: memories of Nepal 1950-1992*, (Delhi: Pilgrims Book House, 1994), at 296.

⁶⁹ Barbara Harrell-Bond, “Towards the Economic and Social ‘Integration’ of Refugee Populations in Host Countries in Africa” (Paper delivered at the Stanley Foundation Conference “Refugee Protection in Africa: How to Ensure Security and Development for Refugees and Hosts,” Entebbe, Uganda, November 10-14, 2002) at 15 [unpublished], online: repository.forcedmigration.org/show_metadata.jsp?pid=fmo:2748.

marked decline in the agricultural productivity of its Western Province.⁷⁰ These impacts can be especially important given that refugee camps are often located in remote, marginalized and border regions that may themselves be underdeveloped in comparison with the rest of the host state.⁷¹

B. Legal Silence: The Inadequacy of the Current Legal Framework

The recognition of protracted refugee situations as an issue of growing and international concern has unfortunately not been matched by the ability of states and international actors to effectively address these situations. This failure is partly a result of and highlights the inadequacy of the current legal framework. The very existence of protracted refugee situations, especially those involving long-term encampment, challenges the coherence and sufficiency of several international legal regimes, specifically international refugee law and international human rights law. Simply put, the way in which international refugee and human rights law has been interpreted and implemented has not been able to provide durable solutions for protracted refugee crises or to ensure that the rights of those refugees are realized and protected.

1. International Refugee Law

Although law may rarely be referred to in day to day interactions within refugee camps, it provides the overarching framework for the relations between refugees, aid providers and the host state. Traditional refugee law is largely focused on emergency situations, the admission of refugees to a state and the immediate consequences of that admission. PRS however, are not traditional refugee crises; they are legal anomalies. As the needs of refugees change over time, it is necessary for the responses to change as well. Yet international refugee law, the *lex specialis* of refugee situations, offers no specific guidance as perpetual refugeehood was never envisioned as a solution to a refugee crisis. One unfortunate consequence is that refugees in protracted

⁷⁰ Betts, “Development Assistance”, *supra* note 66 at 8.

⁷¹ *Ibid* at 11. It is worth noting that while the outcomes of encampment are overwhelmingly negative, in rare situations refugee camps can also be possible sites of political, social, cultural and economic transformation. One example of this is found in the case of Guatemalan women in refugee camps in Mexico. Within the camps women were able to organize with the help of NGOs and UNHCR and thus participate more actively in decision-making within the community. They became more vocal about their own needs and less tolerant of mistreatment. Unfortunately, many of these gains were lost and traditional gender roles re-established when families repatriated to Guatemala. (Christine Cheng & Johannes Chudoba, “Moving Beyond Long-term Refugee Situations: the Case of Guatemala” (2003) UNHCR New Issues in Refugee Research Working Paper No 86, at 20, online: www.unhcr.org/3ea55d704.html.)

situations are left at the mercy of the vagaries of host states, and the rights and duties of states under international refugee law, such as they are, are rarely reflected on the ground where most of the refugee protection and assistance activities take place outside of any conventional legal framework.

Despite their prevalence, there is no mention in the *Refugee Convention* or in the UNHCR Statute of either protracted refugee situations or of refugee camps.⁷² These omissions are at least partially responsible for some of the uncertainties that plague PRS in terms of legal status and governance. The international refugee law regime was not created with protracted refugee situations in mind and has proven to be inadequate to the task of addressing them.

From a strictly legal point of view, every state is responsible for the refugees and refugee camps located upon its territory. This responsibility is grounded in the most fundamental concepts of public international law: state sovereignty. At its most basic, state sovereignty means that a sovereign state has jurisdiction over its territory and over the people within its territorial boundaries. The basis for state responsibility for refugees can also be found in several other general propositions of international law. One of these propositions asserts that “every State has the duty to protect the human rights of everyone within its territory and subject to its jurisdiction.”⁷³ Additionally, every state must ensure that its laws and policies are compatible with its general obligations under international law (including any treaties that the state is a party to) and every state is obligated to fulfill its international legal obligations in good faith.⁷⁴ As a consequence of these principles and because there are no laws that specifically address the protracted refugee situations and refugee camps, the law that applies in any particular PRS will depend upon the international obligations and domestic laws of the host state.

⁷² *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [*Refugee Convention*]; *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428(V), UNGAOR, 5th Sess, Supp No 20, UN Doc A/1775 (1950).

⁷³ Guy S. Goodwin-Gill, “Refugees and their Human Rights” (2004) University of Oxford Refugee Studies Centre Working Paper No 17 at 3, online: www.rsc.ox.ac.uk/publications/refugees-and-their-human-rights. This principle can be traced to the *International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights)*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*]). The International Court of Justice has also found that the rules concerning the basic rights of the person are *erga omnes* obligations (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970] ICJ Rep 3 at paras 33, 34).

⁷⁴ Goodwin-Gill, *ibid* at 3.

1951 Refugee Convention

As previously mentioned, the primary body of law governing protracted refugee situations is international refugee law, embodied in the *Refugee Convention* and its *1967 Protocol*.⁷⁵ When the *Refugee Convention* was drafted, international human rights law was in its infancy; the *Universal Declaration of Human Rights* had been adopted in 1948, the *European Convention on Human Rights* had only just been adopted in 1950 and neither the *International Covenant on Civil and Political Rights* nor the *International Covenant on Economic, Social and Cultural Rights* were yet foreseen. Although the *Refugee Convention* was not intended to be a human rights instrument, recent developments were clearly in the minds of the drafters as evidenced by the reference in the very first paragraph of the preamble of the *Refugee Convention* to the Charter of the United Nations and to the *Universal Declaration of Human Rights* as having affirmed the principle that human beings enjoy fundamental rights and freedoms. In addition, several of the key obligations contained within the *Refugee Convention* were incorporated into the regime of international human rights: most importantly, the principle of *non-refoulement* or the right not to be returned to a country where one faces persecution.⁷⁶

Nevertheless, many authors take issue with the suggestion that international refugee law is fundamentally a rights-based regime.⁷⁷ In his writings, James Hathaway proposes that such a claim is misleading as the refugee system is based on a Eurocentric concept of burden-sharing, excludes the majority of refugees from the global South and can be manipulated by state parties in part because there is no effective form of international supervision.⁷⁸ Catherine Dauvergne's writing supports Hathaway's assertion by reiterating the critique that "the Refugees Convention is more effective at keeping people out of prosperous nations than at letting them in."⁷⁹ Instead of constraining state sovereignty and requiring the state to offer protection, refugee law becomes another forum for the assertion of state sovereignty and the right of states to control entrance to their territory.⁸⁰

⁷⁵ *Refugee Convention*, *supra* note 72; *1967 Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁷⁶ Goodwin-Gill, *supra* note 73 at 7.

⁷⁷ In support, see e.g. Catherine Dauvergne, "The Dilemma of Rights Discourses for Refugees" (2000) 23 UNSWLJ 26; Goodwin-Gill, *supra* note 73; Brian Gorlick, "Human Rights and Refugees: Enhancing Protection through International Human Rights Law" (2000) 69 Nordic J Intl L 117. In opposition, see e.g. James C. Hathaway, "Reconceiving Refugee Law as Human Rights Protection" (1991) 4:2 Journal of Refugee Studies 113.

⁷⁸ Hathaway, *supra* note 77 at 114.

⁷⁹ Dauvergne, *supra* note 77 at 60.

⁸⁰ *Ibid.*

Whether refugee law is viewed as being a rights-based regime may depend in part upon how a right is characterized. Catherine Dauvergne defines a right as “any claim recognised by the law which some legal body will, in some circumstances, determine and enforce.”⁸¹ By defining “rights” in this narrow way, as a legally enforceable claim, Dauvergne is emphasizing the link between rights and the legal system. Thus her definition of rights excludes many of the aspirational or moral claims that are often associated with this term and would even exclude some of the rights that are enshrined in the international human rights covenants and declarations. Under this conception, the ‘rights’ contained in the *Refugee Convention* are either not rights or only very weak rights as refugees are rarely if ever able to claim them within the domestic legal system and, more often than not, the state’s strong interest in maintaining absolute control over its borders trumps whatever assertions of right refugees might bring.

A distinction can potentially be drawn between whether a particular individual possesses a specific right in a specific case and whether a right exists in theory. Certainly the claim to asylum or to any of the guarantees contained within the *Refugee Convention* has the potential to be enforceable. Remedies do exist even if they are not attainable in practice. The fact that a state’s interests or ‘rights’ may trump those of the individual is not a fatal flaw either. Rights do come into conflict with one another and these conflicts must be addressed. Even the most basic right, the right to life, could potentially be violated if it comes into conflict with the right to life of another. For example in a case of self-defence, where one person attacks another; both have a right to life but the person who is defending herself may violate the right of the other while protecting her own life. Human rights are violated every day: to say that a right only exists where state institutions are prepared to enforce it greatly undermines the strength of the rights regime and may lead to stagnation in the propagation and development of human rights. It was rights in their aspirational form that led to the adoption of the human rights Covenants and their, at least partial, incorporation into the domestic law of many states. In the end, regardless of whether one conceives of the *Refugee Convention* as being rights-based or not, it contains the building blocks for the international refugee law regime but maintains the traditional structure of a treaty such that it is formally a set of obligations between states, not between states and refugees.⁸²

⁸¹ *Ibid* at 61.

⁸² Goodwin-Gill, *supra* note 73 at 7.

The standards of treatment, or minimum rights, contained in the *Refugee Convention* apply to those individuals who fall within the convention definition of ‘refugee’ contained in article 1 of the Convention. As many refugees in protracted refugee situations are part of mass displacements where individual status determination may be impossible, they are instead considered refugees on a *prima facie* or group basis. A *prima facie* refugee is a person who is recognized as a refugee by a state or UNHCR “on the basis of objective criteria related to the circumstances in his or her country of origin and his or her flight, which justify a presumption that he or she meets the criteria of the applicable refugee definition.”⁸³ Although refugees who meet the Convention definition criteria on a *prima facie* basis are entitled to the standards of treatment set out under the Convention, in fact *prima facie* refugees often find their access to those rights limited.⁸⁴ Protracted refugee populations may also include asylum-seekers who have not yet been recognized as refugees but are being offered temporary protection until their claims can be determined and other persons of concern who do not meet the Convention definition of a refugee as they are fleeing generalized violence as opposed to individual persecution.⁸⁵

Because refugees lack the protection of a state, they are considered to be a special category of non-citizens deserving of a particular set of rights. However, not all refugees are created equal. The question of status becomes important with respect to the rights and standards of treatment enumerated in the *Refugee Convention* for while the Convention does guarantee important rights, these rights are subject to a complex entitlement structure. An individual’s entitlements depend upon their status within the country and upon the length of time they have been present; very few of the rights apply to asylum-seekers and even recognized refugees do not benefit from all rights immediately upon recognition.⁸⁶ Moreover, the treatment afforded to

⁸³ UNHCR, *UNHCR Handbook for the Protection of Women and Girls: Glossary* (1 January 2008) at 388, online: www.unhcr.org/cgi-bin/tehis/vtx/search?page=search&docid=47cfad9e2&query=glossary.

⁸⁴ UNHCR, *The State of the World’s Refugees: In Search of Solidarity – A Synthesis* (2012) at 10, online: www.unhcr.org/4fc5ceca9.html.

⁸⁵ This group will include mandate refugees: those determined to be refugees by UNHCR in accordance with its Statute and relevant UN General Assembly and ECOSOC resolutions. UNHCR, *Protection of Women*, *supra* note 83 at 385.

⁸⁶ Rights applying specifically to asylum seekers include the right to non-discrimination, the right not to be penalized for illegal entry and stay in cases where there is a threat to life or freedom and non-refoulement. (*Refugee Convention*, *supra* note 72, arts 3, 31, 33.) The right to wage-earning employment set out in article 17 is an example of a right that changes as the relationship between the refugee and the host state becomes stronger over time. Alice Edwards, “Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders” (2008-2009) 30 *Mich J Intl L* 763 at 793 [Edwards, “Human Security”].

refugees will also depend upon the right in question as is evident in the following table:⁸⁷

	Treatment accorded to aliens generally	Most-Favoured-Nation Treatment	National Treatment
Refugee	13. movable and immovable property 22. post-elementary education	33. non-refoulement	4. freedom of religion 14. intellectual property 16. access to courts 20. rationing 22. elementary education 29. fiscal charges
Refugee lawfully present in the territory	18. self-employment 26. freedom of movement	32. expulsion	
Refugee lawfully staying in the territory	19. liberal professions 21. housing	15. right of association 17. wage-earning employment	23. public relief 24. labour legislation and social security
Refugee unlawfully in the territory	31. immunity from penalties 31. restrictions on freedom of movement		

Table 1. Categorization of refugee rights

Unlike most human rights treaties and conventions, the Refugee Convention does not contain any true enforcement provisions. There is no formal mechanism for either individual or inter-state complaints. Article 35 contains the requirement that states cooperate with the Office of the United Nations High Commissioner for Refugees and facilitate its duty of supervising the Convention.⁸⁸ This cooperation requires that states provide UNHCR with information pertaining to the condition of refugees, the implementation of the Convention and other laws and regulations relating to refugees. However, this provision has not been given full effect and as a result there is no system of review of country practices.⁸⁹ Because of its widespread presence in the field, UNHCR has been able to play a supervisory and *de facto* enforcement role, but its success in this role, as well as its involvement in refugee protection, is highly dependent upon the scope within which a particular country permits UNHCR to exercise its mandate and the resources available.⁹⁰

Alternative Sources

In addition to the *Refugee Convention*, there are several regional instruments that also play a role in refugee protection. Of particular relevance is the *1969 Convention Governing the*

⁸⁷ Table adapted from a document provided by François Crépeau on file with the author.

⁸⁸ Article 35.1: The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. (*Refugee Convention, supra* note 72.)

⁸⁹ See Gorlick, *supra* note 77 at 123.

⁹⁰ *Ibid* at 123-124.

*Specific Aspects of Refugee Problems in Africa*⁹¹ and the 1984 Cartagena Declaration.⁹² While the *OAU Convention* is a legally binding treaty that has been ratified by 45 member states, the *Cartagena Declaration* is merely a statement that was drafted by a group of experts and government representatives from across Central America. Nevertheless, although not formally legally binding, the *Cartagena Declaration* was endorsed by the states that participated in its drafting, is widely respected across Central America and has been incorporated into the national laws of some countries.⁹³ Both of these documents recognize the centrality of the *Refugee Convention* and the role of UNHCR in refugee protection and call upon states to recall the universal applicability of human rights regardless of legal status. Most importantly, both of these documents introduce an expanded definition of “refugee” that includes individuals who have fled more generalized instances of violence.

Another authoritative source of guidance in the international refugee regime is the standards developed by the UNHCR Executive Committee (ExCom). ExCom conclusions are adopted by consensus by a committee of 94 states and cover everything from the protection of UNHCR staff and the accessibility of refugee populations, to the protection of refugee women and the principle of non-refoulement.⁹⁴ Although they do not create formally binding obligations, these conclusions make up a body of soft law that is particularly important because the members that make up the ExCom and that draft and agree to the conclusions are states that have a demonstrated interest in refugee matters, generally states party to the main refugee treaties and/or important refugee hosting countries.

ExCom conclusions also reaffirm and expand on the provisions contained in the *Refugee Convention* providing states and other actors with authoritative guidance on the minimal

⁹¹ *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“*OAU Convention*”), 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

⁹² *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, online: www.unhcr.org/refworld/docid/3ae6b36ec.html.

⁹³ See e.g. *Argentina: Acta resolutive No. 465 de 1998, Comité de elegibilidad para los refugiados* (24 February 1998) art 1c; *Brazil, Law No. 9474/97, establishing arrangements for the implementation of the 1951 Status of Refugees and related provisions* (23 July 1997) art 1; *Honduras, Decreto No. 208-2003, Ley de Migración y Extranjería* [Honduras] (3 March 2004) art 42; *Peru: Ley No. 27.891 de 2002 – Ley del refugiado* [Peru] (20 December 2002) art 3.

⁹⁴ See e.g. UNHCR, *Conclusion on Safety of UNHCR Staff and Other Humanitarian Personnel*, No 83 (XLVIII)-1997, 17 October 1997, online: www.unhcr.org/3ae68c4338.html; UNHCR, *General Conclusion on International Protection*, No 108 (LIX) -2008, 10 October 2008, online: www.unhcr.org/49086bfd2.html; UNHCR, *Conclusion on Women and Girls at Risk*, No 105 (LVII)-2006, 6 October 2006, online: www.unhcr.org/45339d922.html; UNHCR, *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, No 103 (LVI)-2005, 7 October 2005, online: www.unhcr.org/43576e292.html [UNHCR, *Conclusion on Complementary Protection*].

standards of treatment applicable in refugee situations. In addition to the issues noted above and to conclusions on international protection generally, there have been conclusions that directly address the treatment and rights of refugees. For instance, conclusion 111 urges states to ensure the civil registration of all refugee children, conclusion 107 calls on states to respect and ensure the rights of children at risk, conclusion 88 reasserts the need to protect the unity of refugee families, and conclusion 103 reaffirms the principle that all human beings are entitled to enjoy human rights and fundamental freedoms without discrimination.⁹⁵

Despite these statements of support for refugee rights, the refugee protection framework suffers from a number of other weaknesses that undermine its ability to address protracted refugee situations.⁹⁶ In addition to the limited range of rights granted by the *Refugee Convention* (as part of a pre-human rights regime) and the lack of enforcement and supervisory mechanisms, international refugee law has proven to be particularly susceptible to manipulation by states which often interpret the *Refugee Convention* as narrowly as possible. The regime fails to provide authoritative guidance or strategies to address mass influxes and mixed-migration flows. International refugee law has also proven unable to ensure that refugees are provided with durable solutions within a reasonable period of time, largely because states are unwilling to resettle or integrate substantial numbers of refugees. The international refugee law framework contains no guidance on implementing a system of responsibility-sharing between states and while it provides protection for refugees once they have entered a host state, there is no legally binding obligation on states to provide individuals with asylum. Consequently, many people fleeing persecution are forced immediately into a state of illegality because their only way to obtain protection is to enter a state illegally.⁹⁷ It is in addressing some of these weaknesses that international human rights law can offer some assistance.

2. International Human Rights Law

Unlike international refugee law which requires individuals to fit into a relatively narrow definition before being able to benefit from the rights contained in the *Refugee Convention*,

⁹⁵ UNHCR, *Conclusion on Civil Registration*, No 111 (LXIV)-2013, 17 October 2013, online: www.unhcr.org/525fdfe9.html; UNHCR, *Conclusion on Children at Risk*, No 107 (LVIII)-2007, 5 October 2007, online: www.unhcr.org/4717625c2.html; UNHCR, *Protection of the Refugee's Family*, No 88(L)-1999, 8 October 1999, online: www.unhcr.org/3ae68c4340.html; UNHCR, *Conclusion on Complementary Protection*, *supra* note 94.

⁹⁶ See e.g. Volker Türk & Rebecca Dowd, "Protection Gaps" in Fiddian-Qasmiyeh, et al, eds, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) 278.

⁹⁷ See generally Edwards, "Human Security", *supra* note 86.

international human rights law provides for the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”⁹⁸ These rights “derive from the inherent dignity of the human person.”⁹⁹ Although a few specific rights may be limited based upon citizenship, generally speaking the rights provided for under international human rights law are not dependent upon membership or legal status in a particular state or community; every individual possesses these rights merely by virtue of being human.

In addition to being more restrictive in terms of application, the rights contained in the *Refugee Convention* are limited; under international refugee law, refugees do not benefit from the full panoply of rights contained in international human rights conventions.¹⁰⁰ Is one to understand then that by leaving one’s state of origin and seeking asylum elsewhere, often specifically because of human rights violations, a refugee becomes less deserving of the equal rights from which all humans are supposed to benefit? Or, as is more likely, is this state of affairs merely a result of the *Refugee Convention* pre-dating most international human rights treaties and of the state-sovereignty concerns that underpin refugee law? This discrepancy in content really only makes sense if the rights contained in international treaties are dependent upon membership in a state. But international human rights law is not nationality-based, it is jurisdiction-based and so with very few exceptions (such as voting rights and the right to enter and stay in one’s country), the state should recognise the same rights to every individual within its jurisdiction.¹⁰¹ This is not to deny the fact that there are great discrepancies in terms of rights protection, respect and enjoyment from one state to another and also within many states; in practice it is still very difficult for some groups to claim or to enforce their rights. Nonetheless, in theory at least, under international law, every individual, regardless of his/her race, sex, age or membership in a state, has the same fundamental rights. The rights set out in the *Refugee Convention* may be viewed as the absolute minimum required under international refugee law where the state has no other human rights obligations but as soon as the host state is a party to

⁹⁸ See e.g. *ICCPR*, *supra* note 73 at preamble.

⁹⁹ See e.g. *ibid.*

¹⁰⁰ Edwards, “Human Security”, *supra* note 86 at 792.

¹⁰¹ Alice Edwards, “Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the International Protection of Refugees” in Roberta Arnold & Noëlle Quéniévet, eds, *International Humanitarian Law and Human Rights Law* (Leiden, The Netherlands: Brill Academic Publishers, 2008) 421 at 428 [Edwards, “Crossing Legal Borders”].

one of the stronger human rights instruments, respect for human dignity requires that whichever standard affords the greatest protection take precedence.¹⁰²

International human rights law becomes especially important in cases where states are not party to the *Refugee Convention*, where individuals are in need of protection but do not neatly fit into the Convention definition of refugee and in addressing issues, such as protracted refugee status or prolonged encampment, that are not directly addressed in international refugee law instruments. The application of international human rights law to protracted refugee situations can be illuminated by looking at CCPR General Comment No. 15: The Position of Aliens under the Covenant.¹⁰³ That General Comment exhorts states to remember that the rights contained in the *ICCPR* generally apply to every individual within the state's territory and subject to its jurisdiction regardless of their nationality or status. Although article 14 of the *Universal Declaration of Human Rights* provides that every individual has the right to seek and to enjoy asylum from persecution, neither the *ICCPR* nor the *ICESCR* includes such a right. In fact, these instruments do not recognize the right of any alien (or non-national) to enter or reside in the territory of a state party.¹⁰⁴ However, once an individual has entered the territory of a state, she is entitled to benefit from the rights set out in the *ICCPR*.¹⁰⁵ Refugees may in fact begin to benefit from the rights contained in the *ICCPR* and *ICESCR* even before they are granted entrance to a state. As mentioned above, international human rights law is jurisdiction-based and so an individual who is within the jurisdiction of a state, even if she is not within the territory of the state, will benefit from the rights granted under international human rights law. Simply put, international human rights law applies prior to flight, during flight and once asylum is granted, as opposed to refugee law which only begins to apply once an individual seeks asylum in another state and not until she has crossed an international border.¹⁰⁶

In addition to an expanded range of rights applicable to refugees, international human rights law also contains some of the enforcement mechanisms that are lacking in refugee law.

¹⁰² See Gorlick, *supra* note 77. Note that the Gorlick thinks that the set of rights in the *Refugee Convention* is sufficient.

¹⁰³ UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens under the Covenant*, UN Human Rights Committee, 27th Sess. UN Doc HRI/GEN/1/Rev.9 (Vol 1) (11 April 1986) 18. Note that the General Comments of the Human Rights Committee are not legally binding but are considered to be very persuasive.

¹⁰⁴ *Ibid.* Under certain circumstances, individuals may benefit from the protection of the Covenant in relation to entry or residence, for example with regards to the prohibition of inhuman treatment.

¹⁰⁵ *Ibid.*

¹⁰⁶ Edwards, "Crossing Legal Borders", *supra* note 101 at 429.

These will not be examined in detail here and it is important to note that their effectiveness is far from ideal; however, imperfect enforcement is generally to be preferred over no enforcement at all. The mechanisms available under international human rights law include compulsory state reporting, individual and inter-state complaint mechanisms, country and thematic rapporteurs, working groups, binding General Comments, the possibility of highlighting violations through formal reports and, increasingly, the possibility of international prosecution for severe human rights violations.¹⁰⁷

Criticism

While the importance of human rights in refugee protection and the need to strengthen the relationship between these two bodies of law and practice may be intuitive for many, there are also a number of criticisms frequently raised.¹⁰⁸ One criticism is that refugee situations will come to be seen as purely human rights issues and that the special protection and status afforded to refugees will be undermined by characterising refugee protection in terms of human rights.¹⁰⁹ Another debate that has much broader implications and that is not specific to the application of human rights in the refugee context, is whether human rights are in fact really universal or whether international human rights law is merely a Western Judaeo-Christian construct that is not culturally appropriate in many societies. Linked to this is the criticism of human rights as being overly individualistic and thus not accurately representing the priorities of many societies where communal interests (whether of the family, community or country) are prioritized over those of the individual. This individualism could be particularly problematic in the context of refugee crises which generally affect groups of individuals and where issues pertaining to community, social group and family can be especially important.¹¹⁰

With regards to the first criticism, there is no reason why a consideration of human rights should or would displace a consideration of refugee rights. Refugee issues necessarily have a human rights component, both in terms of the reasons for flight and the treatment of asylum-seekers once they have fled their country of origin. Recognizing this convergence is simply

¹⁰⁷ Note that not every mechanism is available in all situations. See Gorlick, *supra* note 77 at 123-124.

¹⁰⁸ See e.g. Karin Mickelson, "How Universal is the Universal Declaration?" (1998) 47 UNBLJ 19; Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76:2 American Political Science Rev 303 [Donnelly, "Human Dignity"].

¹⁰⁹ See e.g. Daniel Warner, "Refugees, UNHCR and Human Rights: Current Dilemmas of Conflicting Mandates" (1998) 17:6 Refuge 12.

¹¹⁰ For example the emphasis placed on family reunification, as well as the grounds for asylum which may pertain to membership in a particular group.

acknowledging the reality of the situation; that refugees are not only human rights holders but a particular type of human rights holder in need of special protection. In that way, consideration of human rights need not take away from refugee protection but can add an additional level of protection that is greatly needed given the propensity of states to undermine the principles of the refugee regime and to offer only the absolute minimum protection required by law.

With regards to the other criticisms, these are debates that have a long history in international human rights law apart from any consideration of refugee matters. Tailoring the language and content of international human rights law so that it is acceptable and applicable in different cultural traditions can be an important part of ensuring that human rights are actually implemented and enforced within states. Yet, at the same time, perhaps the most important characteristic of international human rights is their universality – the very fact that they are, at least in theory, independent from culture and tradition. It is this universality that elevates these rights and obligations above the type of merely contractual nature of most international treaties. Furthermore, the debate as to the universality of human rights has been explicitly addressed through the adoption of the *Vienna Declaration and Programme of Action* at the World Conference on Human Rights in 1993.¹¹¹ The *Vienna Declaration*, which was endorsed by the forty-eighth session of the United Nations General Assembly, was a reaffirmation and restatement of the principles that had developed in the decades since the adoption of the *Universal Declaration of Human Rights*. The *Vienna Declaration* also strengthened the foundation for human rights protection by recognizing the link between human rights, development and democracy and by taking steps to promote and protect the rights of women, children and indigenous peoples. In addition to reaffirming that “all human rights derive from the dignity and worth inherent in the human person,”¹¹² the *Vienna Declaration* explicitly recognized that the universal nature of human rights and fundamental freedoms “is beyond question.”¹¹³

Of course the international human rights system also has many weaknesses. While there may be enforcement mechanisms in place, the effectiveness of those varies greatly. In a horizontal system, there is no overarching authority to ensure that states respect their obligations. Thus, the system relies heavily on “naming and shaming” and on political pressure and bartering

¹¹¹ *Vienna Declaration*, *supra* note 10.

¹¹² *Vienna Declaration*, *supra* note 10 at preamble.

¹¹³ *Ibid* art 1.

between states. States often apply human rights law selectively and inconsistently, using tools such as the derogability of some rights to limit their application, and may or may not incorporate their treaty obligations into domestic law. Nevertheless, particularly in protracted refugee situations where international refugee law is at its weakest, international human rights instruments have the potential to strengthen the current protection regime.

3. Domestic Law

In addition to the above-mentioned international legal regimes, the domestic law of the host state is also very important in protracted refugee situations. Where a state has acceded to the *Refugee Convention* or international human rights treaties, one must determine the extent to which these international obligations have been incorporated into domestic law. National laws may include specifics regarding how the rights and obligations contained in these instruments are to be implemented. Where states are not party to the *Refugee Convention* or another regional instrument, one must look to domestic laws to determine whether the state has adopted a definition of ‘refugee’ and what rights are granted to ‘aliens’. The human rights and immigration laws of any state may provide protection to individuals seeking asylum regardless of the state’s international obligations.¹¹⁴ In any event, on a day to day basis, it is the domestic law of the host state that the refugee is most likely to come into contact with. Whatever the state’s international obligations, the local security forces and courts are primarily concerned with the enforcement of the domestic laws of the state and, with the exception of UNHCR, these may be the only recourse mechanisms available to refugees.

Although far from ideal, it may not be immediately apparent from looking at the legal principles above why the current international legal regime is inadequate in protracted refugee situations. Two specific reasons can be identified. First, the current refugee law regime does not take into consideration the fundamental differences between traditional refugee situations and protracted refugee situations. Second, the current international protection regime is not sufficiently *effective* in practice. Refugees, whether long-term or not, are granted a wide range of rights and protections depending upon the domestic laws and international obligations of the host state. Yet regardless of the rights that refugees are formally granted by law, the extent to which those rights and protections exist in practice and are accessible to refugees in any particular

¹¹⁴ See e.g. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1981* (U.K.), 1982, c 11.

situation is extremely variable. Where the current legal regime falls short is not so much on paper as in practice, at the point where law, interests and policy intersect. It is the inability of long-term refugees to claim or assert their rights and the inability or unwillingness of states to give effect to refugee rights through their domestic and international policies that present the greatest obstacles.

C. The Evolution of Refugee Policy and the Stagnation of Refugee Practice

Historically, and to a great extent still today, refugee protection and assistance has been viewed as a humanitarian issue. This perception, based on the premise that most refugee movements are the product of short-term humanitarian emergencies, has in turn shaped the manner in which responses to refugee situations have been structured.¹¹⁵ In particular, a humanitarian understanding of refugee crises has enabled states to focus on the provision of emergency relief and the implementation of care and maintenance initiatives rather than on the much more complicated and difficult work of resolving the root causes of displacement. Nevertheless, the reality is that while many refugee crises may originate in an emergency situation, the majority of refugees remain in exile long after the initial emergency phase is over.¹¹⁶ These refugees find themselves caught in the state of limbo described previously, unable to return to their countries of origin due to ongoing conflict, unable to integrate locally due to restrictions placed on them by the host state and unable to be resettled to a third country due to the limited number of resettlement places available.¹¹⁷ A growing recognition of the increasingly long-term nature of many refugee situations and of the insufficiency of traditional approaches resulted in a flurry of policy development regarding new approaches to refugee assistance starting in the 1980s and intensifying within the last decade.¹¹⁸ Unfortunately, while individual initiatives have on occasion met with some success, the overarching conclusion is that the

¹¹⁵ Betts, “Development Assistance”, *supra* note 66 at 4.

¹¹⁶ *Ibid.*

¹¹⁷ See e.g. *ibid.*

¹¹⁸ For a chronology of relevant initiatives, see Bryan Deschamp & Sebastian Lohse, *Still Minding the Gap? A Review of Efforts to Link Relief and Development in Situations of Human Displacement, 2001-2012*, UNHCR Policy Development and Evaluation Service, UN Doc PDES/2013/01 (February 2013) annex 2, online: www.unhcr.org/512cdef09.html.

developments in policy have not resulted in a real or substantial change in the practice of refugee assistance.¹¹⁹

1. Maintaining but Not Really Caring: the Insufficiency of Traditional Relief Models

Under traditional relief-based approaches such as ‘care and maintenance’ programmes, refugees are admitted to host countries on a group and *prima facie* basis and confined to camps and settlements, usually established and run by UNHCR in conjunction with host state authorities.¹²⁰ Within these camps and settlements refugees are provided with the means to satisfy their basic needs such as shelter, food, primary education and health care by state authorities, international donors, UNHCR and its operational partners until such time as the situation in their country of origin changes and they are able to return home.¹²¹

While these programmes achieve some objectives, namely they enable the basic needs of refugees to be met and provide some degree of protection and assistance to refugee communities, they offer few additional benefits. Care and maintenance programmes may be all very well for dealing with emergency situations for the short term but what about when conflict and insecurity prevents repatriation from occurring for years? By focusing only on the basic, short-term needs of refugee communities as opposed to investing in the development of sustainable programmes, traditional relief models are predominantly reactive and are largely responsible for creating situations of long-term dependence on external aid. On the one hand, the substantial and continuous input of resources that these programmes require is inefficient and wasteful and makes the host state itself dependent upon external assistance. That assistance in turn may or may not be forthcoming as donors suffer from donor fatigue and lose interest in funding these open-ended projects or become distracted by other more immediate emergencies leaving host states and refugee communities in a perilous position.¹²² On the other hand, reliance on external assistance in conjunction with the restrictions characteristic of refugee camps and settlements

¹¹⁹ See e.g. *ibid* at 46.

¹²⁰ UNHCR, *Protracted Refugee Situations: A discussion paper prepared for the High Commissioner’s Dialogue on Protection Challenges*, UN Doc UNHCR/DPC/2008/Doc.2 (20 November 2008) at 13, online: www.unhcr.org/492ad3782.html [UNHCR, *PRS Discussion Paper*].

¹²¹ *Ibid* at 13.

¹²² *Ibid*; UNHCR ExCom, *Protracted Refugee Situations: Revisiting the Problem*, 42nd Mtg, UN Doc EC/59/SC/CRP.13 (2 June 2008) at 3, online: www.unhcr.org/484514c12.html; Jeff Crisp, “Mind the Gap! UNHCR, Humanitarian Assistance and the Development Process” (2001) UNHCR New Issues in Refugee Research Working Paper No 43, at 2, online: www.unhcr.org/3b309dd07.pdf [Crisp, “Mind the Gap”].

(restrictions on the right to work, access to education and livelihood opportunities) also undermines the capabilities and resources of the refugee community itself and creates a system of dependence that is very difficult to get out of. This dependence perpetuates the disempowerment and precariousness of the refugee community and reinforces the common but damaging stereotypes of refugees as helpless, pitiful victims or, alternatively, as freeloaders.¹²³ In short, while potentially effective in the first stages of a refugee crisis, traditional relief-based approaches to refugee assistance such as care and maintenance programmes have not been effective in substantially, and sustainably, bettering the lives of refugees in protracted refugee situations, in leading to durable solutions for those refugees, or in providing any substantive benefit for the host state and local communities. UNHCR has recognized that, while they may save lives, these relief-based approaches are not necessarily effective in achieving other longer-term objectives such as developing capabilities, building healthy communities and preparing refugees for durable solutions.¹²⁴

Adherence to traditional relief-based models of refugee assistance also fails to acknowledge that refugees increasingly eschew refugee camps and reside instead in urban settings. According to the 2012 UNHCR Statistical Yearbook, more than 50% of refugees for whom the type of accommodation was known reside in individual (and often urban) settings rather than refugee camps.¹²⁵ Traditional relief models are not designed with these populations in mind and generally do not address their needs.

2. Falling Short: Bridging the ‘Gap’ between Relief and Development

As early as the late 1960s, scholars and policy developers recognized the existence of a transition ‘gap’ between humanitarian and relief efforts on one hand and development initiatives on the other.¹²⁶ Over subsequent decades, the interest in bridging this gap has ebbed and flowed depending largely upon the state of the world’s refugees and upon the international political context.¹²⁷ A first climax was reached in the early 1980s following the International Conference on Assistance to Refugees in Africa (ICARA I) in 1981. The stated objective of that conference

¹²³ For an interesting discussion of the ethics of humanitarian assistance in the refugee context see Barbara Harrell-Bond’s article “Can Humanitarian Work with Refugees be Humane?”, *supra* note 3.

¹²⁴ See generally UNHCR, *Handbook for Planning and Implementing Development Assistance for Refugees (DAR) Programmes* (January 2005), online: www.unhcr.org/refworld/docid/428076704.html.

¹²⁵ UNHCR, *Statistical Yearbook 2012*, *supra* note 4 at 9.

¹²⁶ Crisp, “Mind the Gap”, *supra* note 122 at 1.

¹²⁷ See generally *ibid*; Deschamp & Lohse, *supra* note 118; Betts, “Development Assistance”, *supra* note 66.

was to “mobilize additional resources to assist both refugees and returnees” and to “aid countries of asylum in bearing the burden imposed upon them by the large number of refugees.”¹²⁸

Subsequently, ICARA II was convened in 1984 with the objective of using integrated development assistance to fund projects focusing on the regions hosting refugees in exchange for which African states would increase the availability of durable solutions through local integration.¹²⁹ Importantly, ICARA II emphasized the concept of “additionality”; the idea that funding for development assistance to refugees must be *additional* and not just a reallocation of existing funding.¹³⁰ Ultimately, however attractive in theory, neither of these initiatives achieved much in practice due in large part to a fundamental disconnect between the expectations and interests on the part of host states and donors.¹³¹ Summarized simply, host states wanted increased “burden”-sharing and were unwilling to provide local integration and donor states wanted durable solutions and were unwilling to commit to “additionality” (additional resources).¹³² This impasse, combined with an increase in the refugee population in the 1990s, caused the refugee aid and development strategy of which ICARA was a part to fall by the wayside and to be replaced by a resurgence of care and maintenance programmes in the 1980s and 1990s.¹³³

Despite this failure, the recognition that displacement represents both a humanitarian and a development challenge has only increased and ICARA has been followed by a number of *ad hoc* initiatives aimed at addressing the relief-development gap.¹³⁴ In addition to these practical initiatives, there has been a substantial amount of effort put into international discussions, policy

¹²⁸ UNGA, *International Conference on Assistance to Refugees in Africa*, 73rd Plen Mtg, GA Res. 42, A/RES/35/42 (1980).

¹²⁹ Betts, “Development Assistance”, *supra* note 66 at 7.

¹³⁰ Alexander Betts, “International Cooperation and the Targeting of Development Assistance for Refugee Solutions: Lessons from the 1980s” (2004) UNHCR New Issues in Refugee Research Working Paper No 107, at 2, online: www.unhcr.org/415d0d982.pdf [Betts, “International Cooperation”].

¹³¹ See generally *ibid.*

¹³² *Ibid* at 12.

¹³³ This resurgence was facilitated by two factors. First, host states began increasingly to feel that a disproportionate amount of the “burden” of refugee protection was on developing countries, especially with aid from donor countries decreasing after the end of the Cold War. Second, states in the global North became increasingly concerned with domestic, regional and international security. States began to view refugees as possibly posing threats to their security and became preoccupied with restricting the number of people able to gain entry to their borders. To this end, these states employed a variety of strategies including carrier sanctions, visa restrictions, interdiction and increased use of detention that continue to this day. Observing this shift in policy, and faced with diminished international aid, some developing states followed suit and implemented similar restrictions. See generally Crisp, “Mind the Gap”, *supra* note 122.

¹³⁴ UNHCR, *Transitional Solutions*, *supra* note 48 at 2. For a full list of these initiatives see Crisp, “Mind the Gap”, *supra* note 122; and see Deschamp & Lohse, *supra* note 118.

papers and the development of guidelines and tools in order to address this gap including the Brookings Process, the UNHCR Agenda for Protection, the High Commissioner's Framework for Durable Solutions and the High Commissioner's Convention Plus initiative.¹³⁵ Unfortunately, these initiatives have run into many of the same obstacles that resulted in the failure of ICARA I and ICARA II, namely the inability to secure consistent funding and the full engagement of development actors, a failure in international responsibility-sharing and the reluctance of host governments to embrace local integration programs.¹³⁶ Thus, the reality is that the substantive impact of these efforts in practice has been minimal.¹³⁷

Nevertheless, whatever their practical challenges, the focus on bridging the gap between relief and development has brought to light some very important considerations in designing and implementing refugee assistance initiatives. In particular, the role of development assistance in refugee crises can be separated into two overlapping components: that which relates to the transition from conflict to peace and that which with relates to the protection and assistance afforded to refugees during exile. Most recent international efforts in this regard have focused primarily on the former dimension, namely the role that development aid can play in facilitating a sustainable post-conflict transition to peace.¹³⁸ This position is based on the understanding that long-term displacement has the potential to cause instability in the host state and that the resolution of situations of displacement is an essential part of resolving conflict, achieving peace and stability and preventing a return to conflict in the country of origin.¹³⁹ Although strategies of this type may refer to durable solutions broadly, in reality they appear to be predominantly concerned with the successful repatriation and reintegration of displaced populations in the country of origin as opposed to resettlement or local integration in the country of asylum. Thus development assistance can be used to secure a warmer reception for returnees and to provide both returnees and receiving communities with the resources necessary to ensure lasting integration and subsequent development.

¹³⁵ See e.g. UNHCR, *Agenda for Protection*, 3rd edition (October 2003), online: www.unhcr.org/3e637b194.html; UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (May 2003) online: www.refworld.org/docid/4124b6a04.html; UNHCR, *Convention Plus*, online: www.unhcr.org/pages/4a2792106.html.

¹³⁶ Deschamp & Lohse, *supra* note 118 at 1; see also UNHCR, *Transitional Solutions*, *supra* note 48 at 2.

¹³⁷ See generally Deschamp & Lohse, *supra* note 118.

¹³⁸ See *ibid* at 3, 48.

¹³⁹ See e.g. Deschamp & Lohse, *supra* note 118 at 1; UNHCR, *Transitional Solutions*, *supra* note 48 at 2.

While the emphasis on repatriation and reintegration is consistent with the international community's overwhelming support for repatriation as the durable solution of choice, as noted above, continued violence and insecurity means that repatriation is not a viable option for many refugees. The second stream of development assistance-based initiatives more effectively addresses these situations by promoting the use of development aid to support refugees in their countries of first asylum and the local communities hosting them, and to thereby enhance the protection afforded to refugees.¹⁴⁰ The idea behind this type of targeted development assistance is to provide assistance and protection to refugees as well as to address the concerns of the host state by incorporating refugees into development agendas and by mobilizing additional development assistance.¹⁴¹ These strategies seek to promote co-existence between refugees and the host community by ensuring refugee protection while working to eradicate poverty and encourage local development in hosting regions.¹⁴² These objectives are achieved (in theory) by increasing the capacity and promoting the use of existing state structures and institutions, by developing partnerships to ensure a more efficient use of humanitarian and development resources, and by helping the government to institute policies and practices that create the conditions necessary for refugees to achieve some degree of self-sufficiency at the same time as responding to its own development objectives.¹⁴³ At the same time, these initiatives aim to increase the capacities, self-reliance, empowerment and overall quality of life of refugees pending durable solutions. Where the host state is willing, development assistance could also be used to achieve permanent local integration of the refugee population;¹⁴⁴ almost inevitably, development assistance initiatives would result in a greater degree of local integration of the refugee community on at least a temporary basis.

At its heart, this second branch of development assistance initiatives embodies (and requires) a greater commitment to a more effective system of international responsibility-sharing. As Alexander Betts explains, targeted development assistance has the potential to turn what is often regarded as a zero-sum game into a positive-sum game by increasing the quality of refugee

¹⁴⁰ See e.g. UNHCR, *DAR Handbook*, *supra* note 124.

¹⁴¹ See generally *ibid.*

¹⁴² *Ibid* at 5.

¹⁴³ *Ibid* at 3.

¹⁴⁴ This strategy, part of the Targeted Development Assistance component of Convention Plus was referred to as Development through Local Integration. UNHCR, *Quick Impact Projects (QIPs) – A Provisional Guide* (May 2004) at v, online: www.unhcr.org/refworld/docid/416bd5a44.html.

protection while addressing the interests of both host and donor states.¹⁴⁵ According to this model, donor states would provide host states with substantial additional development funding on the condition that host states were willing to commit to moving beyond strict encampment policies and to ensure the rights and foster the self-sufficiency (and potentially local integration) of refugees.¹⁴⁶ By improving the conditions of asylum and increasing self-sufficiency, this model would reduce the likelihood of secondary migration to donor countries and eventually reduce dependence on long-term humanitarian aid. Likewise, increased development assistance targeted at refugee hosting areas would provide local communities with benefits such as improved infrastructure and greater economic development. Finally refugee communities would benefit by being offered more opportunities for personal development and achieving self-reliance, as well as an increase in preparation for, or even access to, a durable solution.¹⁴⁷

3. Moving Forward with Empowerment

There are many reasons why efforts to bridge the relief-development gap have failed to achieve much success in practice. As noted above, two substantial factors are the reluctance of donor states to commit to the principle of additionality in development assistance and the unwillingness of host states to establish the conditions under which refugees could achieve self-reliance or even local integration. For its part, UNHCR has explicitly stated that the primary obstacle to effectively addressing situations of displacement continues to be a lack of early planning and inadequate resources.¹⁴⁸ Other scholars and policy analysts have identified a lack of coherence and coordination between humanitarian and development actors with regards to their objectives, client focus and even budgeting cycles that can result in the duplication of efforts, competition for resources and confusion regarding their mandates.¹⁴⁹

Even if these practical challenges could be overcome, current development assistance initiatives in refugee situations are fundamentally flawed in that, despite employing the language of rights at a conceptual level,¹⁵⁰ they have ultimately failed to address the human rights needs of refugees in practice. These initiatives are founded upon a rights-deprived conception of

¹⁴⁵ Betts, “Development Assistance”, *supra* note 66 at 10.

¹⁴⁶ See Betts, “Development Assistance”, *supra* note 66.

¹⁴⁷ See generally UNHCR, *DAR Handbook*, *supra* note 124.

¹⁴⁸ UNHCR, *Transitional Solutions*, *supra* note 48 at 7.

¹⁴⁹ See e.g. UNHCR, *DAR Handbook*, *supra* note 124; Feldman, *supra* note 67; Betts, “Development Assistance”, *supra* note 66.

¹⁵⁰ See e.g. UNHCR, *DAR Handbook*, *supra* note 124.

development and self-reliance that “rarely transcends marketing folkloric handcrafts and cultivating kitchen gardens.”¹⁵¹ While these activities may help refugees ensure that there is food on their table, a roof over their heads and an occupation to fill their days, they are largely aimed at satisfying only the most basic, and often purely material, needs as opposed to fully embracing the refugee as a rights-bearer. Are working conditions fair? Do camp residents have recourse when problems arise? Is the dignity of each individual being respected? A refugee mother may be happy because a weaving program provides her with money to take her child to the hospital, but does she have a *right* to go to the hospital? Must she request permission from the camp commander? When she arrives, will she be treated as a second-class patient because she is a refugee? If she is refused assistance, can she claim a remedy? Is she able to seek assistance from the authorities? These are the questions that development assistance initiatives mostly overlook in their focus on the economics of refugee situations. As remarked by Merrill Smith in the 2005 World Refugee Survey, by largely avoiding addressing questions of refugee rights with host governments, development-based initiatives have failed to move beyond the “refugees-as-burden” paradigm.¹⁵² Increasing livelihood opportunities and enhancing economic self-sufficiency is undoubtedly beneficial in protracted refugee situations but to truly improve the lives of refugees in exile and to achieve durable solutions requires an acceptance of refugees as rights-bearing individuals, fully entitled to live in security and dignity. It is time to move towards the concept of “refugees-as-responsibility”, which emphasizes their dignity and rights.

II. The Capabilities Approach: Moving from an Economic to a Social Justice Focus

As the discussion in the previous section has illustrated, despite the lip-service paid to the human rights of refugees, development-inspired approaches to protracted refugee situations have been dominated by a narrow and primarily economic understanding of self-reliance and development. In seeking to design an approach that fully addresses the complexity of protracted refugee situations, that respects the rights of refugees and that fosters and supports their inherent dignity, a more comprehensive understanding of refugee well-being must be adopted. To this

¹⁵¹ Merrill Smith, “Development Without Refugee Rights? A Civil Society Response” (2004-2005) 28 *Fordham Intl LJ* 1479 at 1487.

¹⁵² See generally Merrill Smith, “Development Aid for Refugees: Leveraging Rights or Missing the Point?”, *World Refugee Survey 2005* (Washington DC: US Committee for Refugees and Immigrants, 2005) 4.

end, and in keeping with the evolution of development theory, the capabilities approach as elaborated by Amartya Sen and Martha Nussbaum has been chosen as a means of explaining the shortfalls of current efforts to address protracted refugee situations and as a means of outlining the basic requirements of a “just” approach.¹⁵³

A. The Emergence of the Human Development Approach as an Alternative to Insufficient Economic Gauges in the Evaluation of Development

The capabilities approach elaborated by Amartya Sen can be seen as having been a response to important shortcomings in traditional development theory.¹⁵⁴ Historically, there has been a strong tendency to define development primarily in economic, and specifically monetary, terms. The advantage of financial indicators such as GDP per capita or the level or growth of household income, is that they are relatively uncomplicated to determine and allow states or communities to be compared to one another easily.¹⁵⁵ If we accept GDP as a measure of development, then it follows that the objective of development strategies should be to increase the GDP. Economic gauges, however, only go so far and ultimately fail to capture the complexity of human development. Although an individual’s quality of life is not unrelated to her financial resources, there is not a direct correlation between them. Income levels can affect what a person is able to do or to become, but income growth, particularly when averaged over an entire community, does not necessarily lead to better lives for individual members of that community. Likewise, better lives for community members do not necessarily rely (or at least not exclusively) on income growth. Furthermore, there are many things that people value and have reason to value and that contribute to a bettering of their lives that cannot be easily quantified or expressed in economic terms. How else can we explain the artist who earns barely enough to live on but foregoes a higher paying factory job to do something that she loves? How does one place an economic value on strong supportive communities, on empowerment or on the

¹⁵³ For Amartya Sen see generally Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000); Amartya Sen, *Inequality Reexamined* (Cambridge, Mass: Harvard University Press, 1992). For Martha Nussbaum see generally Nussbaum, *Creating Capabilities*, *supra* note 29; Martha Nussbaum, *Women and Human Development* (Cambridge, UK: Cambridge University Press, 2000).

¹⁵⁴ See e.g. Jean Drèze & Amartya Kumar Sen, *India, Economic Development and Social Opportunity* (Delhi: Oxford University Press, 1995) [Drèze & Sen, *Social Opportunity*]; Sen, *Development as Freedom*, *supra* note 153; Amartya Sen, “Development as Capability Expansion” (1989) 19 *J Development Planning* 41 [Sen, “Capability Expansion”].

¹⁵⁵ To avoid extremely distorted results, GDP per capita is often adjusted for Purchasing Power Parity (the amount of money needed to purchase the same goods in different countries).

possession of a large range of human rights? Is a country that protects its natural resources by creating national parks less developed than one that earns millions of dollars exploiting and ultimately destroying those resources?

Economic indicators of poverty and development also fail to account for what Sen refers to as ‘conversion’ difficulties.¹⁵⁶ Conversion difficulties are the difficulties that some individuals and some classes of individuals face in converting income and other types of resources into valuable “beings and doings”. The existence of conversion difficulties means that the capability of different individuals to achieve the same functioning may vary greatly. Consider for example a young man in Canada who has received a good education (resource) and wishes to convert it into a job that he enjoys (a functioning) versus the situation of a Dalit man who receives a good education in India where there is a long history of discrimination based on class and caste. Despite the same starting point or resource, a good education, the Dalit man has fewer capabilities – he is unable, or at least it is more difficult for him, to convert his resources into something that he values and has reason to value (a job or career). Certain individuals may also require more resources to achieve the same ends as others. Take for example the situation of two people, one physically disabled and one not, who both wish to purchase a vehicle so that they can get to work – the desired ends here being mobility. The disabled person will require substantially more resources (or money) to achieve this end because he would need to have the vehicle modified and customized to fit his needs which would cost significantly more. The benefit that each individual reaps from available income and resources is highly dependent upon the specific circumstances at play.

In addition to conversion difficulties, Sen identifies five categories of considerations that are often overlooked when we focus on income and resources as measures of well-being: (1) personal heterogeneities, (2) environmental diversities, (3) institutional variations, (4) differences in relational perspectives, and (5) distribution within the family.¹⁵⁷ These factors, described in detail below, affect not only the conversion of income into quality of life but also the conversion of resources generally (education, artistic ability, knowledge, skills, etc.).

Personal heterogeneities are the wide variety of personal characteristics that every individual has. These include age, gender, disability and health and affect both a person’s needs

¹⁵⁶ Sen, *Development as Freedom*, *supra* note 153 at 88.

¹⁵⁷ *Ibid* at 70.

and his or her ability to convert resources into the satisfaction of those needs. As demonstrated in the example of the car above, a disabled person may require a higher income to achieve the same quality of life as someone who is not disabled. A person who is diabetic will have different medical and nutritional needs than a nursing mother.

Environmental diversities are the variations in environmental conditions and climate that can influence the level of income needed to sustain a particular quality of life. For example, the heating and clothing requirements of people living in the north or the flooding that comes with the monsoon season in South-Asia. Similarly, the presence of tropical diseases such as malaria and dengue fever and the level of pollution of water sources all affect the quality of life that an individual is able to achieve.

Institutional variations or variations in social climate can also have a substantial impact on the quality of life and conversion possibilities. These factors include elements such as the institutional arrangements within a community (including public education and availability of health services), as well as the structure and characteristics of a given society (community governance, political system, prevalence of crime and violence, corruption...).

The differences in relational perspectives that Sen outlines refer to the specific requirements of different societies and communities, influenced by the customs and norms of the society in question. Essentially, Sen is referring to those beings, havings and doings that are necessary for an individual in order that she might be able to “appear in public without shame.”¹⁵⁸ For example, an individual on welfare in Canada may be *relatively* poor and as a consequence unable to procure those necessities that would enable him or her to lead a full life (proper housing, clothing, food and certain material belongings), despite the fact that he or she will see more money in a year than many people in a poorer country will see in a decade. Another simple example would be a child who has no shoes. Such a child might be able to attend school without much difficulty in a very poor country but would be the object of scorn in a European one and would likely be unable to fully participate in the activities to which he is entitled. The ability of a person to appear in public without shame and, more than that, to be able to participate in public life is intimately linked to the dignity and self-respect of the individual as

¹⁵⁸ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), quoted in Sen, *Development as Freedom*, *supra* note 153 at 71.

a person's human dignity depends not only on how she sees herself but on how she is seen and valued by society as well.¹⁵⁹

The final element that Sen identifies as often overlooked when considering economic measures of development is the distribution of wealth and resources within the family.¹⁶⁰ Distribution within a family may depend upon a variety of factors including age, gender and economic contribution (family members who earn income as opposed to those who work in the home). For example, in a society where women are undervalued, food, resources and opportunities will likely not be distributed equally among female and male children. A female child who is undernourished and who is denied an education in favour of her brothers has few opportunities, a lower level of well-being and a grim future. Sen uses the family as his reference point because incomes earned by family members are shared among both earners and non-earners within the family and because the family is the basic unit of many societies, bearing the primary responsibility for the maintenance and the well-being of its members.¹⁶¹ However, one could add that the traditional conception of development also overlooks other distribution deficiencies.

Even within a relatively rich country, wealth and well-being are not evenly distributed and within one state there may be many different levels of development. Consider as an example non-democratic countries with high incomes from extractive industries or states with high levels of corruption. In these cases, the GDP per capita may present a very skewed image of the society because although the country may have great wealth, that wealth is concentrated in a very small number of pockets with the vast majority of the country living far below the poverty line.¹⁶² Alternatively, wealth within a country may be divided along racial, ethnic or even geographic lines, with specific groups suffering from increased disadvantage and hardship.¹⁶³ Obviously, as

¹⁵⁹ Liebenberg, *supra* note 15 at 6.

¹⁶⁰ Sen, *Development as Freedom*, *supra* note 153 at 71.

¹⁶¹ *Ibid.*

¹⁶² Consider for example the case of Colombia. Ranked at 108th in the world, Colombia is in the mid-range with regards to its GDP per capita (PPP) which is estimated to be \$10,100 in 2011. On the other hand, Colombia is ranked 11th (1 being the worst) in the world with regards to the distribution of family income. The lowest 10% of Colombia's population have only 0.8% of the household income, while the highest 10% have a 45% share. Central Intelligence Agency (CIA), "Colombia" in *The World Factbook*, online: www.cia.gov/library/publications/the-world-factbook/geos/co.html.

¹⁶³ In *Development as Freedom*, Sen presents the case study of African Americans in the United States who, as a group, have a much higher level of mortality than do white Americans and also a higher mortality rate than people born in much poorer countries such as Costa Rica, Sri Lanka, China or Jamaica. Sen, *Development as Freedom*, *supra* note 153 at 21, 97.

much as we might like there to be, there is no country where wealth and opportunity are truly divided evenly so any examination of the well-being of a society will inevitably be based on generalizations. The issue is not so much that there are disparities but *what* and *where* those disparities are. In a community, you will have rich people and poor people; people who are leading comfortable, satisfying lives and those who are scrounging to survive. However, when those at the bottom of the scale of well-being all share a specific characteristic (gender, racial group, religion, etc...), clearly there is some factor other than the normal inequalities at work that needs to be taken into consideration.

A last set of factors alluded to above that Sen does not mention but that could also be included here are the independent choices of lifestyle that individuals make; for example the choice to become an artist instead of an investment banker. Although some people might argue that these factors should not be considered as they are voluntary choices, if we are really concerned with personal development and fulfillment, then it should be acknowledged that the lifestyle that an individual chooses may be an integral part of their being and very fundamental to their dignity and, as a consequence, should not be lightly dismissed.

Faced with narrow economic development theories that were unable to fully capture the nuances of human life,¹⁶⁴ Amartya Sen posited that poverty could better be seen as a deprivation of capabilities, of opportunities to achieve a life of value, rather than merely a deprivation of income or financial resources.¹⁶⁵ Based on that premise, Sen expounded a human-centered theory of development that could be used to evaluate and assess both individual well-being and social arrangements and that was better able to address the discrepancies between income and development outcomes. Ultimately, this approach marked a profound shift in our understanding of development by providing the foundation for the Human Development model used to this day.¹⁶⁶

¹⁶⁴ An intermediate position is occupied by the basic needs approach developed in the late 1970s and early 1980s which posited that the realization of basic needs should be the objective of development policy. In practice, however, this approach was fairly narrow, focussing on the minimum requirements for a decent life (health, nutrition and literacy) and the goods and services needed to realize that life (sanitation, clean water, primary education, housing, etc.). Séverine Deneulin, “Ideas Related to Human Development” in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London UK: Earthscan and International Development Research Center, 2009) 49 at 57 [Deneulin, “Ideas”].

¹⁶⁵ See generally Sen, *Development as Freedom*, *supra* note 153.

¹⁶⁶ UNDP *Human Development Report 1990: Concept and Measurement of Human Development*, (Geneva: 1990), online: hdr.undp.org/en/reports/global/hdr1990/.

B. Amartya Sen's Approach: Expanding Human Capabilities

At its core, the capabilities approach is about answering a very simple question: “What am I actually able to do and to be?”¹⁶⁷ This approach rests upon the principle that human well-being and social arrangements should be evaluated according to “a person’s capability to achieve functionings that he or she has reason to value.”¹⁶⁸ The objective of development then should be to expand people’s capabilities, to expand their freedom or opportunities to promote or achieve the lives that they value and have reason to value.¹⁶⁹

There are several inter-related concepts that lie at the heart of the capabilities approach: functionings, capabilities, freedom and agency. Sen has defined a functioning as “an achievement of a person: what he or she manages to do or to be.”¹⁷⁰ A functioning may be as simple as being clothed and well-nourished or as complex as being able to “appear in public without shame.”¹⁷¹ Functionings are constitutive of human well-being and, taking it a step further, of the person’s being itself.¹⁷² They may relate to every dimension of human life from survival, health and work to empowerment, spirituality, self-respect and fulfillment.¹⁷³ Capabilities, on the other hand, refer to the “alternative combinations of functionings that are feasible for [an individual] to achieve”¹⁷⁴ or, stated otherwise, “the substantive freedoms [a person] enjoys to lead the kind of life he or she has reason to value.”¹⁷⁵ The capabilities approach is not simply about amassing a particular set of primary goods, which might include not only material possessions and income but an assortment of rights and opportunities; it is about increasing the quality of human life by expanding the capability of the individual to choose, and ultimately realize, the life that she values and has reason to value.

¹⁶⁷ Nussbaum, *Creating Capabilities*, *supra* note 29 at 106.

¹⁶⁸ See Sabina Alkire & Séverine Deneulin, “The Human Development and Capability Approach” in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London UK: Earthscan and International Development Research Center, 2009) 22 at 31 [Alkire & Deneulin, “Human Development”]; Sen, *Inequality Reexamined*, *supra* note 153 at 5.

¹⁶⁹ Sen, *Development as Freedom*, *supra* note 153 at 36; Sabina Alkire, “Why the Capability Approach?” (2005) 6:1 *J of Human Development* 115 at 122 [Alkire, “Why the Capability Approach”]; Alkire & Deneulin, “Human Development”, *supra* note 168 at 31.

¹⁷⁰ Sen, “Capability Expansion”, *supra* note 154 at 44.

¹⁷¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), quoted in Sen, *Development as Freedom*, *supra* note 153 at 71.

¹⁷² Alkire, “Why the Capability Approach”, *supra* note 169 at 118; Sen, “Capability Expansion”, *supra* note 154 at 44.

¹⁷³ See Alkire & Deneulin, “Human Development”, *supra* note 168 at 32.

¹⁷⁴ Sen, *Development as Freedom*, *supra* note 153 at 75.

¹⁷⁵ *Ibid* at 87.

Importantly, there is both a subjective and an objective dimension to capabilities and functionings. Subjectively, it is up to the individual to determine what functionings are most valuable to him in order to live the life he wants to. A particular functioning will not ‘count’ as such for an individual if that person does not value it.¹⁷⁶ On the other hand, the definitions of functionings and capabilities explicitly incorporate value judgments. Individuals may value certain beings or doings that they do not have reason to value from a broader ethical or societal perspective. For example a sociopath may enjoy and value causing pain to others but this would still not be considered a functioning.¹⁷⁷ The objective dimension may also help the capabilities approach address the case of adaptive preferences most often found in groups that have been subject to generalized discrimination and oppression, namely preferences and expectations that have been adjusted to the low level of functioning that an individual can realistically achieve.¹⁷⁸ An example of an adaptive preference would be the situation of a woman who cannot and does not aspire to secondary education or a job because of gender discrimination both within the family and the community or alternatively the case of women who accept domestic violence as part of their lives due to engrained cultural practices. Emphasizing capabilities also better addresses the issue of conversion difficulties. As an examination of capabilities looks at the *real* freedom and opportunity of individuals to achieve valuable functionings, not the opportunities that exist in theory or law but are unrealizable, the discrepancies in conversion *ability* will be acknowledged.¹⁷⁹

By focusing on capabilities as opposed to achieved functionings, the capabilities approach emphasizes the importance of freedom and agency. Functionings can be expanded and achieved in many different ways including in ways such as by force, domination or coercion which do not take account of freedom or of the agency of individuals to bring about ends that they value.¹⁸⁰ Focusing instead on capability, and as a result on the substantive freedom of individuals, draws attention to the means by which valuable functionings are achieved,

¹⁷⁶ See Alkire & Deneulin, “Human Development”, *supra* note 168 at 32.

¹⁷⁷ See *ibid.*

¹⁷⁸ Martha Nussbaum, “Capabilities and Human Rights” (1997) 66:2 Fordham L Rev 273 at 283 [Nussbaum, “Capabilities and Human Rights”].

¹⁷⁹ See Alkire, “Why the Capability Approach”, *supra* note 169 at 121.

¹⁸⁰ See generally Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London UK: Earthscan and International Development Research Center, 2009); see also Sabina Alkire, *Valuing Freedoms: Sen’s Capability Approach and Poverty Reduction* (New York: Oxford University Press, 2002) at 6 [Alkire, *Valuing Freedoms*].

specifically the value of empowerment, of agency and of choice. The capabilities approach acknowledges that an individual may value the freedom to do, have or be something without actually acting upon it. A person may still value the freedom or right to speak freely and engage in political protest even if he has no desire to do so himself.¹⁸¹ Similarly, a person should be free to refrain from a functioning, or to prioritize one functioning over another if they so choose even if the achievement of this functioning transcends or even conflicts with his personal well-being.¹⁸² Using an example provided in *Development as Freedom*, it is the difference between a person who is fasting and one who is starving.¹⁸³ The end result is that neither is eating but there is a fundamental difference in terms of their positions – one has made a choice, she has the freedom to fast or to stop fasting, to pursue whichever end has value to her, and that freedom itself has value.

While the existence of opportunities or freedoms is intrinsically important, it is also instrumentally important which is where the concept of agency comes in. The expansion of capabilities and freedoms is dependent upon people being able to act and also actually acting and a person's ability to act (or not) and to exercise a particular freedom or to choose a particular set of functionings to realize is linked to his agency. Consequently, the capabilities approach accepts the principle of each person as an end and requires that people be seen as agents that have different valued objectives rather than as passive entities.¹⁸⁴ For Sen, an agent is not merely an individual who acts on behalf of others; it is a person who acts and brings about change in line with her own conception of the good,¹⁸⁵ who is able to pursue and realize the objectives that she values including, but also extending beyond, those concerns pertaining to her own well-being.¹⁸⁶

The central principles of the capabilities approach reviewed in this section clearly reveal that this theory has at its heart a conception of the particular inherent dignity of the human being, of the importance of having the ability, opportunity and freedom to be an active participant in one's own life. What is somewhat less clear is how Sen's capabilities approach can be used in practice, not to evaluate human life but to actually increase human well-being by influencing the

¹⁸¹ Sen, *Development as Freedom*, *supra* note 153 at 36-37.

¹⁸² See Alkire, *Valuing Freedoms*, *supra* note 180 at 7.

¹⁸³ Sen, *Development as Freedom*, *supra* note 153 at 292.

¹⁸⁴ See e.g. Nussbaum, *Women and Human Development*, *supra* note 153 at 56; Sen, *Development as Freedom*, *supra* note 153 at 18-19; Alkire, "Why the Capability Approach", *supra* note 169 at 124-125.

¹⁸⁵ Sen, *Development as Freedom*, *supra* note 153 at 19; Sen, *Inequality Reexamined*, *supra* note 153 at 56.

¹⁸⁶ Sen, *Development as Freedom*, *supra* note 153 at 19; Alkire & Deneulin, "Human Development", *supra* note 168 at 37; Sen, *Inequality Reexamined*, *supra* note 153 at 56.

design and implementation of law and policy. It is on this point that the ideas of two of the leading capabilities approach scholars, Amartya Sen and Martha Nussbaum, diverge.

C. Operationalizing Sen's Approach: Capabilities and Public Reasoning

If we accept that the quality of human life can be assessed by looking at the capabilities available to an individual, their real freedom and opportunity to achieve valuable functionings, then it follows that efforts to increase the quality of human life should focus on increasing capabilities. But which capabilities do we focus on? In his writing, Sen presents many examples of capabilities but refuses to elaborate any list of central or basic capabilities that could form the objective of a practical application of the capabilities approach or to provide any guidelines for drawing up such a list. His argument against any such list is that the capabilities that are most important will vary depending upon the specific circumstances in question and that it is not possible to develop a complete list and ordering of what constitutes human well-being without specifying the relevant context.¹⁸⁷

In fact, Sen does not reject the idea of creating a list of important capabilities and even recognizes that capabilities must be identified and prioritized; what he rejects is the proposition of a “predetermined canonical list of capabilities, chosen by theorists without any general social discussion or public reasoning.”¹⁸⁸ According to Sen, in order to be legitimate, any list must be the outcome of social discussion or public reasoning.¹⁸⁹ To have one authoritative list that is applicable in all situations substantially diminishes the scope of public reasoning and may even preclude the possibility of public participation which is itself an important part of the human agency and dignity that form the foundation of the capabilities approach.¹⁹⁰ The result is that Sen's capabilities approach is deliberately incomplete but consequently very flexible and pluralistic and can be relevant to a wide variety of different situations.¹⁹¹

¹⁸⁷ See Alkire & Deneulin, “Human Development”, *supra* note 168 at 43; Amartya Sen, “Human Rights and Capabilities” (2005) 6:2 J Human Development 151 at 157 [Sen, “Human Rights and Capabilities”].

¹⁸⁸ Amartya Sen, “Capabilities, Lists, and Public Reason: Continuing the Conversation” (2004) 10(3) Feminist Economics 77 at 77 [Sen, “Continuing the Conversation”]; Sen, “Human Rights and Capabilities”, *supra* note 187 at 158.

¹⁸⁹ See generally Sen, “Human Rights and Capabilities”, *supra* note 187.

¹⁹⁰ See generally *ibid*; see also Sen, “Continuing the Conversation”, *supra* note 188.

¹⁹¹ See Alkire, “Why the Capability Approach”, *supra* note 169 at 119.

From a purely theoretical perspective, Sen's desire to ensure the broadest possible space for public debate is admirable in that it recognizes the agency of individuals and respects the ethical, philosophical, cultural and circumstantial differences that exist between communities. However, for the purposes of this analysis Sen's approach has at least two substantial shortcomings. The first weakness is a philosophical one that relates to the idea that it is not possible to elaborate a list of basic capabilities that are applicable in all circumstances. At its extreme, that assertion raises the specter of relativism. Examined more closely, it is fairly certain that Sen would not take the argument to that level as the very language of the capabilities approach, with its emphasis on "functionings of value"¹⁹² and the "things that a person has reason to value,"¹⁹³ clearly indicates that there are certain capabilities that can *not* be endorsed as part of a list, namely those functionings that are harmful or in violation of an individual's dignity even if they are an integral part of a particular culture. In fact, Sen himself admits that there are certain basic capabilities that would likely feature, though not necessarily with the same weight, in any list of relevant capabilities in any society.¹⁹⁴ This lends some support to the argument that will be presented below that there *are* in fact capabilities that are universally important and that can and should form the basis of the application of the capabilities approach in all situations. This set of capabilities is necessary but not sufficient to all circumstances. Thus Sen is correct in asserting that there is no one list that will completely satisfy every situation but does not give sufficient weight to the fact that there is still a core set of capabilities that will indeed be applicable in all cases.

The second criticism of Sen's approach is that it is incomplete (deliberately so) and, as a consequence, cannot be effectively employed as the basis for policy decisions.¹⁹⁵ In other words, although we can use the idea of capabilities to evaluate the current state of affairs in a particular situation by examining the breadth of the capabilities that individuals have, without a specific list of capabilities or a guide as to how such a list could be elucidated, Sen's approach provides little guidance as to how this framework could be applied in practice. Would Sen argue that we can only use the capabilities approach as a guide for action when there has been a comprehensive process of public discussion and democratic debate that has resulted in a specific list of

¹⁹² *Ibid* at 121.

¹⁹³ Sen, *Development as Freedom*, *supra* note 153 at 56.

¹⁹⁴ Sen, "Continuing the Conversation", *supra* note 188 at 79.

¹⁹⁵ See e.g. Polly Vizard, "Specifying and Justifying a Basic Capability Set: Should the International Human Rights Framework be Given a More Direct Role?" (2007) 35:3 *Oxford Development Studies* 225 at 227.

capabilities and that such a process must be completed in every situation where there is a question of development? Although perhaps theoretically attractive, it is not an entirely realistic proposition when considered in terms of practical implementation.

By not adopting a concrete list of capabilities and relying instead on public debate and discussion within a particular community to determine and order important capabilities, Sen is overlooking the potential impact of power dynamics within the community on this deliberation. It is all very well to aspire to free and fair dialogue that will result in a consensus regarding which capabilities should be the focus of development efforts, but what guarantee is there that there will actually be a consensus? Within any society or community, even one that is disadvantaged as a whole, there are individuals who wield a disproportionate amount of power: these may be the economic elite or members of a particular religious, gender, family, racial, social or political group. There is always a concern that these individuals or groups will choose capabilities that further their own interests regardless of the effects on others within the community.¹⁹⁶ This risk is particularly great given that the capabilities approach was originally designed with situations of under-development and poverty in mind, situations where the groups most in need of assistance to increase their capabilities are characterized by social exclusion, disadvantage and voicelessness. It is difficult to reconcile the possibility of a list of capabilities that reproduces these disadvantages with the concepts of human dignity and individual worth that underpin the capabilities approach. Should we merely accept what may be an unfortunate outcome as the legitimate result of public debate? How can a list of capabilities that is skewed due to power imbalances, coercion or other improper influence be used to improve the situation of the most vulnerable? Thus, although the adherence to a pluralistic and flexible capabilities approach that prioritizes agency and public debate and discussion is theoretically admirable, it is clear that Sen's capabilities approach does not lend itself easily to practical implementation.

D. Social Justice and Martha Nussbaum's Central Capabilities

In contrast to Sen who aims to establish a general framework for the evaluation of social arrangements and the quality of life of individuals through his capabilities approach, Nussbaum seeks to produce a normative partial (and minimal) theory of social justice based on respect for the inherent dignity of the human being that outlines the fundamental political entitlements of

¹⁹⁶ See Alkire & Deneulin, "Human Development", *supra* note 168 at 43.

individuals. In her version of the capabilities approach, Nussbaum explicitly states that she is not attempting to develop a comprehensive conception of the “good”. Instead, the approach she advocates is part of a “partial moral conception” and, as it is introduced for political purposes, it does not have, nor need, a basis in metaphysical ideas.¹⁹⁷ At the core of her theory, Nussbaum introduces two important concepts: that of central capabilities and that of a capability threshold.¹⁹⁸

To start, Nussbaum’s capabilities approach is primarily concerned with the protection of “areas of freedom so central that their removal makes a life not worthy of human dignity.”¹⁹⁹ In order for the capabilities approach to have direct political application, Nussbaum argues that an actual list of central capabilities is needed to act as the focus for political planning.²⁰⁰ This list of central capabilities then represents “a political conception of human capability that is the potential object of an overlapping consensus among all the reasonable comprehensive doctrines.”²⁰¹ The origins of the idea of an overlapping consensus can be found in the work of John Rawls and though the context in which the term is used here is somewhat different, the basic principle is similar. Briefly, Rawls referred to the idea of an overlapping consensus in his discussion of stable liberal societies. In that context, an overlapping consensus refers to the situation where citizens support the same basic laws but for different reasons.²⁰² In the capabilities approach, the central capabilities are those capabilities that are, or have the potential to be part of such a consensus – accepted by the major religious and secular comprehensive philosophies regardless of what other commonalities or disagreements exist. Thus, while Nussbaum’s approach does not have a metaphysical grounding itself, it is constructed in such a way as to be compatible with many different philosophical streams.

In addition to introducing the concept of central capabilities, Nussbaum has advanced a list of ten central capabilities that she considers to be the potential object of an overlapping consensus.²⁰³

¹⁹⁷ Nussbaum, *Creating Capabilities*, *supra* note 29 at 109.

¹⁹⁸ See Nussbaum, “Capabilities and Human Rights”, *supra* note 178.

¹⁹⁹ Nussbaum, *Creating Capabilities*, *supra* note 29 at 31.

²⁰⁰ Nussbaum, “Capabilities and Human Rights”, *supra* note 178 at 286.

²⁰¹ Nussbaum, *Creating Capabilities*, *supra* note 29 at 169.

²⁰² Leif Wenar, “John Rawls”, in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2008 ed, online: plato.stanford.edu/entries/rawls/#StaOveCon.

²⁰³ Given that this list is not being adopted in this text, the elements that make up this list are only mentioned without further elaboration. For a detailed explanation of each element, see Nussbaum, *Creating Capabilities*, *supra* note 29 at 33; Nussbaum, *Women and Human Development*, *supra* note 153 at 78.

- 1) Life
- 2) Bodily health
- 3) Bodily integrity
- 4) Senses, imagination and thought
- 5) Emotions
- 6) Practical reason
- 7) Affiliation
- 8) Other species
- 9) Play
- 10) Control over one's environment (political and material)

Although necessarily connected, each of these capabilities is distinct and must be secured and protected in its own way; providing a broader scope for one central capability does not make up for failing to ensure the protection or realization of another.²⁰⁴

While using a defined list of capabilities has some important benefits such as its potential to neutralize the power dynamics within a community that, as noted above, may influence the choice of capabilities to the detriment of particular groups,²⁰⁵ identifying a specific list of capabilities also opens the door to much potential criticism especially relating to the content of that list. Why are these specific elements included? What about other capabilities? According to Nussbaum's theory, the elements that make up her list of central capabilities are so absolutely fundamental that the absence of any one of these capabilities results in a life that is not worthy of human dignity – a life that is something less than fully human.²⁰⁶ As every individual is endowed with the same human dignity, and as these capabilities are necessary to the full respect for that dignity, it follows logically that every individual will require these same basic capabilities.

Despite the apparent categorical nature of her list, Nussbaum does allow for some flexibility. While the elements on the list of central capabilities are fundamental, the list itself is not immutable; it is subject to constant revision and rethinking (though it can be assumed that any changes, especially deletions, would require substantial justification).²⁰⁷ Moreover, the capabilities included in the list are deliberately abstract and broad, and as such there is the opportunity for further refinement and specification, not to mention adaptation, through public

²⁰⁴ See e.g. Nussbaum, *Creating Capabilities*, *supra* note 29 at 97.

²⁰⁵ This effect is increased when, as suggested later in this chapter, the list of capabilities adopted corresponds to the list of fundamental human rights as these rights, by definition, protect the most vulnerable members of society by giving ensuring their equality.

²⁰⁶ See Nussbaum, *Women and Human Development*, *supra* note 153 at 74; see also Nussbaum, "Capabilities and Human Rights", *supra* note 178 at 286.

²⁰⁷ Nussbaum, *Creating Capabilities*, *supra* note 29 at 36.

and political deliberation according to the specific circumstances of each situation.²⁰⁸ This adoption of a list of central capabilities also does not preclude diversity because many of the principles and rights that underpin notions of pluralism are included in the list of central capabilities such as the concepts of freedom of thought and expression, self-determination and individual agency.²⁰⁹ Finally, the central capabilities are only a *partial* moral conception; they represent the bare minimum required by respect for human dignity. In every situation there will be a broad range of capabilities that are fundamentally necessary and that will include, but not be limited to, the central capabilities. The other capabilities that must be realized will be determined on a case by case basis.

As important as the list of central capabilities is, it is the introduction by Nussbaum of the concept of a capability threshold that ultimately establishes her capabilities approach as a partial theory of social justice. Nussbaum's claim is that "respect for human dignity requires that citizens be placed above an ample (specified) threshold of capability" with respect to all of the central capabilities.²¹⁰ The exact location of the threshold in each society, like the specification of central capabilities, should be a product of public and democratic debate and deliberation. Conceived thus, in order to be considered even minimally just, society (often embodied by the state) must secure to all individuals at very least this minimum threshold level of each central capability.²¹¹ As a *partial* theory of justice, Nussbaum's threshold level of central capabilities must be regarded as a necessary but not necessarily sufficient condition for a just society. Real justice may often require more than the social minimum established by the capabilities approach. For instance, Nussbaum's capabilities approach is silent with respect to distributional problems and the resolution of inequalities above the threshold level. Put into more practical terms,

²⁰⁸ See *ibid* at 40.

²⁰⁹ See *ibid* at 110.

²¹⁰ *Ibid* at 36. Note that Nussbaum expressly states that she uses the language of citizenship to refer to the primary case but does not mean to deny the entitlements of other members of society who are not citizens of the country in which they live. Although this caveat goes some way to mitigating her citizen-centric approach, it will be suggested below that insofar as human dignity is relied upon as a foundational principle, the capabilities of citizens should not be prioritized over those of non-citizens.

²¹¹ See *ibid* at 32; see generally Martha Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" in Alexander Kaufman, ed, *Capabilities Equality: Basic Issues and Problems* (New York: Routledge, 2006) 44 [Nussbaum, "Capabilities as Entitlements"].

Note that in some cases, for example with regards to the capability for health, the government cannot actually ensure the capability itself – a government can't ensure that you will be healthy, it cannot control whether or not you get cancer or some other illness – all that can be expected is that the government will deliver the social basis of these capabilities (education, accessible health services, proper sanitation, etc.). Nussbaum, *Women and Human Development*, *supra* note 153 at 89.

achieving a threshold level of each of the central capabilities may not be sufficient for a truly just society but a just society is impossible without it.²¹²

Importantly, together the list of central capabilities and the concept of a capability threshold can form the basis of specific claims that individuals are entitled to make on the state.²¹³ Nussbaum proposes that these claims can be translated into important constitutional principles that both embody and protect central capabilities.²¹⁴ This process may be seen as a two-way street. On the one hand, the list of capabilities can act as a source for political and constitutional principles and can enlighten judicial interpretation and the implementation of legislation. On the other hand, it is also through the process of judicial interpretation and policy development that the central capabilities are expounded upon, specified and given more concrete substance depending upon the precise circumstances in question.

E. Shared Characteristics: Applying Development Theory to PRS

In addition to the formal recognition of the “gap” between relief and development, the impetus for drawing on development theories in addressing protracted refugee situations stems from the acknowledgement that PRS and situations of under-development share many characteristics. In fact, UNHCR has repeatedly recognized the connection between refugee crises and poverty or under-development. In its report on global trends in 2012, UNHCR noted that four fifths of the world’s refugee population are hosted in developing countries and that 2.4 million refugees reside in the 49 Least Development Countries.²¹⁵ Additionally, more than 50% of the refugees under UNHCR’s mandate are hosted by countries whose GDP per capita is below 5000 USD.²¹⁶ In the *Handbook for Planning and Implementing Development Assistance for Refugees*, UNHCR further noted that poverty is a common feature for refugees but also for refugee hosting areas.²¹⁷

²¹² Nussbaum, *Creating Capabilities*, *supra* note 29 at 40; Nussbaum, *Women and Human Development*, *supra* note 153 at 75.

²¹³ Nussbaum, *Creating Capabilities*, *supra* note 29 at 64.

²¹⁴ See generally *ibid*; Nussbaum, *Women and Human Development*, *supra* note 153.

²¹⁵ UNHCR, *Displacement: The New 21st Century Challenge*, UNHCR Global Trends 2012 (2013) at 2, online: www.unhcr.org/51bacb0f9.html.

²¹⁶ *Ibid*.

²¹⁷ UNHCR, *DAR Handbook*, *supra* note 124 at 9.

Poverty is not the only common characteristic; both refugees and individuals in situations of under-development also suffer from social exclusion.²¹⁸ There are many different definitions of social exclusion, but at its core it represents the whole or partial exclusion of individuals or groups from fully participating in the society in which they live.²¹⁹ People who are poor either in terms of finances or capabilities are often excluded from society to some extent and that exclusion further restricts the freedoms and opportunities available to those individuals. Thus they are caught in a vicious circle where their poverty results in their exclusion which results in turn in greater poverty.

In industrialized societies, social exclusion is often the result of financial poverty, but it is also linked to factors such as reliance on social and housing assistance and on food banks, unemployment, disenfranchisement, lack of education/illiteracy, etc. These factors establish barriers that prevent certain people from being full members of our society. Similarly, refugees are excluded both in practice and legally from participating in the life of the host state. In addition to the physical separation, even after ten or fifteen years, refugees in PRS may be dependent upon food and material handouts which means that they have limited participation in the normal commerce of the state, they are unable to integrate into the workforce, they attend different schools and they are prevented from participating in the political life of the state in which they live. From a legal standpoint, the temporary and insecure legal status of refugees and the specific rights regime that applies to them, deepen and entrench the social exclusion that refugees are subject to, leaving them open to potential exploitation and abuse.

In addition to, or perhaps as part of social exclusion, individuals and groups in PRS and in situations of under-development are also more likely to suffer from discrimination, vulnerability and lack of voice and agency. While discrimination is a human rights violation in itself, as well as both a cause and a consequence of social exclusion, it can also be a precipitating factor in the restriction of other human rights, thereby increasing the physical, legal and economic insecurity of individuals. Individuals and groups that are excluded from society and suffer discrimination are not only significantly more vulnerable to violence, criminality and

²¹⁸ For a description of a social exclusion based approach to development, see generally Caterina Ruggeri Laderchi, Ruhi Saith & Frances Stewart, "Does it Matter that we do not Agree on the Definition of Poverty? A Comparison of Four Approaches" (September 2003) 31:3 Oxford Development Studies 243.

²¹⁹ European Foundation, *Public Welfare Services and Social Exclusion: The Development of Consumer Oriented Initiatives in the European Union* (Dublin: The European Foundation, 1995), quoted in Ruggeri Laderchi, Saith & Stewart, *supra* note 218 at 257; Ruggeri Laderchi, Saith & Stewart, *supra* note 218 at 258.

insecurity, but the impact of these events is likely to be greater as it is harder for vulnerable groups to obtain redress.²²⁰ These individuals and groups are also more vulnerable to events beyond anyone's control such as environmental disasters, famine and disease, as they lack the ability to insure themselves against these eventualities or to mitigate their effects. Vulnerable groups, whether made up of refugees, minorities, the poor or other communities, are also characterised by a lack of agency and voice.²²¹ They are often unable to determine the course of their own lives, to act and effect change on their own behalf (agency) or to participate actively in the decision-making processes (political, legal, social, economic, etc.) that affect their lives (voice). Vulnerable groups may lack the skills, resources or abilities necessary to take action or they may be denied the opportunity to take action through discriminatory legislation and practices such as restrictions on free speech, freedom of association, freedom of movement, right to work and access to services. In either case, the needs and interests, not to mention rights, of vulnerable groups are too often overlooked.

Ultimately, these shared characteristics result in the inability of individuals and groups to achieve the functionings that they value and have reason to value; in short, they suffer from a capability deficiency. Both refugees in protracted refugee situations and individuals caught in situations of under-development lack the freedom and opportunity to achieve valuable functionings, to determine the course of their own lives and to realize their desired ends.²²²

III. Conclusion

Despite the promise of the capabilities approach as a more dignity-centered approach to situations of disadvantage and marginalization, if a society is to be judged based on how it treats its most vulnerable members, the global community, particularly state and inter-state actors, deserves to be judged harshly. Record levels of protracted displacement and the exclusion and violations of human rights and dignity that are characteristic of these situations represent a fundamental failure of both political and legal regimes. The longstanding inability of states, inter-state and non-state actors to effectively protect the dignity of displaced persons in exile,

²²⁰ UNDP, *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Asia-Pacific Rights and Justice Initiative (Bangkok: UNDP, 2005) at 3 [UNDP, *Programming for Justice*].

²²¹ The concept of agency and its relevance in protracted refugee situations is discussed in detail in subsequent chapters.

²²² Sen, *Development as Freedom*, *supra* note 153 at 87.

much less resolve situations of displacement, suggests that it is time to seek out new approaches that are consistent with a commitment to equal and universal human rights. By combining elements of development and legal theory, the following chapters will provide an alternative framework for understanding of protracted refugee situations and, by extension, the rights and obligations that arise from them. With an emphasis on the critical role that the law and legal mechanisms and institutions play in guaranteeing the human rights of individuals, this proposed reconception of protracted refugee situations will endeavour to demonstrate how the inherent dignity of the human person imposes obligations on the host state to ensure, among other things, the development of human capabilities and agency.

Chapter 2 - The State-Refugee Fiduciary Relationship: The Legal Obligation to Secure Human Rights-based Capabilities

I. Introduction

In the previous chapter we discussed the “gap” between relief and development but there is another gap that has revealed itself: the gap between theory and practice. In a world where the inherent dignity and equal and fundamental rights of each human being have been repeatedly affirmed, why has much refugee policy and programming in practice continued to be largely based on outdated and discriminatory notions of charity and care and maintenance? There have, of course, been many smaller initiatives and programs that have embraced a human rights-based approach but by and large states and the main international actors have been unable to translate the theory of human rights into their realization on the ground. Although the objective of this dissertation is to demonstrate the need for substantial changes in refugee assistance strategies in order to bring them in line with a commitment to human dignity and human rights, to achieve these objectives we first need to change how we see refugee situations and the rights and obligations that arise within them. Thus, this chapter seeks to outline an alternative conceptual framework which will provide a strong theoretical foundation for changes in the development of refugee law, policy and programming.

This new conceptual framework is based substantially upon a combination of Martha Nussbaum’s capabilities approach and the fiduciary theory of state legal authority. Like Nussbaum’s approach, what is being proposed here is not a comprehensive theory of the “good life” but a partial theory of justice based on a specific list of central capabilities which constitute the minimum conditions necessary to a dignified life. A state that fails to secure a threshold level of each of these basic capabilities then “falls short of being a fully just society.”²²³ Where this proposal differs from Nussbaum’s approach is in the content of the list of central capabilities. Instead of Nussbaum’s somewhat idiosyncratic list of central capabilities, the minimum capabilities necessary to a dignified life should be seen to be those that are embodied in the

²²³ Nussbaum, “Capabilities as Entitlements”, *supra* note 211 at 51.

International Bill of Human Rights.²²⁴ By combining the conceptual weight of human rights with pragmatism of the capabilities approach, the human rights-based capabilities approach can provide a foundation for effective interventions in refugee policy and programming.

As this chapter will show, the human rights-based capabilities approach, however, can be more than merely a set of moral or political prescriptions when approached through the lens of the fiduciary theory of state legal authority; it can be a set of legal entitlements of refugees and legal obligations of the state. By reconceiving the refugee-state relationship as being fiduciary in nature, and thus by definition giving rise to certain specific legal obligations, the fiduciary theory provides the foundation for the assertion that states, and potentially other power-holders as well, are under a legal obligation to provide those persons under their power with a minimum level of the basic, or central, human rights-based capabilities. In short, the proposition advanced here combines the moral and political authority of the capabilities approach with the legal authority of the fiduciary theory to provide a theoretical basis for calling upon states to give greater force and effect to human rights principles in practice. Underpinning this conceptual framework is the standard account of the purpose of the state which is, at a minimum, to establish the conditions under which individuals can live a secure and dignified life.²²⁵

II. A Human Rights-based Capabilities Approach

In the 2000 *Human Development Report* it is stated that “Human rights and human development share a common vision and a common purpose – to secure the freedom, well-being and dignity of all people everywhere.”²²⁶ Nevertheless, while Sen and Nussbaum both acknowledge the connections between human rights and capabilities, and the common

²²⁴ The International Bill of Human Rights consists of the *Universal Declaration of Human Rights* (GA Res 217(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 710), the *International Covenant on Economic, Social and Cultural Rights* (16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*]), and the *International Covenant on Civil and Political Rights* (*ICCPR*, *supra* note 73) and its two *Optional Protocols* [*Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991)].

²²⁵ Nussbaum, *Creating Capabilities*, *supra* note 29 at c. 3; Evan Fox-Decent & Evan Criddle, *International Law and the Fiduciary Constitution of Sovereignty*, New York: Oxford University Press [forthcoming in 2015] [Fox-Decent & Criddle, *International Law*].

²²⁶ UNDP, *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000) at 1.

motivation to protect and respect the dignity of individuals, they approach this relationship quite differently.

Sen discusses human rights primarily with regards to the distinction between the opportunity aspect and the process aspect of freedom. The process aspect refers to the more procedural dimension of freedom of action and decision (whether the person is free to make autonomous decisions without interference) while the opportunity aspect refers to the substantive opportunities that an individual has to achieve those things that she has reason to value.²²⁷ To explain this distinction more clearly, consider the example of a man who decides to participate in a political demonstration. That individual benefits from both dimensions of freedom. On the other hand, if that man (who was going to participate anyhow) is ordered by government officials to take part in the demonstration, there has been a violation of the process aspect of his freedom since a specific action is being forced upon him (regardless of whether he would have chosen that same course of action on his own). Consider then a third case where the government officials order the man to stay home and watch TV. In this case, Sen would conclude that both the process aspect of freedom (being forced to do something) and the opportunity aspect (doing something he didn't want to do) have been violated. According to Sen, the content of human rights reflects the importance of both opportunity and process. Capabilities, on the other hand, cannot fully capture the process dimension of freedom but can contribute significantly to our understanding of the concept of opportunity by shifting our focus to whether or not an individual is actually able to *achieve* the ends that she values as opposed to whether she merely has the means to pursue them. Thus, capabilities are able to highlight how different individuals with the same means may not have the same opportunities given the conversion difficulties that come into play.²²⁸ So although there are links between human rights and capabilities, and many human rights can be characterized and expressed as capabilities, one cannot be completely subsumed by the other.²²⁹ Sen also reserves a role for human rights in the process of specifying valuable capabilities and determining their relative importance through public reasoning and social debate

²²⁷ Sen, *Development as Freedom*, *supra* note 153 at 17; Sen, "Human Rights and Capabilities", *supra* note 187 at 87; Vizard, *supra* note 195 at 229.

²²⁸ Sen, "Human Rights and Capabilities", *supra* note 187 at 155. But see Martha Nussbaum, "Capabilities, Entitlements, Rights: Supplementation and Critique" (2011) 12:1 J Human Development and Capabilities 23 at 28 [Nussbaum, "Supplementation and Critique"].

²²⁹ See Sen, "Human Rights and Capabilities", *supra* note 187 at 163; see generally Polly Vizard, Sakiko Fukuda-Parr & Diane Elson, "Introduction: The Capability Approach and Human Rights" (2011) 12:1 Journal of Human Development and Capabilities 1.

by identifying human rights as an important source of information that can, and should, be used to inform those discussions.²³⁰

While much of Sen's writing focuses on the concept of freedom, Nussbaum appears much more willing to embrace and use the concept and language of human rights, even going so far as to characterize her version of the capabilities approach as a type of human rights approach. She also acknowledges the common foundation that capabilities and human rights share: the idea that all human beings possess certain core entitlements simply by virtue of their shared humanity and that it is the duty of society to respect and support these entitlements.²³¹ Nevertheless, while the content of capabilities covers much of the same ground as first and second generation human rights, and while both capabilities and human rights can provide a basis for "cross-cultural comparison" and basic constitutional principles,²³² Nussbaum does not conflate these two concepts suggesting instead that capabilities and human rights are both supplementary and complementary.²³³

In particular, Nussbaum suggests that capabilities can supplement human rights by addressing some of the criticisms or weaknesses of which human rights have been accused.²³⁴ To start with, the idea of human rights has been understood in many different ways with disagreements arising as to the basis of a rights claim, whether rights are pre-political or the product of laws and institutions, whether they are side-constraints or substantive social goals, whether rights belong only to individuals or also to groups, etc.²³⁵ By demonstrating a philosophical clarity regarding these questions and the basic notions involved that human rights lack, and simply by being substantially more concrete and down-to-earth, the language of capabilities can help to clarify the nature and scope of human rights.²³⁶ Finally, Nussbaum suggests that the language of capabilities emphasizes the material and social aspects of rights and the need for positive action (generally on the part of the government) in order to establish the

²³⁰ Alkire, "Why the Capability Approach", *supra* note 169 at 124.

²³¹ Nussbaum, *Creating Capabilities*, *supra* note 29 at 62.

²³² *Ibid* at 62; Nussbaum, "Supplementation and Critique", *supra* note 228 at 23.

²³³ See e.g. Nussbaum, *Women and Human Development*, *supra* note 153 at 99.

²³⁴ See e.g. Nussbaum, *Creating Capabilities*, *supra* note 29 at 63.

²³⁵ See e.g. Nussbaum, "Supplementation and Critique", *supra* note 228 at 24; Nussbaum, *Women and Human Development*, *supra* note 153 at 97.

²³⁶ Nussbaum, *Creating Capabilities*, *supra* note 29 at 63; Nussbaum, *Women and Human Development*, *supra* note 153 at 97. Capabilities are based upon the bare humanity of the person, are pre-political and represent substantive social goals.

social conditions necessary for the realization of rights thereby outlining more clearly the relationship between duties and entitlements.²³⁷

Despite being a proponent of capabilities, Nussbaum explicitly recognizes the continued relevance and value added of the language of human rights. In particular, she acknowledges that the language of human rights speaks directly to the idea of urgent, justified and non-negotiable entitlements to certain types of treatment regardless of the surrounding circumstances, grounded in the notion of basic justice in a way that capabilities do not.²³⁸ Referencing human rights also identifies these claims as being of a particular sort – they are especially important claims that every individual has by virtue of their bare humanity.²³⁹ The language of human rights also has the capacity to mobilize political action and to call upon a body of international legal and political standards in a way that the language of capabilities cannot yet do.²⁴⁰

Nussbaum’s analysis of human rights and capabilities, while maintaining the distinction between these two concepts, highlights the overlap and interplay between capabilities and fundamental human rights at the conceptual level and their complementary nature. The proposition made here is that this overlap and interplay indicates the potential for a much closer linkage where human rights and capabilities can be integrated into a single approach with fundamental human rights, namely those contained in the International Bill of Rights, taking the place of central capabilities. For lack of a better term, we will call this approach the Human Rights-based Capabilities Approach (HRCA).²⁴¹

A. Human Rights *as* Central Capabilities

In chapter 1 we discussed the tension between Sen and Nussbaum regarding specifying a concrete list of capabilities. Though Sen’s reluctance to narrow the scope of public deliberation by identifying a list of capabilities is admirable in terms of its commitment to the agency of individuals, its flexibility and its pluralism, the capabilities approach is being adopted here not as

²³⁷ Nussbaum, “Supplementation and Critique”, *supra* note 228 at 29; Nussbaum, *Creating Capabilities*, *supra* note 29 at 65.

²³⁸ Nussbaum, *Women and Human Development*, *supra* note 153 at 100; Nussbaum, *Creating Capabilities*, *supra* note 29 at 68; Nussbaum, “Supplementation and Critique”, *supra* note 228 at 36.

²³⁹ Nussbaum, *Creating Capabilities*, *supra* note 29 at 68; Nussbaum, *Women and Human Development*, *supra* note 153 at 100; Nussbaum, “Capabilities and Human Rights”, *supra* note 178 at 293.

²⁴⁰ Vizard, Fukuda-Parr & Elson, *supra* note 229 at 12; Nussbaum, “Supplementation and Critique”, *supra* note 228 at 36.

²⁴¹ Note that this terminology was also used by Polly Vizard in her article “Specifying and Justifying a Basic Capability Set: Should the International Human Rights Framework be given a more Direct Role?” *supra* note 195.

a comprehensive philosophy but as a political doctrine that can be used to inform the development of policy and the implementation of effective action and provide the foundation for specific individual claims against the state. In these endeavours, the difficulties associated with operationalizing Sen's deliberately incomplete approach lead us to favor Nussbaum's conception of a partial theory of justice based on a list of minimally necessary capabilities that can act as a focal point for political action.

In explaining her own list of central capabilities, Nussbaum emphasizes two fundamental characteristics that define central capabilities. First, central capabilities are capabilities that are central to the idea of "a life worthy of human dignity;"²⁴² without an adequate level of these capabilities, we cannot say that an individual is living a dignified life. Second, central capabilities must have the potential to be the object of an overlapping consensus, by which Nussbaum means that they can form the moral core of a political conception that can reasonably be supported by individuals regardless of their different metaphysical, religious or ethical worldviews.²⁴³

While Nussbaum's list of central capabilities may indeed have the potential to form the basis of a consensus, overlapping as they do with concepts of human rights, serious questions remain regarding the contents and origins of that list. Some of the items on Nussbaum's list are more or less familiar such as "life", "bodily integrity" and "affiliation" but others are not immediately recognizable or easily understood (for example: "emotions", "other species" or even "play"). These are not terms that are in general usage; they are concepts or categories of social goods that Nussbaum has developed. While Nussbaum suggests that the list of central capabilities may be modified in the future and that there is room for public debate and deliberation in determining the required threshold level of each capability in individual situations, it is unclear why this particular list is to be preferred over others and where her authority to specify such a list comes from. In contrast, Sen clearly asserts that the authority for developing a list of central capabilities must come from a process of public debate and reasoning.²⁴⁴ It is the contention here that fundamental human rights, as expressed in the International Bill of Rights, fully satisfy all of the criteria for central capabilities including

²⁴² Nussbaum, *Creating Capabilities*, *supra* note 29 at 166.

²⁴³ Nussbaum, *Women and Human Development*, *supra* note 153 at 76. The term "overlapping consensus" is borrowed from John Rawls, *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 1996).

²⁴⁴ See generally Sen, "Human Rights and Capabilities", *supra* note 187.

Nussbaum's requirement that central capabilities be the potential object of an overlapping consensus and Sen's requirement that they be the product of public debate and reasoning and do so in a manner that is far superior to any existing list.

To start, like capabilities, fundamental human rights are founded on the concept of the inherent dignity of the human person. This foundation is explicitly recognized in the three main documents that make up the core of the International Bill of Rights and to which we should look when considering the basic capabilities necessary to a life with dignity: the *Universal Declaration of Human Rights*, the *ICCPR* and the *ICESCR*. For the pure theorist or the philosopher it may seem somewhat pedestrian to be referring to legal instruments as the basis for the capabilities approach but given the practical intent behind this theoretical framework it is not the purpose of this thesis to engage in a discussion of the potential metaphysical basis of human rights and capabilities. Furthermore, as the following sections will demonstrate, having the list of central capabilities clearly set out in a legally authoritative document has clear advantages.

In assessing their potential to form the object of an overlapping consensus, we must look to the universality of human rights. The universality of human rights can be understood in two different ways: human rights are universal in that every individual possesses them simply by virtue of their common humanity, and they are universal because their existence has been universally accepted. The latter understanding provides support for the assertion that human rights can be seen as being the object of an overlapping consensus insofar as they have received universal approbation – or at least as universal as can be expected in our diverse world. The virtually universal ratification of the legal instruments that make up the International Bill of Rights is a strong indication of the general acceptance of human rights, of their universality and ultimately of the existence of an overlapping consensus. Although there continue to be those who criticize human rights as being a predominantly Western construct and who see their spread as a reflection of Western neo-imperialism, both the principles of human rights and their legal expression can be found in different countries and traditions around the world and throughout history.²⁴⁵ While the current *expression* of human rights may be primarily “Western” in origin, the *substance* of human rights is not. So not only do human rights have the potential to form the

²⁴⁵ See e.g. Nussbaum, *Creating Capabilities*, *supra* note 29 at 101ff; Amartya Sen, “Human Rights and Asian Values” (1997) July 14/21 *The New Republic* 33; *contra* Donnelly, “Human Dignity”, *supra* note 108.

basis of an overlapping consensus, but it can be argued that to some extent they already *are* the subject of such a consensus.

Unlike Nussbaum's list of central capabilities which has no real foundation outside of her own theory and which has not been the subject of public deliberation, the content, scope and foundation of human rights have been debated and discussed for hundreds of years. This discussion has taken many different forms throughout history, but coalesced (in an admittedly European context) after World War II into the current international human rights legal and political framework. Though the main human rights instruments (*UDHR*, *ICCPR* and *ICESCR*) were drafted over fifty years ago, the public discussion and debate continue with regards to their interpretation, their application and the development of new human rights instruments. A list of central capabilities based on fundamental human rights is not static or immutable, as the international human rights framework reflects an ongoing process of evolution and negotiation, of public debate and deliberation, between governments and with other actors.²⁴⁶

In keeping with Nussbaum's assertion that public reasoning should determine the threshold level of each capability, while the International Bill of Rights sets out the fundamental human rights that have been universally recognized, in any given situation there needs to be public debate about how these rights are to be interpreted and realized in practice. This discussion and the concretization of these human rights-based central capabilities are influenced by a society's history and traditions and occur in a variety of different forums including through legislation, judicial interpretation, policy development and other democratic processes.²⁴⁷ Thus the space for further public reasoning going forward remains protected. Moreover, it is essential to remember that as central capabilities, fundamental human rights are the starting point, not the final word. What other capabilities, in addition to these central ones, need to be prioritized will also be determined through public deliberation.

Given that there has been no direct vote on the content of the International Bill of Rights, that much of the debate has occurred at the level of high politics and that there has not always been full representation or consensus, one might question whether or not the international human rights framework truly meets the requirements of free and fair public reasoning.²⁴⁸ Nevertheless, fundamental human rights have been publicly tested and endorsed in a manner that Nussbaum's

²⁴⁶ See Vizard, *supra* note 195 at 237.

²⁴⁷ See Nussbaum, "Supplementation and Critique", *supra* note 228 at 29.

²⁴⁸ See Vizard, *supra* note 195 at 235.

capabilities have not been. The concepts of human rights have been the object of debate within domestic legal and political forums as well as at the international level, they have been the subject of scholarship, and they have been at the heart of many popular movements, all of which constitute forms of public deliberation and have led to the popular endorsement of human rights principles. Ultimately, it is the existence of this broad public debate surrounding human rights, as well as the clear statements in support of fundamental human rights in international treaties and documents that provides legitimacy to the human rights-based capabilities approach and moreover endows it with particular political and legal power.

B. Lending the Capabilities Approach Strength: Basic Human Rights Principles

Besides fulfilling both Sen and Nussbaum's requirements for important capabilities, fundamental human rights are associated with several basic principles which can assist in explaining why human rights should form the core of the capabilities approach. These principles are universality, equality, inalienability, indivisibility and interdependence. In the section above, we discussed how the universality of human rights indicates the existence of an overlapping consensus but the principle of universality can also be linked with the principles of equality and inalienability. Together, these three precepts embody the idea that there is something at once unique about the human race and inherent in all of its members that makes us all equally worthy of particular regard, and consequently entitled to equal, universal human rights: namely our human dignity. Respect for human dignity requires that every individual be recognized as being entitled to the fundamental rights set out in international instruments because those rights are all essential for a fully human life. This is the same basic idea behind Nussbaum's list of central capabilities; central capabilities are the conditions that result in a life that is worthy of human dignity.²⁴⁹ When these capabilities are unfulfilled, when individuals are denied their fundamental rights, the result is a life that is something less than fully human and that does not respect the inherent dignity of individuals.

Central capabilities are also described as being separate but indispensable components that are important in their own right but also as part of an "interlocking set of entitlements"

²⁴⁹ See generally Nussbaum, *Creating Capabilities*, *supra* note 29 at 64; Nussbaum, *Women and Human Development*, *supra* note 153 at 73.

whereby certain capabilities may be critical to the fulfillment of others.²⁵⁰ The absence of one central capability cannot be compensated for by providing more of another.²⁵¹ Similarly, human rights, while representing separate capabilities, are indivisible and interdependent.²⁵² One cannot be substituted for another, all are interrelated and a lack of any one of these elements will undermine the others. This is why they are central capabilities: because they are all necessary for a minimally just and dignified life. Thus, fundamental human rights as capabilities have both intrinsic and instrumental value: they each have value in terms of their contribution to a fully human life and also in terms of their contribution to the realization of other capabilities.

C. The Supplementary Role of Capabilities

Earlier in this chapter, we examined the characteristics of human rights that Nussbaum found to be complementary to the capabilities approach; by defining central capabilities in terms of human rights, the capabilities approach gains access to those strengths. Within human rights instruments and national constitutions, urgent claims to specific capabilities have been given political and legal form through the language of human rights. The language of rights and its associated documents have the capacity to mobilize action locally, nationally and internationally to an extent that Nussbaum's list of central capabilities cannot. Human rights language is familiar and consistent, and it carries with it numerous implications regarding the importance and urgency of the claims contained therein.²⁵³ Given these benefits, one might question why we should bother with capabilities at all; why not simply limit our discussion to human rights? The reason for adopting an integrated approach is that while we may disagree about the content of the list of central capabilities, the capabilities approach itself provides a valuable framework for the realization of human rights. Adopting a capabilities framework focuses attention on what it means to have *effective* human rights.

In her discussion of human rights and capabilities, Nussbaum notes that it is possible to say that an individual has been granted a right (for example by legislation) even if that right cannot be exercised or secured in practice as a consequence of legal and social conditions or the

²⁵⁰ Nussbaum, *Creating Capabilities*, *supra* note 29 at 145.

²⁵¹ Nussbaum, "Capabilities and Human Rights", *supra* note 178 at 288.

²⁵² See *Vienna Declaration*, *supra* note 10.

²⁵³ See Deneulin, "Ideas", *supra* note 164 at 61; Nussbaum, "Supplementation and Critique", *supra* note 228 at 36.

lack of institutional or material resources.²⁵⁴ For example, a woman may have the right to freedom of political expression even if she is not permitted to vote in elections. However, if she is not permitted to vote, we cannot say that she has the capability for political expression (at least to that extent). Similarly, a child may have a right to education but if the child must work in order to support his family or if there are no schools within walking distance, the child does not have the requisite capability. In these cases we can say that the individual does not benefit from an *effective* right; possession of that right does not change what the person can be and do so she does not benefit from that central capability. Conceiving of fundamental human rights as capabilities ensures that emphasis is placed not only on the formal existence of rights in theory but on *securing* those rights in practice. Ultimately, it is only when human rights are effective and secured that they are truly meaningful to individuals on the ground. From this focus on securing rights follows the need for government action to protect rights but also to establish the social, legal and material conditions necessary for the realization of those rights. Remember that the principle behind the list of central capabilities is that these are the capabilities that must be achieved for a state to be even minimally just. Consequently, as central capabilities, fundamental human rights become “trumps” with strong priority over other goals that will influence government action and the allocation of resources within the state.²⁵⁵

Another reason for adopting a human rights-based capabilities approach is that it functions well in very different forums, both at the level of high politics and that of ground-level implementation. As noted above, the language of human rights is very familiar and accepted even in the highest levels of political discourse both nationally and internationally. It is a language that has legitimacy and that has been given concrete form in treaties and legislation. It is the subject of much debate and discussion and is capable of mobilizing action by various groups including governments and non-governmental organizations. At the same time, the language of human rights may be more problematic at the ground level because individuals often do not conceive of their own problems and desires in terms of rights. Depending upon the level of education and the cultural context, the language of rights may be unfamiliar or even regarded in a somewhat negative light, even though the *substance* of human rights is generally, though not always, accepted. The language of capabilities bridges this gap by grounding entitlements in the

²⁵⁴ Nussbaum, “Capabilities and Human Rights”, *supra* note 178 at 293.

²⁵⁵ See Nussbaum, “Supplementation and Critique”, *supra* note 228 at 35.

lives of ordinary people without referring to any metaphysical background or specific cultural context.²⁵⁶ Regardless of whether one understands what due process guarantees are or what it means to ensure the highest level of health possible, everyone understands that something is wrong in society when a person is imprisoned without cause or cannot access a medical clinic or does not have the identity papers required to send their child to school. Everyone can understand the objective of expanding what one can be and do. This is one of the strengths of human rights-based capabilities approach; it takes the content and theory of human rights and makes them concrete and accessible.²⁵⁷

The capabilities approach as outlined by Sen also contributes to a better understanding of human rights by helping to explain why the effective exercise of human rights is often very unequal within a community through the concept of conversion difficulties. “Real poverty” in terms of the deprivation of capabilities is exacerbated by the difficulties that some people have in converting resources into valuable functionings.²⁵⁸ As explained in the previous chapter, this is certainly true when talking about income but it is also true when talking about human rights. The existence of conversion difficulties is one of several factors that contribute to the discrepancy between rights as they exist on paper and their effective exercise. Consider as an example the case of the right to education. Although members of a refugee community may be granted the right to obtain an education in theory, if they do not speak the language in which the education is being provided, they will be prevented from realizing this right – from converting the right to be educated into an actual education. It is especially important to consider conversion difficulties when dealing with refugee communities because these are communities that are already in extremely vulnerable situations and that often face immense obstacles in overcoming these difficulties.

By combining the authority and legitimacy of human rights with the grounded nature of capabilities, the human rights-based capabilities approach provides a framework for operationalizing human rights. This integrated approach successfully refocuses our attention on the value of human rights, not merely as moral principles but as concrete entitlements that must be satisfied in order to ensure a dignified life.

²⁵⁶ See *ibid* at 23.

²⁵⁷ See generally *ibid* at 29.

²⁵⁸ See generally Sen, *Development as Freedom*, *supra* note 153 at 88.

D. Potential Critiques of the Human Rights-based Capabilities Approach

As with any theory or proposition, there are no doubt many criticisms that can be levelled against the HRCA but the three that are addressed here relate to the universality, specificity and individualism of the approach.

1. Questioning the Universality of Human Rights-based Capabilities

One longstanding critique of human rights which could consequently be brought against a human rights-based capabilities approach is that human rights are not in fact universal but are instead a western construct and that their propagation around the world is merely a product of western cultural imperialism. There are at least two responses to this assertion. The first, noted by Nussbaum, is that even if true, that assertion does not necessarily constitute an argument against human rights.²⁵⁹ We live in a diverse world where cultures constantly borrow from one another. Whether the principles of human rights originated in one tradition or another is not an argument for or against them. Obviously, it is less desirable to consider a situation where human rights principles were imposed upon another tradition, as some would argue was the case during colonial times, as opposed to being adopted voluntarily.²⁶⁰ Nevertheless, the widespread ratification of human rights treaties and the inclusion of human rights principles in state constitutions, including in countries following independence from colonial powers is evidence that there is something valuable about these principles whatever their origins might be.

The second response is a flat rebuttal of the assertion that human rights are uniquely western in origin. Although the formulation of human rights that is currently in use is largely European, antecedents of human rights can be found in most, if not all, cultures and traditions around the world, often predating the correlative ideas in western traditions. For example, the idea of religious tolerance can be found in the teachings of the Buddhist emperor Ashoka dating back to the third to second centuries B.C.E. Similarly, ancient Hindu law recognizes ten freedoms and virtues that include freedom from violence, want and exploitation. The Qur'an recognizes basic economic rights such as the right to food, shelter and protection against poverty.

²⁵⁹ Nussbaum, *Creating Capabilities*, *supra* note 29 at 102.

²⁶⁰ *Ibid* at 104. In fact, as Nussbaum has noted, in some instances human rights were adopted by some societies in response to their experiences as colonial subjects, not imposed by the colonial powers (who often demonstrated a blatant disregard for the rights of their subjects). Nussbaum, "Supplementation and Critique", *supra* note 228 at 30.

Confucianism advocated mass education as well as limits on the powers of rulers who were understood as having obligations towards their people. And the list goes on.²⁶¹

There are also strong arguments against the claim that the current expansion of human rights is a new form of imperialism. One has only to look at the states that participated in the drafting process for the *Universal Declaration of Human Rights* to see the extent to which human rights were widely accepted even fifty years ago. The drafting committee itself included representatives from China, Lebanon, USSR and Chile. Many other countries, including Cuba and India presented proposals during the drafting process. Finally, states voting in favour of the General Assembly resolution that adopted the UDHR included Afghanistan, China, Ethiopia, Liberia, Pakistan, Thailand and many UN member states from Central and South America. More recently, all international human rights instruments have been both drafted and ratified by a broad range of states coming from all regions of the globe and representing all traditions and cultures. The presence of human rights principles in the national constitutions of many states ranging from Ghana, Venezuela and Indonesia, to Turkey and Uganda also provides evidence to refute the claim of neo-imperialism.

Last but not least, the universality of fundamental human rights was definitively reaffirmed by the *Vienna Declaration and Programme of Action* adopted at the 1993 World Conference on Human Rights which was a truly international exchange involving over 7000 participants including 171 delegations from member states and more than 800 NGOs.²⁶² The final declaration of the conference, which was adopted by consensus by the 171 participate states, put to an end doubts regarding the universality of human rights by affirming that “all human rights are universal, indivisible and interdependent and interrelated,” and that the universal nature of human rights and fundamental freedoms is “beyond question”.²⁶³

2. Human Rights Lack Specificity

One of the critiques of human rights that Nussbaum identifies is the contention that they lack specificity. Although she recognizes their utility and importance, in “Capabilities and

²⁶¹ See Olivia Ball & Paul Gready, *The No-Nonsense Guide to Human Rights* (Toronto: New Internationalist Publications, 2006) at 15; See also Sen, *Development as Freedom*, *supra* note 153 at 230.

²⁶² UNOHCHR, “World Conference on Human Rights. (14-25 June 1993) Vienna, Austria,” online: United Nations Human Rights www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx.

²⁶³ *Vienna Declaration*, *supra* note 10.

Human Rights,” Nussbaum claims that human rights lack theoretical and conceptual clarity.²⁶⁴ She suggests that there are too many disputes and unresolved questions about human rights.²⁶⁵ These include, but are certainly not limited to, disagreements about the content of human rights, the basis of rights claims, whether rights are pre-political or merely the products of laws and institutions,²⁶⁶ whether they belong to the individual or to other entities, whether they correlate with specific duties,²⁶⁷ and whether a right is a claim to a certain standard of treatment or to a particular outcome.²⁶⁸ Indeed, no one who has studied human rights can dispute that they are the subject of many unresolved debates but the question is whether this uncertainty undermines the proposal that human rights should form the basis of the list of central capabilities.

The contention here is that these disagreements are not only unavoidable but are an intrinsic part of the capabilities approach. We are only aware of these discrepancies because human rights have been the subject of much public debate and discussion. Was Nussbaum’s list put to the same test; it is likely that similar disagreements would be noted. What is important is that even without unanimity regarding every one of these questions there is a clear consensus regarding the existence and importance of the body of fundamental human rights contained in the International Bill of Rights. One person may see the right to freedom of expression as having its origin in the God-given rationality of the human person while another sees it as a necessary component of democracy outlined in an international treaty. One person may envision the right to education as including the right to free university while another concludes that it consists only of the right to primary education. In either case, there is still agreement regarding the existence of a right to freedom of expression and a right to education. The HRCA is not intended to be a comprehensive philosophy; it is intended to be a partial theory of social justice that will provide the conceptual framework for concrete policy and action. There is room within this theory for disagreement specifically because ongoing public discussion and negotiation regarding the exact content and form that the realization of each capability will take in a particular situation is a critical component of the effective implementation of the capabilities approach.

²⁶⁴ See Nussbaum, “Capabilities and Human Rights”, *supra* note 178 at 273.

²⁶⁵ *Ibid* at 274.

²⁶⁶ Nussbaum, “Supplementation and Critique”, *supra* note 228 at 24.

²⁶⁷ The question of correlative duties will be dealt with in detail in the following chapter.

²⁶⁸ Nussbaum, “Capabilities and Human Rights”, *supra* note 178 at 274.

3. My Rights and Capabilities: the Critique of Individualism

The last critique is one that has been levelled against the capabilities approach generally, regardless of the existence or content of a list of central capabilities, and consists of the claim that by focusing on the capabilities of each person, on what an individual can be and do, the capabilities approach is too individualistic and places too much emphasis on the individual as a unitary being as opposed to her position as a member of a family, community and society.²⁶⁹ In fact, the capabilities approach does not overlook the importance of collectivities whether they be social groupings, families, states, religious communities or whatever else; these entities are acknowledged as playing a vital role in promoting and protecting human capabilities (we've all heard about there being strength in numbers) and even in specifying capabilities. Being able to form or be a member of such groups is itself recognized as a central human capability. It is never presumed that human being can act in a completely independent manner or that society is ultimately nothing but a collection of individuals.²⁷⁰

The individualism of the capabilities approach is an ethical individualism which “postulates that individuals, and only individuals, are the *ultimate* units of moral concern.”²⁷¹ As human dignity is necessarily individual, each person must be seen, and treated, as an end in herself and is thus the basic unit of not only moral concern but also of political concern within the state. It is this principle of each person as an end on which we can base the claim that the society has an obligation to secure a threshold level of the central capabilities to *each* individual, as opposed to being satisfied with some level of aggregate well-being. Social structures and institutions are still important, but their importance is evaluated in terms of their effect on individual well-being, on what they can do for each person.²⁷²

Collectivities remain vitally important because most choices are not made by individuals alone but by groups (or at very least strongly influenced by groups, for better or worse).²⁷³

²⁶⁹ Ruggeri Laderchi, Saith & Stewart, *supra* note 218 at 257; Alkire & Deneulin, “Human Development”, *supra* note 168 at 35.

²⁷⁰ See Alkire & Deneulin, “Human Development”, *supra* note 168 at 35.

²⁷¹ Ingrid Robeyns, “Sen’s Capability Approach and Feminist Concerns” in S Alkire, M Qizilbash & F Comim, eds, *The Capability Approach: Concepts, Measures and Applications* (Cambridge: Cambridge University Press, 2008) at 90, quoted in Alkire & Deneulin, “Human Development”, *supra* note 168 at 35.

²⁷² See Alkire & Deneulin, “Human Development”, *supra* note 168 at 35; See also Nussbaum, *Women and Human Development*, *supra* note 153 at 251.

²⁷³ While collectivities can be supportive and empowering, they can also restrict and oppress individuals. Consider for example the case of an Afghan girl who wishes to attend school; her family and her religious community can either facilitate her decision or they may prevent her from acting upon her preference.

Groups, whether they are women's groups, minority groups, unions, social movements or political parties, also play a central role in human rights and as well as in development initiatives. They are often both the instigators and the work-horses of social change. Nevertheless, despite the acknowledged importance of collectivities, Sen's original formulation of the capabilities approach focuses specifically on the individual and her capabilities. In addition to the principle of each person as end, another reason for this focus is that if the "smallest fundamental unit of moral concern" is a group (say a family or a community), then any analysis of the situation in question will overlook the inequalities that exist *within* that group.²⁷⁴ Traditionally, the most common base unit for evaluation in development has been the family as it is assumed that members of the family will provide for one another and share resources. However, by using the family as the base unit, the distinctions that the elderly, women and children are subject to within the family are made invisible. In those evaluations it is enough that there is money to feed the children and send them to school. That only the male members of the family receive proper education and healthcare does not figure into the calculations. Thus, to take full account of the distinctions and inequalities that exist within *all* groups, it is necessary to adopt the individual as the primary unit of moral concern.

As we will see in the chapters ahead, this form of individualism is extremely important when dealing with refugee communities in protracted refugee situations. Too often refugees are abstracted into a single uniform mass. Humanitarian actors, aid providers, government officials and the media often talk about what "the refugees" need or what "the refugees" want, without acknowledging the diversity and individuality of the members of refugee communities. Individuals caught in a protracted refugee situation, even if they come from the same country, may have very different backgrounds, skills, knowledge, needs, concerns and desires that must be acknowledged if their situation is to be effectively addressed. Moreover, as in many social groupings, there is no lack of distinction and inequality occurring *within* refugee communities. In the Burmese refugee camps in Thailand there is frequent discrimination against camp residents that do not have UNHCR status by those who do. There is also tension between members of the Karen ethnic group who were primarily farmers and were displaced by widespread military campaigns in their ethnic territories and the small number of refugees who fled Burma because of their explicitly political activities and who are often members of the dominant Burman ethnic

²⁷⁴ Alkire & Deneulin, "Human Development", *supra* note 168 at 35.

group.²⁷⁵ Gender, age, religious affiliation, education, status and political membership are all the bases for varying levels of differential treatment with some individuals suffering from intersecting vulnerabilities (such as disabled women). These are nuances that can only truly be captured by focussing on individuals and by acknowledging that what is most important, from both a political and moral perspective, is what each individual can do and be.

E. Conclusion

In this section we have outlined the reasoning behind adopting the fundamental human rights contained in the International Bill of Rights as the central capabilities of the capabilities approach. Given the extensive, longstanding public deliberation that has given rise to human rights in their current form and the broad endorsement that they enjoy, it is contended that these standards offer the best option for a capabilities approach that is able to fully meet the requirements of human dignity, keeping in mind that the objective here is not to provide a comprehensive theory but a conceptual framework that can provide the basis for effective policy and action.

III. Establishing Human Rights-based Capabilities as Legal Entitlements

So far we have outlined an approach for achieving the conditions for a dignified life based on the combined strengths of human rights principles and the capabilities approach. As attractive as the human rights-based capabilities approach may be at a conceptual level, its effective operationalization requires us to look more closely at the very nature of the entitlements that we are talking about. As envisioned by Sen and Nussbaum, the capabilities approach clearly provides a set of moral or ethical obligations that Nussbaum asserts *should* form the basis of constitutional protections. As the following discussion will substantiate, by grounding the notion of central capabilities in fundamental rights, the human rights-based capabilities approach establishes central capabilities that are not just moral or ethical precepts but that are legal entitlements with corresponding duties that arise as a function of the fiduciary nature of the relationship between individuals and the state. While the human rights-based capabilities

²⁷⁵ Information gathered by the author during interviews with members of the refugee community in Mae La Refugee Camp, Thailand, in June 2011.

approach provides a more comprehensive understanding of what it means to live a dignified life, the fiduciary theory of state legal authority can help us to understand how the conditions for that life can be brought about.

A. The Indeterminacy of Capabilities

Capabilities are entitlements that individuals possess by virtue of their common human dignity. Who has the obligation to fulfill those entitlements and what that obligation demands are questions that are somewhat more obscure but of critical importance if the capabilities approach is to be given full force and effect in practice.

To start, the entitlements embodied in the list of central capabilities (in this case, those based on fundamental human rights) are entitlements that have correlative duties for an entitlement that there is no duty to secure is meaningless in practice.²⁷⁶ In this case, the absence of a duty to secure central capabilities would undermine the very principle of human dignity as it would legitimize the persistence of a situation of indignity, where the conditions necessary to a dignified life remained unmet. This duty exists even if, as noted by Nussbaum, it is difficult to determine on whom it falls.²⁷⁷ Nevertheless, to operationalize the capabilities approach, we need to be able to identify the party that bears the duty and responsibility for realizing central capabilities and this is a question that Nussbaum fails to adequately address.²⁷⁸

In some of her writings, Nussbaum asserts that the entire world is “under a collective obligation to secure the capabilities to all world citizens.”²⁷⁹ We can rationalize this assertion based on the understanding that every individual possesses human dignity and that a violation of the human dignity of one individual is an affront to the human dignity of all. Consequently it is in every person’s interest to protect the dignity of others and to ensure that they are able to live a dignified life. Moreover, we live in a world where social co-operation is unavoidable and each individual’s actions can have an impact on the lives and dignity of others. Given the difference in abilities and resources of individuals, one might suggest that the allocation of duties should

²⁷⁶ Nussbaum, “Supplementation and Critique”, *supra* note 228 at 26.

²⁷⁷ *Ibid.*

²⁷⁸ Ingrid Robeyns, “Equality and Justice” in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London UK: Earthscan and International Development Research Center, 2009) 101 at 115 [Robeyns, “Equality and Justice”].

²⁷⁹ Nussbaum, “Supplementation and Critique”, *supra* note 228 at 26; see also Nussbaum, *Creating Capabilities*, *supra* note 29 at 168; Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass: Belknap Press, Harvard University Press, 2007) at 280 [Nussbaum, *Frontiers of Justice*]. Note that Nussbaum is referring to capabilities generally, not to central capabilities alone.

follow Marx and Engel's maxim "from each according to his ability, to each according to his needs." That is, every person (or institution, given that institutions are made up of individuals) who has the capacity to assist in ensuring that the entitlement to capabilities is secured, must do so to the extent that she is able. Nevertheless, this allocation of responsibility (or lack thereof) is distinctly unhelpful in constructing or implementing social policy or, as is the objective here, in providing a pragmatic working model for responding to protracted refugee situations.²⁸⁰

Consider for a moment the case of the free expression of one's views which we can generally accept as an important capability. Obviously, there is a duty on all individuals to not impede the free expression of others (within reason) but what about the idea of promoting or enabling that free expression? Individuals can make a contribution (for example by organizing forums for expression) but are unable to enact or enforce the laws or guidelines that would actually govern the parameters of free expression. Education is another example of an important capability; every individual can help to educate others and people of means might choose to create schools, but should we really be relying on private individuals and institutions to create the conditions under which the capability of education can be secured? In the end, and as we will discuss below, the appropriate allocation of responsibility depends substantially on what we conceive as being the content of the obligations associated with capabilities: are they merely constraints or do they require some positive action?

An alternative answer that is more practical and theoretically coherent is that while responsibility for other capabilities may be divided up among different parties, the primary obligation for satisfying *central capabilities* falls upon the state.²⁸¹ The justification for this allocation depends largely upon a traditional republican conception of the purpose of the state which is, at a minimum, to secure people's most basic entitlements: those conditions that are necessary for a life consistent with human dignity and which could often not be secured without the government.²⁸² By definition, the central capabilities *are* those conditions that are intimately

²⁸⁰ In several instances, Nussbaum merely remarks that responsibility to realize capabilities may also belong to other actors (individuals, groups, institutions) but that the allocation of these duties is difficult and provides little further assistance. See e.g. Nussbaum, *Frontiers of Justice*, *supra* note 279 at 273ff; Nussbaum, "Supplementation and Critique", *supra* note 228 at 26.

²⁸¹ As the human rights-based capabilities that are equivalent to Nussbaum's central capabilities are the main focus of the human rights-based capabilities approach, a full discussion of the allocation of responsibility for other types of capabilities is beyond the scope of this analysis.

²⁸² See Nussbaum, *Creating Capabilities*, *supra* note 29 at 64; Nussbaum, "Supplementation and Critique", *supra* note 228 at 26.

linked to human dignity and, by extension, to the purpose for which the state exists and so states have an obligation to protect and secure them. This explanation is consistent with Nussbaum's claim that for a state to be minimally just it must secure the central capabilities to individuals within its borders.²⁸³ As its authority depends upon meeting this duty, if it fails to do so, the state undermines its own claim to legitimacy. A state may delegate some part of its obligation to protect and secure capabilities to another entity (a sub-national government, a corporation, a non-governmental organization, etc.), but it is the state that retains ultimate responsibility. The argument that the state is the primary duty-bearer is even stronger in the case of human rights-based central capabilities where it is already a well-accepted principle that states have the main responsibility for providing the legal and political framework and institutions necessary to ensure the respect, protection and fulfillment of fundamental human rights.²⁸⁴

As noted above, the allocation of responsibility also requires us to address the question of the content and nature of the capability obligations. In *Creating Capabilities*, Nussbaum notes that the capabilities approach offers criticism of some standard versions of the human rights models, specifically referring to the conception of rights common in the United States that holds rights to be barriers against interfering state action (negative rights) and nothing more. She suggests that, in contrast, the capabilities approach points to the need for positive action on the part of the state; the state must not only refrain from impeding the central capabilities of individuals but must take active measures to secure them, for, as noted above, the state's legitimacy depends upon the realization of these conditions.²⁸⁵ In reality, the idea that human rights require only negative state action or the absence of interference is unreasonable and highly inconsistent with current human rights law. Even the very traditional understanding of "freedom from" (as opposed to "right to") requires that states actively prevent interference in the exercise of liberties, and provide remedies when such interference occurs, often through the use of judicial mechanisms, policing and administrative measures, all of which are established through positive action by the government. All fundamental rights are rights to do or to be something, but they "are only words unless and until they are made real by government action."²⁸⁶ By focusing

²⁸³ See Nussbaum, *Creating Capabilities*, *supra* note 29 at 36.

²⁸⁴ Deneulin, "Ideas", *supra* note 164 at 60; Evan Fox-Decent & Evan J Criddle, "The Fiduciary Constitution of Human Rights" (2009) 15 *Legal Theory* 301 at 315 [Fox-Decent & Criddle, "Human Rights"].

²⁸⁵ Nussbaum, *Creating Capabilities*, *supra* note 29 at 65; Nussbaum, "Supplementation and Critique", *supra* note 228 at 31.

²⁸⁶ Nussbaum, *Creating Capabilities*, *supra* note 29 at 65.

on the important things that individuals are able to be and to do, capabilities, including human rights-based capabilities, emphasize the positive role that the state must play which is consistent with the principle that the state exists in large part to secure those important things to individuals that they are unable to secure for themselves.²⁸⁷ Human rights-based capabilities are not merely side-constraints on the actions of others; they are entitlements to a certain standard of treatment that give rise to positive obligations on the part of governments.²⁸⁸

B. Capabilities as Legal Entitlements

Until now, we have discussed human rights-based capabilities as essentially political or moral claims. As such, these capabilities have the potential to provide important guidance for state action and policy and can assist the state in making decisions about where to focus its political attention and resources. What is lacking in this model is the potential for enforceability, particularly as those individuals with the greatest stake in securing their capabilities are often those that have the least political power within the state. Indeed some scholars have criticised the capabilities approach for failing to adequately address issues of power on the ground.²⁸⁹ Although a state's political and moral legitimacy may be threatened if it fails to meet its obligations in terms of securing a minimum level of each central capability to individuals, this threat does not provide any assurance that capabilities will be guaranteed in practice and leaves individuals with little recourse. The contention being made here is that these shortcomings can be addressed by recognizing that combining the capabilities approach with fundamental human rights brings capabilities within the realm of legality. In other words, human rights-based capabilities are not only political and moral claims, they are also legal entitlements.

1. Capabilities as the Basis for Constitutional Guarantees

Nussbaum does not appear to consider capabilities to be inherently legal; instead she views the law as a means of protecting and securing important capabilities. If a capability is important enough to be included on the list of central capabilities then the state is under an obligation to use the law and public policy to secure that capability and the capability should be

²⁸⁷ Nussbaum, "Supplementation and Critique", *supra* note 228 at 26.

²⁸⁸ See generally Martha Nussbaum, "Beyond the Social Contract: Capabilities and Global Justice" (2004) 32:1 Oxford Development Studies 3; Nussbaum, *Creating Capabilities*, *supra* note 29 at 64.

²⁸⁹ Robeyns, "Equality and Justice", *supra* note 278 at 116ff.

legally enforced.²⁹⁰ In particular, Nussbaum suggests that central capabilities can and should form the basis of constitutional guarantees.²⁹¹ According to this conception, a particular central capability can be the subject of public debate and discussion and then, when it has been specified appropriately according to public preferences and relevant social, historical and cultural circumstances, it can be incorporated into the national constitution. Once enshrined in a national constitution, these capabilities then become enforceable legal entitlements that are correlative to legal obligations.

This approach views the legal nature of capabilities as being conditional upon the state taking the actions necessary to incorporate central capabilities into the constitution and or to enact relevant legislation. This approach is somewhat problematic in that it relies heavily on state action and gives states the opportunity to pick and choose which capabilities they are willing to endow with legal force without providing any guarantee that all central capabilities will be legalized in this way. By extension then, those central capabilities that are not explicitly noted in legislation will likely be deemed to not be legally enforceable. Additionally, while prioritizing some central capabilities over others is often necessary in terms of practical implementation, fixing this hierarchy in a constitution or in domestic legislation undermines the idea that all central capabilities are equally necessary to human dignity and are interdependent and interrelated.

2. Capabilities as Obligations under International Treaty Law

While some of Nussbaum's central capabilities may be given legal status under the constitutions of certain countries, all human rights-based capabilities correspond to specific, existing international legal obligations contained in the International Bill of Rights which can be referred to when seeking to ensure that states comply with the requirements of the HRCA. In addition to providing the theoretical basis for the list of central capabilities, international human rights treaties and *jus cogens* norms are very important as they represent an explicit commitment on the part of state parties, a public declaration of intention that states can call upon each other to respect. Nevertheless, this explanation of the legality of human rights-based capabilities is even more state-centric than the constitutional explanation above. Although individuals are the object

²⁹⁰ Nussbaum, *Creating Capabilities*, *supra* note 29 at 168; Nussbaum, "Supplementation and Critique", *supra* note 228 at 26.

²⁹¹ See generally Nussbaum, *Women and Human Development*, *supra* note 153 at 74.

of human rights, international human rights treaties are agreements designed, concluded and enforced by states with only a peripheral role for individuals. If we assert that the legal nature of human rights-based capabilities originates in the treaty obligations of states, what happens to that legality when a state has not signed onto a particular treaty? As in the case of the capabilities that are not included in a national constitution, the logical conclusion would seem to be that those entitlements and their corresponding duties would not be legally binding in that state. How is this result consistent with the equal and inherent dignity of each individual? If the objective of the capabilities approach is to establish conditions that ensure a dignified life for every individual and every individual has the same dignity, how can we justify differing legal obligations to secure those conditions? The short answer is that we cannot.

Finally, by their very nature the international human rights treaties represent high-level policy. The principles contained in these treaties are indeed legal entitlements but considering the difficulties associated with their enforcement and the tensions noted above, their value also lies in being highly aspirational and symbolic. In contrast, the human rights-based capabilities approach is intended to be a pragmatic working model. While international human rights treaties may effectively embody the human rights aspect of this approach, these treaties do not fully capture the capabilities aspect. Thus, what is needed is a justification for the legality of human rights-based capabilities that is not dependent upon state action and that is grounded in the actual experiences of individuals.

C. The Fiduciary Theory of State Legal Authority as the Foundation of Legality

In the previous sections we have examined two unsatisfactory justifications for the legality of human rights-based capabilities. In one human rights-based capabilities are translated into legal entitlements through the use of domestic legislation, in the other international treaties are used to ground legal obligations. In both cases, the justification for the very legality of capabilities originates in an institution or action that is external to the capabilities approach and which is thus vulnerable to the vagaries of state politics. In contrast, the fiduciary theory of state legal authority demonstrates how human rights-based capabilities can be understood as being inherently legal. According to the fiduciary theory, this legality follows automatically from the foundational principles of the HRCA (human dignity and the conception of the state) and is grounded in the relationship between the state and individuals subject to its power.

The fiduciary theory of state legal authority and the human rights-based capabilities approach are complementary, sharing many of the same basic principles. Like the HRCA, the fiduciary theory does not assume or promote a comprehensive conception of the “good”, but relies instead on moral principles that are inherent in law rather than any comprehensive theory of natural or positive rights.²⁹² Like the human rights-based capabilities approach, the fiduciary theory is pragmatic in that it has clear practical implications for how the institutions of a state function, as well as for the overarching objectives of state policy and practice. Most importantly, the fiduciary theory and the capabilities approach share a common moral foundation that is embodied in two ideas: the primacy of the inherent dignity of the human person and the dominant purpose of the state which is to establish the basic entitlements necessary to a dignified life.²⁹³

The fiduciary theory of state legal authority elaborated by Evan Fox-Decent states that “[t]he fundamental interaction that triggers a fiduciary obligation is the exercise by one party of discretionary power of an administrative nature over another party’s interests” and it is this relationship or obligation that “provides the justification for the state’s legal authority and its obligation to act in the interests of its subjects.”²⁹⁴

All fiduciary relationships share a common structure: one party, the fiduciary, is authorized by a court judgment, legislation, agreement, or law to exercise discretionary power of an administrative nature over the legal or practical interests of a beneficiary. Moreover, the beneficiary is markedly vulnerable to the exercise of these powers by the fiduciary and unable to protect herself against potential abuses.²⁹⁵ Traditionally a fiduciary relationship gives rise to a duty of loyalty which requires that the fiduciary act solely in the beneficiary’s interest and to refrain from any self-serving actions. Where there are multiple beneficiaries, each of whom is

²⁹² Fox-Decent & Criddle, “Human Rights”, *supra* note 284 at 318, 320.

²⁹³ See generally Evan Fox-Decent, “The Fiduciary Nature of State Legal Authority” (2005-2006) 31 *Queen’s LJ* 259 at 265 [Fox-Decent, “State Legal Authority”]; Fox-Decent & Criddle, “Human Rights”, *supra* note 284 at 315; Nussbaum, *Creating Capabilities*, *supra* note 29 at 29, 64.

Fox-Decent refers to the state’s role as being to “establish a regime of secure and equal freedom.” Although the capabilities approach presented here does not explicitly discuss the concept of freedom, human dignity and freedom are closely connected in that our understanding of human dignity is centered on the ability of individuals to exercise control over and make decisions regarding their own lives, in other words to be free to choose their own path.

²⁹⁴ See Fox-Decent, “State Legal Authority”, *supra* note 293 at 259. In this section Fox-Decent and Criddle’s theory has been outlined in broad strokes. However, given the complexity of their ideas and the limited space available, some nuances will necessarily be lost. For a full and detailed explanation of their theories see Fox-Decent, “State Legal Authority”, *supra* note 293; Fox-Decent & Criddle, “Human Rights”, *supra* note 284; Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford, UK: Oxford University Press, 2011).

²⁹⁵ *Frame v Smith*, [1987] 2 SCR 99 at 136, cited in Fox-Decent, “State Legal Authority”, *supra* note 293 at 274.

entitled to the same regard for his or her interests, the duty of loyalty to the interests of the beneficiaries requires the fiduciary to respect the formal moral equality between beneficiaries and becomes a duty of fairness and reasonableness.²⁹⁶ Applying the traditional duty of loyalty would be impossible in these cases as the specific interests of different beneficiaries will often conflict with one another. Instead, the fiduciary must exercise its discretion fairly between different classes of beneficiaries, and act in good faith with due regard to the separate interests of the beneficiaries.²⁹⁷ The fiduciary cannot be said to be fulfilling its fiduciary duty if it is acting in a manner that disregards the interests of beneficiaries, even if the interests are all impugned equally (fairly).

1. Human Dignity as the Moral Foundation for the Fiduciary Theory

As in the case of the capabilities approach, the moral or philosophical justification for the fiduciary theory can be traced back to the concept of inherent human dignity. Acknowledgement of the inherent dignity of the person means recognizing individuals as free and equal, self-determining agents.²⁹⁸ As such, every human being is equally capable of having rights and acquiring obligations; in other words, every individual is endowed with equal legal personhood which the law, including fiduciary law, protects. Inherent human dignity and the related idea of equal legal personality provide the moral basis for the fiduciary relationship and for the beneficiary's right to be treated in accordance with that relationship.²⁹⁹ Put simply, "the fiduciary principle can be understood to authorize the use of fiduciary power only to the extent that such power may be exercised in a manner consistent with each person's equal dignity."³⁰⁰ For the fiduciary to use its discretionary power to further its own interests as opposed to those of the beneficiaries, or otherwise exploit its power, would be to breach its fiduciary obligations and to violate the human dignity of its subjects as their entrusted interests are embodiments of their legal personality and dignity.³⁰¹

²⁹⁶ Fox-Decent, "State Legal Authority", *supra* note 293 at 265.

²⁹⁷ *Ibid* at 266; Fox-Decent & Criddle, "Human Rights", *supra* note 284 at 312.

²⁹⁸ Fox-Decent, "State Legal Authority", *supra* note 293 at 283.

²⁹⁹ *Ibid* at 279. Fox-Decent specifically refers to the idea that the interests that the beneficiary entrusts to the fiduciary are "embodiments of her legal personality, and therefore immune to the fiduciary's appropriation."

³⁰⁰ Fox-Decent, "State Legal Authority", *supra* note 293 at 265.

³⁰¹ See generally Fox-Decent & Criddle, "Human Rights", *supra* note 284; Fox-Decent, "State Legal Authority", *supra* note 293.

2. The State as Fiduciary

Applying this framework to the state, we can see how the state's assertion of sovereignty automatically places it in a fiduciary relationship with those persons subject to its authority. By definition, the state has the discretion to exercise public powers of an administrative nature that individual subjects are not able or entitled to exercise – thus making individuals particularly vulnerable to the state's authority. Additionally, the exercise of those powers by different organs of the state can clearly have a profound impact on nearly every dimension of the individual's practical and legal interests. In particular, individuals are dependent upon the state for the provision of legal order as they cannot make laws that apply to others generally or decide their own legal disputes, much less set up any comprehensive legal framework.³⁰² As noted in previous sections, it has long been recognized that one of the basic functions of the state is to secure to individuals those entitlements that they cannot secure for themselves, including to ensure a regime that protects (and respects and fulfills) the legal rights of those within it.³⁰³ It follows then, that one of the practical manifestations of the state's fiduciary obligation is the rule of law. While one might argue that the democratic political power of the state is based upon the consent of the people, it is the fiduciary theory that explains both the requirement that every individual within the state be subject to the law, as well as the state's correlative legal obligations towards those subject to its power. We speak here about individuals subject to the power of the states as opposed to citizens because every individual over whom the state can exercise discretionary administrative power, regardless of civil or political status, is entitled to the same regard for his or her interests because all are beneficiaries of the same fiduciary relationship.

As a fiduciary, the state does not have the authority to exercise untrammelled power; instead its authority is subject to the limits imposed by the individual's vulnerability to the state's power and his inherent worth as a person.³⁰⁴ Thus, although (and in some ways, because) the state has broad discretionary and exclusive power over certain interests belonging to the beneficiary, the state-subject relationship can only be understood as being “mediated by legality”

³⁰² Fox-Decent, “State Legal Authority”, *supra* note 293 at 308.

³⁰³ *Ibid* at 271.

³⁰⁴ See generally Fox-Decent, “State Legal Authority”, *supra* note 293.

if the state is precluded from using its position of power to unilaterally set the terms of its relationship with the beneficiaries, those subject to its jurisdiction.³⁰⁵

3. Non-Instrumentalization and Non-Domination: Human Rights and the Limits of State Legal Authority

The conception of inherent human dignity that gives rise to the duty of loyalty (or fairness and reasonableness) also gives rise to two other complementary principles that limit the state's exercise of power: the Kantian principle of non-instrumentalization and the republican ideal of non-domination.³⁰⁶ According to these two principles, in order to fulfill its fiduciary obligation in a manner that is consistent with the inherent dignity of the individual and to satisfy its function of establishing a regime that protects that dignity, the state must also treat individuals as ends rather than merely as means to an end (non-instrumentalization) and it must secure individuals against arbitrary power and interference (non-domination).³⁰⁷ The distinction between these two concepts is explained as follows by Fox-Decent and Criddle: “[w]hereas noninstrumentalization prohibits the state from wrongfully interfering with its subjects, nondomination bars the state from holding arbitrary power that ipso facto would pose a wrongful threat because it could be exercised wrongfully at any time.”³⁰⁸ Thus the principle of non-instrumentalization controls the exercise of power while the principle of non-domination controls the threat of its exercise. Both of these principles reflect the recognition of each person as a free and equal individual worthy of respect in her own right and as an independent agent that is entitled to exercise her self-determination without wrongful interference or the threat of such interference, as well as the state's role in protecting and ensuring these conditions.³⁰⁹

According to this theory, human rights and the state's obligation to respect them, are best understood as norms arising from the fiduciary relationship between states and those subject to their authority that further constrain the way in which fiduciary power can be exercised.³¹⁰ Human rights are the concrete manifestation of the individual's entitlement to be treated in a way that is consistent with her inherent dignity and of the state's duty to secure conditions consistent

³⁰⁵ Fox-Decent & Criddle, “Human Rights”, *supra* note 284 at 302. See also Fox-Decent, “State Legal Authority”, *supra* note 293 at 280.

³⁰⁶ Fox-Decent & Criddle, “Human Rights”, *supra* note 284 at 302

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid* at 322.

³⁰⁹ *Ibid* at 310.

³¹⁰ See Fox-Decent & Criddle, “Human Rights”, *supra* note 284.

with the principles of non-domination and non-instrumentalization; they provide the framework within which the state's duty can be realized. To put it another way, the legal and moral legitimacy of the fiduciary relationship depends upon the fiduciary exercising power subject to the limitations arising from the beneficiary's dignity as a person; these limitations include a commitment to non-instrumentalization and non-domination that takes the form of human rights.

For a particular standard or norm to qualify as a human right under the fiduciary theory, it must satisfy three conditions. First is the principle of integrity, which requires human rights to have as their object the good of the people and not that of the authorities of the state. This is in keeping with the idea that a fiduciary duty only authorizes the exercise of power for an other-regarding purpose and so the state must act in the interests of the beneficiaries rather than those of its rulers or officials. Second, is the principle of formal moral equality. This principle is linked to the concept of fairness mentioned above. The state owes the same duty of fairness to each separate individual because each individual is subject to the same fiduciary power or is in the same fiduciary relationship with the state. As a consequence, human rights must regard individuals as "equal co-beneficiaries of the fiduciary state."³¹¹ Third, the final necessary feature of human rights is solicitude. Human rights must be solicitous of the legitimate interests of each individual under the state's authority as those interests are vulnerable to the state's unilateral coercive exercise of power.³¹² Thus, according to the fiduciary theory, "all human rights serve a common purpose: to protect persons subject to state power from domination and instrumentalization. Norms qualify as human rights if they further these objectives and satisfy the fiduciary theory's substantive criteria of integrity, formal moral equality, and solicitude."³¹³

4. The Fiduciary Theory as the Foundation of Legality and State Legitimacy

Unlike some other theories, the fiduciary model provides a strong, unified philosophical basis for human rights as *legal* obligations, as opposed to merely moral or political obligations, independent of any treaty or specific legal instrument. Under the fiduciary theory, the state's overarching duty to those subject to its power is to establish a regime that protects and ensures

³¹¹ *Ibid* at 318.

³¹² *Ibid*.

³¹³ *Ibid* at 326.

their equal dignity under the rule of law.³¹⁴ The law then enshrines human rights as legal rights because they are constitutive the state's fiduciary (and therefore legal) obligation to exercise sovereign powers in order to establish that regime. According to this reasoning, human rights must also be seen as imposing correlative duties on states because both the recognition of the right and of the duty are necessary to fully protect the individual from instrumentalization or domination, in other words to protect her inherent dignity. Importantly, the duties thus imposed require the state to take the necessary positive actions in order to secure these conditions of non-instrumentalization and non-domination.³¹⁵ As human rights advocates have long surmised, it is not enough for the state to respect and protect the rights of individuals itself, to meet its fiduciary obligations it must also fulfill those rights.

In the end, it is the circumstances inherent in state sovereignty, specifically power, the discretion to exercise power and the peculiar vulnerability of subjects to that power,³¹⁶ that give rise to the fiduciary relationship between the state and those individuals subject to its jurisdiction and authority and to the concomitant rights and duties.³¹⁷ As Fox-Decent and Criddle explain:

[...] the state's sovereignty to govern domestically and represent its people internationally consists in its fiduciary authorization to do so. And because this authorization is constrained and constituted by a duty to respect, protect and implement human rights, state sovereignty is likewise constrained and constituted by human rights.³¹⁸

The state's duty to respect human rights exists independently of its accession to any particular human rights treaty and is thus inherent in its sovereignty. It follows then that a state that fails to respect the human rights of its beneficiaries violates its fiduciary duty and "subverts its claim to govern and represent its people as a sovereign actor."³¹⁹

5. The Human Rights-based Capabilities Approach and the Fiduciary Theory as Complementary

Returning now to our original objective, we can see how the fiduciary theory complements the human rights-based capabilities approach in several different ways including

³¹⁴ *Ibid* at 315.

³¹⁵ *Ibid* at 329.

³¹⁶ The powers referred to here are public powers that private individuals are not entitled to exercise and are thus particularly vulnerable to. *Ibid* at 314.

³¹⁷ Fox-Decent, "State Legal Authority", *supra* note 293 at 264.

³¹⁸ Fox-Decent & Criddle, "Human Rights", *supra* note 284 at 315.

³¹⁹ *Ibid* at 310.

by providing an explanation for why human rights-based capabilities entail legal entitlements and duties that is inherent in the theory itself and does not rely on the state enacting legislation or becoming party to treaties. The critical link between the fiduciary theory, the capabilities approach and the human rights-based capabilities is that all three theories have as their backbone the concept of the inherent dignity of the human person. Nevertheless, other similarities between these approaches can be seen in the following table:

	Capabilities Approach	Fiduciary Theory of State Legal Authority	Human Rights-based Capabilities Approach
Foundation	Republican conception of the state	The Fiduciary nature of the state-subject relationship	The Fiduciary nature of the state-subject relationship
Duty of the State	<ul style="list-style-type: none"> To secure to those under its authority their most central entitlements – those that are necessary for a life with dignity 	<ul style="list-style-type: none"> To act in the interests and for the benefit of the subjects of the fiduciary relationship; To protect them against instrumentalization and domination; To protect their human dignity; To establish a regime of secure and equal freedom 	<ul style="list-style-type: none"> To secure to those under its authority their human rights-based capabilities which constitute the necessary conditions for a dignified life
Nature of Duty	Moral and political	Legal	Moral, political and legal
Mechanism for Protection	Through central capabilities	Through the rule of law and human rights	Through human rights-based capabilities
Unifying Concept	The Inherent Dignity of the Person		

Table 2. An Integrated Capabilities Approach

The fiduciary theory and the human rights-based capabilities approach are complementary in that each has something to offer the other. By approaching the HRCA approach through the lens of the fiduciary theory, we can better explain what type of entitlements human rights-based capabilities are, how to allocate responsibility for fulfilling the correlative duties, what the content of these entitlements is and how they can be operationalized.

Briefly, as we have discussed above, the fiduciary theory's basis in a specific *legal* relationship establishes that human rights, and by extension the capabilities embodied by these rights, are not only rights but *legal* rights that impose correlative legal obligations. The fiduciary

theory helps to explain how human rights-based capabilities are not merely political or moral entitlements but legal and justiciable claims. Of course, the existence of effective rights also implies the existence of concomitant obligations. With regards to the allocation of responsibility for fulfilling those capability obligations, the fiduciary theory clarifies that the state is the primary duty-bearer not only because of the traditional republican conception of the role of the state but also because of the state's ability to exercise power unilaterally over the interests of its subjects who are in turn particularly vulnerable to that discretion. This focus on the exercise of discretionary power of an administrative nature enables us to explain, in a way that the republican conception of the state does not, how other non-state actors could also be under an obligation to ensure human rights-based capabilities. For instance, the warden of a prison has a legal obligation to help ensure the human rights-based capabilities of inmates because of his role as a delegate of the state but also because his ability to exercise power unilaterally over their interests creates a fiduciary relationship. Similarly, certain international organizations such as the International Committee for the Red Cross, the International Rescue Committee, the World Food Programme, UN peacekeeping missions or even potentially the World Bank could be found to have legal obligations to help ensure capabilities in some cases given their ability to exercise power over the interests of individuals. Thus, in addition to helping to allocate responsibility, the fiduciary theory also specifically addresses the implications of power relations, something that the capabilities approach has been criticized for not adequately doing.

In discussing the content of the entitlements of individuals, both the fiduciary theory and the human rights-based capabilities approach refer to human rights but while the capabilities approach draws on a set of pre-political human rights as embodied in the International Bill of Human Rights, the idea of human rights employed in the fiduciary theory is distinctly political, arising only as a result of the political relationship between the state and those subject to its power. While these two conceptions may seem incompatible on their face, in the end they are complementary in that they are both founded on the inherent (pre-political) dignity of the human person. In particular, the fiduciary theory affirms that a state has a legal obligation to ensure human rights-based capabilities even if that state has not signed on to the relevant human rights treaties or enacted relevant domestic legislation. Treaty law and domestic legislation can expand the range of legal rights that individuals have but the fundamental human rights contained in the

International Bill of Rights are those that satisfy the substantive criteria of integrity, formal moral equality and solicitude and thus exist irrespective of any mention in formal law.³²⁰

The fiduciary theory also supplements our understanding of the human rights-based capabilities by highlighting that the human rights duties of the state are owed directly to individuals under the power of the state and are not merely general obligations that arise as a consequence of agreements with other states. These legal rights and obligations are personal, they belong to the individual as a result of a specific relationship with the state, and the individual in question has the right to claim those entitlements. This focus on the individual and the unique relationship between the individual and the state echoes the emphasis on the individual and the individual's agency that is found in the capabilities approach.

The human rights-based capabilities approach in turn has an important contribution to make to the fiduciary theory. While the fiduciary theory acknowledges the essential nature of human rights, it offers little guidance in terms of their specification or implementation. The human rights-based capabilities approach provides a mechanism for concretizing the human rights and associated obligations that arise as a function of the fiduciary relationship between states and those subject to their power and gives them a form that is susceptible to practical implementation: that of central capabilities. By focusing on what people are actually able to be and to do, the capabilities approach gives substance to the prohibition on domination and instrumentalization. It is only when individuals are able and have the means to exercise their full agency to access and to use those rights and can achieve ends that they value that we can truly say that they are free from the specter of domination and instrumentalization by those that hold power. Expressed differently, human rights-based capabilities and the obligation that the state has to secure these capabilities for all of those subject to its discretionary exercise of administrative power is a practical manifestation of the state's fiduciary duty.

In the end then, by integrating the fiduciary theory of state legal authority and the human rights-based capabilities approach we arrive at a set of human rights-based capabilities that are the legal entitlement of every individual who is subject to the discretionary power of the state and constitute the minimum necessary conditions for a dignified life. In addition to being legal claims themselves, the human rights-based capabilities establish principles to guide state action.

³²⁰ *Ibid* at 326.

The realization of these capabilities is not only a legal obligation of the state; it is an integral part of the state's assertion of sovereignty and legitimacy.

IV. Operationalizing the Integrated Human Rights-based Capabilities Approach in Protracted Refugee Situations

If many of the benefits of combining the fiduciary theory of state legal authority and the human rights-based capabilities approach were examined in the last section, others only fully come to light when this integrated theory is applied to a particular case: that of protracted refugee situations. To start with, the first question to answer is whether or not a fiduciary relationship actually exists between the host state and refugees given that refugees do not possess citizenship in that state. Applying the indicators of a fiduciary relationship noted above (potential for the unilateral exercise of discretionary power of an administrative nature over the rights or interests of beneficiaries and vulnerability to that power) it is evident that such a relationship does exist. As a host to refugee populations, the state has a very broad scope for the unilateral exercise of discretionary power over refugees and, moreover, the power and discretion exercised by the state affects virtually every aspect of refugees' lives and interests. It is the administrative authority of the state that determines the refugee's status within the state, that assures (or not) her security, and that decides what rights and benefits refugees are entitled to and how those are to be implemented.³²¹ The state determines whether refugees are entitled to work, whether they must live in camps or may disperse around the country, whether they are able to access medical and social services, whether they may go to school and even what the refugees will eat (what is included in rations).

Perhaps more than any other group, refugees are particularly vulnerable to the state and its discretionary power. Though it may sound overly dramatic, the state literally holds the power of life and death over refugees. As non-citizens with uncertain legal status, little access to redress or accountability mechanisms in the event that their interests or rights are impinged, virtually no ability to participate in democratic processes, and consequently little or no political voice within the state that could mitigate their vulnerability, refugees are particularly vulnerable to the state's

³²¹ Although the state's discretion is constrained by its obligations under international law, with the exception of the *jus cogens* prohibition on non-refoulement, these are obligations that are largely voluntarily assumed, or self-imposed, by the state. Additionally, regardless of the state's legal obligations, how refugees are treated at a very practical level is subject to the state's discretion.

exercise of public powers. As non-citizens, the interests and rights of these individuals are at risk in the host state; as refugees, they are further endangered by their inability to seek the protection of their state of origin. Clearly the relationship between the host state and refugees has all of the marks of being fiduciary in nature and, as a result, refugees are entitled to benefit from the legal entitlements that follow from this species of relationship.

A. Human Rights-based Capabilities as Legal Entitlements of Non-Citizens

Perhaps the most important contribution of the fiduciary theory to the human rights-based capabilities approach is to provide a clear justification for the legal rights and entitlements of non-citizens, including refugees. The distinction between citizen and non-citizen is one of the primary obstacles to effective refugee protection and to the fulfillment of refugee rights, and it is an issue that is not dealt with in an entirely satisfactory manner in either Nussbaum or Sen's approaches. As the capabilities approach was devised for use in development situations where the people of concern generally have at least bare citizenship, even if they are not fully able to participate in the political life of the state for other reasons, it is not surprising that citizenship has not been a main focus of capability theorists. However, what is being sought here is an approach that can be used to address protracted refugee situations and so it must necessarily be able to address the needs and situation of non-citizens. Both the concept of human rights and the concept of human capabilities are based on the idea of human dignity. Human dignity in turn is entirely independent of citizenship or membership in any state as it is based on the bare fact of being human and possessing a minimal degree of agency. Logically then, as the conditions necessary for a dignified life, human rights and human capabilities must also apply equally to all human beings regardless of their citizenship.

While the universality of human rights-based capabilities may be accepted in theory, it has been somewhat more problematic in terms of the practical application of the capabilities approach. Nussbaum does not overtly restrict her capabilities approach to citizens. In fact, in *Creating Capabilities*, she explicitly states that by referring to citizens she does not intend to deny that non-citizens have a variety of entitlements; she is merely beginning with the most common case.³²² Nevertheless, she does not give any further explanation regarding the status of

³²² Nussbaum, *Creating Capabilities*, *supra* note 29 at 36.

non-citizens and she persists in using the language of citizenship throughout her writings. In particular, she refers to the equality of citizens, the importance of the role of citizens in democratic politics and, most importantly, to the core purpose of the state which she views as being to “secure to all *citizens* at least a threshold level of these ten Central Capabilities.”³²³ So, while Nussbaum may not intend to limit her capabilities approach to citizens, it remains unclear how non-citizens fit into this conception. If it is necessary to make a trade-off between capabilities (as it often is), do the capabilities of citizens necessarily take priority over those of non-citizens? Can the capabilities approach be used to justify the fact that non-citizens are *not* treated in a manner equal to citizens in most states?

Similarly, Amartya Sen’s capabilities approach relies heavily on public reasoning, social discussion and democratic deliberation and yet these are processes to which non-citizens have little access. Refugees generally have no formal role in the political institutions of the host state beyond perhaps some minimal representative role regarding their community’s interests.³²⁴ In addition to their insecure status, which makes them vulnerable to official displeasure, the ability of refugees to take part informally in public processes is further hampered by more mundane obstacles such as restriction to refugee camps, physical isolation, linguistic differences, lack of economic resources and cultural impediments. That refugees and, to varying degrees, other non-citizens are unable to participate in the processes of political deliberation that will determine what capabilities should be pursued or, under Nussbaum’s approach, how the central capabilities should be pursued, means that they are being treated in a manner that is inconsistent with their equal human dignity and that is incompatible with the principles that underlie both human rights and the capabilities approach.

The challenge of applying the capabilities approach to non-citizens is further exacerbated by the importance placed, at least by Nussbaum, on the traditional republican conception of the purpose of the state as a way of justifying the allocation of correlative duties and as the conceptual link between central capabilities and government action. This model of the state is closely tied to the theory of social contract which asserts that the legitimacy of state authority is predicated upon the existence of a fictional contract between the individual and the state, and upon the consent of the individual. One significant weakness of this model is that, with the

³²³ *Ibid* at 33. Emphasis added.

³²⁴ In fact this representative role is often filled by representatives of aid agencies as opposed to members of the refugee community itself.

possible exception of naturalized citizens, explicit consent to this contract is never given. In the case of citizens, one could perhaps argue that consent can be inferred from certain specific acts such as acquiring a passport or voting, as these acts require a mutual recognition by the individual and the state. That recognition is much less likely to be present in the case of refugees and other non-citizens, especially in cases where individuals have entered the territory of the state illegally or are being assisted by UNHCR alone, as the state may not even be officially aware of their presence. As noted above, refugees do not participate in the political processes of the state; they may have no stable legal status within the state; they are unable to benefit from many state services and the state may even refuse to officially recognize their presence on its territory. If refugees are not an active part of the political landscape of a state, it becomes difficult to justify state responsibility based on a social contract model. Refugees can hardly be viewed as being a party to any such contract, or as having given their full consent to being governed unless their consent to the state's authority can be inferred from simple presence within the state.³²⁵ However, for that inference to be valid there must be a real option of leaving and thus repudiating that consent. Refugees rarely have that option; they generally cannot return to their country of origin because of their fear of persecution and they have no right to enter or be present in any other state. As there is no legitimate option of leaving the state, it can be argued that refugees do not have the capacity to give their consent freely and so their implicit consent to this fictional contract is vitiated by virtue of duress.

In contrast to the legal fiction of a social contract, the fiduciary model grounds state legal authority over an individual in an actual legal relationship. The relevant characteristics of this relationship, as noted above, are the state's ability to unilaterally exercise administrative power over individuals in a manner that affects their interests and the vulnerability of the individuals to that power; assuming that these conditions exist, so does the relationship. Given that the relationship is real, so too are the rights and obligations that arise from it. Additionally, once the criteria for a fiduciary relationship are met, no distinction is made with regards to the legal status of the beneficiary. This means that the state's exercise of sovereign powers is constrained equally regardless of whether the beneficiary is a citizen or a non-citizen. What follows from this reasoning then is that the fiduciary relationship gives rise to the same legal human rights duties and obligations on the part of the state with regards to citizens and non-citizens alike.

³²⁵ See Harry Beran, "In Defense of the Consent Theory of Political Obligation and Authority" (1977) 87 Ethics 260.

While a knee-jerk reaction might be to claim that citizens must have a more intimate relationship with the state and so be owed a greater regard, in fact the reasoning set out above is consistent with the universal nature of human rights. According to international law, despite restrictions on a very few political rights, such as the right to take part in the conduct of public affairs which is limited to citizens,³²⁶ and the potentially limited application of some socio-economic rights to non-nationals in developing countries, human rights are recognized as being universal and thus owed to every individual equally.³²⁷ As with obligations under the fiduciary relationship, the universality of human rights is a function of the equal and inherent dignity of every individual.³²⁸ It is worth noting here, however, that the fiduciary relationship is *a* source of legal rights and obligations, but it is not the *only* source.³²⁹ Other rights and obligations arise in different ways including as a result of legislation, the ratification of international treaties and the exercise of state political power. Emphasizing the fiduciary relationship as a source of human rights and obligations does not displace the duties of the state pursuant to general international treaty law, including the state's obligations under the *Refugee Convention*. The state's obligation to secure conditions of non-instrumentalization and non-domination and the human rights that are corollary to that obligation exist as a separate regime *regardless* of how a state interprets or applies its international human rights and refugee protection obligations – or even if it *has* those obligations.

The non-treaty-based nature of the rights that result from the fiduciary relationship is particularly important in the case of refugees as it implies that a state owes refugees within its borders a heightened duty of care even if the state is not a party to the *Refugee Convention*. Generally, the refugee protection regime that exists within non-signatory states is constituted by domestic legislation, international human rights law and certain *jus cogens* norms such as the peremptory norm on non-refoulement. With the exception of domestic legislation, which will vary in each case, these are the same norms that are applicable to any non-citizen within the territory of the state; the protection that they afford largely fails to take into consideration the specific situation of refugees. In contrast, the fiduciary relationship offers a standard of care that

³²⁶ ICCPR, *supra* note 73, art 25.

³²⁷ See *Vienna Declaration*, *supra* note 10, art 1.

³²⁸ *Ibid.* Preamble: "Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms."

³²⁹ Fox-Decent, "State Legal Authority", *supra* note 293 at 282.

is potentially higher than that arising out of international human rights law precisely because it is based on the particular vulnerability of refugees to the exercise of state power; a vulnerability that is even greater than in the case of other non-citizens who still benefit from the protection of their state of origin.³³⁰

One interesting implication of the fiduciary model is that the state's duty to respect, protect and fulfill the human rights of refugees arises as an inherent function of the state's exercise of sovereign powers. These obligations are rooted in the normative structure of state sovereignty as opposed to being imposed by external influences as it is sometimes argued that international treaty obligations are. At a theoretical level then, by protecting and assisting refugees and other non-citizens under its jurisdiction, the state is actually strengthening its claim to sovereign power.

B. The Fiduciary Nature of the UNHCR-Refugee Relationship³³¹

Although this focus of this analysis is primarily on the role of the state in protracted refugee situations given its status as primary duty-bearer under the fiduciary theory, the capabilities approach and international law, the fiduciary theory also helps to provide an alternative understanding of the UNHCR-refugee and state-UNHCR relationships that refocuses attention on UNHCR's original international protection mandate by re-emphasizing the supplementary nature of UNHCR refugee assistance.

Although Fox-Decent and Criddle refer specifically to the fiduciary nature of *state* legal authority, they acknowledge that while states have the primary authority, other entities may also exercise public powers.³³² Indeed this is the case in situations where UNHCR has primary responsibility for refugee assistance and protection and in those situations where it has assumed a governing role. Under these circumstances, the UNHCR-refugee relationship can also be understood as being a fiduciary one. Take, for example, a refugee camp run by UNHCR. Within the confines of the camp, UNHCR often exercises state-like administrative authority over

³³⁰ This section is reproduced from the author's article "Questioning Governance in Protracted Refugee Situations: The Fiduciary Nature of the State-Refugee Relationship" (2014) 25:4 Intl J Refugee L 693.

³³¹ This section is adapted from the author's article "Questioning Governance in Protracted Refugee Situations: The Fiduciary Nature of the State-Refugee Relationship", *ibid*.

³³² Fox-Decent & Criddle, "Human Rights", *supra* note 284 at 326: 'Under the fiduciary theory, any entity that exercises powers of public administration assumes a fiduciary obligation to respect human rights. States have special obligations to respect human rights because international law confers upon them the primary legal authority to establish security and legal order. But sovereign states are not the only entities that may exercise public administrative powers.'

refugees, determining among other things what each individual is entitled to in terms of material assistance and services. As with the state, this power is exercised unilaterally and has profound implications for the refugees' interests. In turn, the refugees are particularly vulnerable to this power given that refugee camps generally create conditions of dependency and vulnerability; leaving refugees almost entirely at the mercy of aid providers.

As in the case of the state, the fiduciary nature of the UNHCR-refugee relationship provides an explanation for UNHCR's specific human rights obligations. In "Quis Custodiet Ipsos Custodes?" Ralph Wilde advances the position that UNHCR has an obligation to govern refugee camps in a manner consistent with international human rights law.³³³ He bases his argument on UNHCR's mandate, its position as an organ of the United Nations and its international legal personality. Using the fiduciary model, it is not necessary to look at the UN Charter, the agreement between the host state and UNHCR, or to attempt to slip UNHCR into the position of the state with regards to treaties that UNHCR is not a party to. According to the fiduciary theory, UNHCR's obligation to govern refugee camps in accordance with human rights principles arises as a function of its power and authority within the camp. Human rights become an inherent extension of the authority to govern.

How then do we reconcile the division of responsibility between the state and UNHCR with the fiduciary theory? Given the practice of host states abdicating their responsibilities for refugee protection to UNHCR, it is tempting to suggest that when UNHCR occupies a governing position, the state is essentially absent – that it is not exercising its administrative power and is thus not in a fiduciary relationship with the refugees. In fact, the very act of delegating authority to UNHCR is, at its heart, an exercise of state administrative power that affects the rights and interests of refugees. Moreover, the fiduciary theory does not actually require that the fiduciary *exercise* its power or discretion, merely that it *have* that power or discretion and certainly the state fulfills this criterion regardless of the role played by UNHCR.

To better understand the implications of the fiduciary theory with respect to the division of power (and labour) in protracted refugee situations, the refugee regime should not be viewed as one in which two equal independent fiduciary relationships exist alongside one another but as one in which there is a hierarchy of relationships. At all times, the state is the primary fiduciary

³³³ Ralph Wilde, "Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of 'Development' Refugee Camps Should be Subject to International Human Rights Law" (1998) 1 Yale Hum Rts & Dev LJ 107.

duty-bearer but, in certain cases and under certain circumstances, the state will delegate the responsibility for fulfilling the fiduciary duty to UNHCR. Consider, as a somewhat imperfect analogy, the situation of children's aid societies. The most fundamental fiduciary duty is that which exists between a parent and a child. However, when a parent cannot fulfill that duty, a children's aid society may step in and a fiduciary relationship is established between the child and the aid society. The aid society does not owe a fiduciary duty to all children at all times as, in most cases, the parents are perfectly able to fulfill their responsibilities. Similarly, UNHCR is not in a fiduciary relationship with all refugees. This type of relationship exists only where the state is unable or unwilling to fulfill its obligations and (unlike the case of aid societies) has requested the assistance of UNHCR. Furthermore, in most cases involving children's aid, intervention does not terminate the parents' rights and duties. Likewise, UNHCR intervention does not terminate the protection and assistance obligations of the state. The secondary nature of the UNHCR-refugee fiduciary relationship is supported by the fact that UNHCR cannot function on the territory of a state without that state's permission and, further, that UNHCR does not have the same powers and capacities as a state in terms of ensuring the protection of refugee rights; it cannot enact legislation, nor does it have the institutions of a state necessary to ensure those rights. Thus the UNHCR's fiduciary relationship exists to supplement and to support that of the state, not to replace it.

C. Conflicting Capabilities: How to Make Tragic Choices

Within the context of protracted refugee situations, the HRCA provides a framework for both protecting and fulfilling the rights of refugees as required by the fiduciary relationship. Under the heading of the capabilities approach, legislators, policy-makers and other aid providers are reminded that their ultimate objective, and legal obligation, is to ensure that refugees are able to live dignified lives. This means going beyond the elucidation of a list of rights and focusing on their realization, on what refugees are actually able to be and to do within the host state. One of the ubiquitous problems of protracted refugee situations that is often cited as a cause for the inability of host states to provide effective protection regimes and for the international community to find durable solutions, is the lack of sufficient resources.³³⁴ States complain that

³³⁴ Though we are focusing on protracted refugee situations, the lack of resources is an obstacle to the full realization and protection of human rights in many other situations as well, particularly in developing countries.

they do not have the funds, human and material resources or expertise necessary to ensure that refugees have adequate living conditions, livelihood opportunities and, most importantly, that their rights are protected. The lack of resources is not an excuse for a violation of human rights, nor does it negate the existence of a right and reciprocal obligation. Nevertheless, it is an unfortunate part of the reality of refugee situations (and all situations) that there will be circumstances in which it is impossible to deliver a threshold level of all human rights-based central capabilities immediately, thus part of being able to realize these capabilities requires finding a way to make these difficult choices.

Given that the central human rights-based capabilities are universal, equal, indivisible and interdependent, prioritizing one over another is conceptually inconsistent but it is not impossible.³³⁵ In fact, in order to move forward in the realization of human rights-based capabilities, we must be able to prioritize them and to determine a starting point. What needs to be acknowledged, however, is that the situation embodied by this collision of capabilities is a tragic one. Any trade-off or choice between capabilities will be imperfect and will involve a violation of some kind, thus creating a situation of injustice where the threshold level of central capabilities cannot be secured to each individual and thus some individuals are not being given a life worthy of their human dignity. In these cases, Nussbaum suggests that we should ask ourselves how we might best work towards achieving “a future in which the claims of all the capabilities can be fulfilled?”³³⁶

On its face, this advice seems somewhat less than practical but in truth these decisions are made all the time. For instance, one might initially give preference to ensuring appropriate medical care for individuals in a refugee camp where there is a risk of a cholera outbreak rather than focusing on establishing schools, given that an outbreak of a life-threatening disease will likely undermine the benefit of education, denying individuals both the capabilities of health and education. Similarly, in the next chapter we will examine how a focus on access to justice and legal empowerment has the potential to create an enabling framework for the realization of many other rights-based capabilities, thus bringing us closer to a situation where the threshold level of human rights-based capabilities is assured for all. In some cases it may also not be possible to raise certain individuals above the threshold level of capabilities immediately but efforts can still

³³⁵ Nussbaum, *Creating Capabilities*, *supra* note 29 at 37.

³³⁶ *Ibid* at 38; Nussbaum, “Supplementation and Critique”, *supra* note 228 at 27.

be made to bring them as close to that level as possible (for instance ensuring access to free primary education even if you cannot yet ensure access to secondary school).³³⁷

In applying this method of ranking, there are three important points to keep in mind. First, any prioritization that occurs in practice is temporary, or context-specific, and does not affect the fundamental equality and indivisibility of central capabilities. Second, we are talking here about making choices between human rights-based capabilities. These are the capabilities that are necessary to ensuring a dignified life. A failure to secure these capabilities is distinguished from an inability to secure other benefits as the central human rights-based capabilities are a necessary component of basic justice and thus trump the realization of other capabilities.³³⁸ Lastly, as in the case of establishing a threshold, the decisions associated with choosing between capabilities are case-specific and must be the product of public debate and deliberation.

D. The Critical Role of Public Deliberation and Debate: Thresholds and Hierarchies

The idea of the effective participation of refugees in debate and discussion concerning their rights and interests is a theme that is woven throughout the coming chapters. More than simply good policy, this idea of public deliberation is central to both the capabilities approach and the fiduciary theory of state legal authority.³³⁹ As we have seen, while the general form of the central capabilities is found in the International Bill of Rights, the human rights-based capabilities approach relies upon a process of public reasoning and debate to determine the threshold level of human rights-based capabilities and the details of their implementation in each case. Moreover, it is only through a process of public discussion that we can legitimately decide which capabilities to prioritize when faced with the tragic situation of conflicting capabilities. Unfortunately, as noted earlier, in practice refugees are generally excluded from the political processes of the state both as a matter of policy and as a matter of law, and thus denied the opportunity to participate in public deliberation, leaving them particularly vulnerable to the will of the host state and its citizens. While not necessarily suggesting that refugees and other non-

³³⁷ Nussbaum, *Creating Capabilities*, *supra* note 29 at 39.

³³⁸ Nussbaum, "Supplementation and Critique", *supra* note 228 at 34-35.

³³⁹ Sen's approach requires a process of public debate and deliberation to determine what capabilities are most important in any particular case and how they should be realized while Nussbaum suggests that public discussion should be used to determine the threshold level of central capabilities and also to make decisions about how this objective should be achieved.

citizens should be given full access to the institutions of democracy (for example the right to vote in state elections), the fiduciary theory reaffirms and provides a justification for the importance of public deliberation. According to Fox-Decent and Criddle, the argument in favour of public deliberation is based on the idea that the state-subject fiduciary relationship is the “legal expression of popular sovereignty – the idea that the state’s sovereignty belongs to the people subject to sovereign power.”³⁴⁰ Thus, public deliberation regarding human rights (and arguably other important interests as well) is a demonstration of the state’s appropriate solicitude for the legitimate interests of those under its authority and of its respect for their inherent dignity and independent agency.³⁴¹ Conversely, failure to engage in such public deliberation reveals the potential for domination through the arbitrary exercise of power (a violation of the fiduciary obligation) and suggests that the state is not taking the dignity of those subject to its authority seriously.³⁴²

In theory then, respect for the inherent dignity of refugees requires that host states ensure that refugees have access to and are able to participate actively in public deliberations about human rights within the state, and especially in those forums where their own rights and interests are being determined.³⁴³ In order to meet the requirements of the fiduciary relationship, the form and substance of these deliberations must in turn be dictated by the principles that are constitutive of that relationship, in particular basic human rights norms and the principles of integrity, formal moral equality, solicitude and equal security under the rule of law.³⁴⁴ Thus a process of deliberation that arbitrarily excludes a certain segment of the population, women for example, fails to respect the formal moral equality of individuals which entitles all persons to equal regard for their dignity. This is not to say that public debate can never be limited, for example in cases of restricted resources or national security, only that those limits must be reasonable, justifiable and other-regarding taking into consideration the equal legal personhood and dignity of beneficiaries. Denying refugee communities the opportunity to participate in public deliberations concerning their own rights and interests merely because they are non-citizens, would not meet this threshold of reasonableness.

³⁴⁰ Fox-Decent & Criddle, “Human Rights”, *supra* note 284 at 324.

³⁴¹ *Ibid* at 324.

³⁴² Fox-Decent & Criddle, *International Law*, *supra* note 225 at chapter 3.

³⁴³ See chapter 5 for a discussion of the importance of participation and the different forms that it can take.

³⁴⁴ Fox-Decent & Criddle, “Human Rights”, *supra* note 284 at 324-5.

E. The Duties of Others: The Human Rights-based Capabilities Approach and Global Justice

In evaluating whether or not a state is fulfilling its responsibilities under the capabilities approach, it is necessary to differentiate between a state that *refuses* to secure the human rights-based capabilities of its subjects and one that is *unable* to secure them due, for example, to a lack of human, material or financial resources, such as is the case with many of the poorest nations. A state that is unable to secure a basic threshold level of human rights-based capabilities still has a moral and legal obligation to take whatever steps it can to move towards full realization but may not be able to achieve this objective alone. In these cases, an argument can be made that more prosperous states (and potentially non-state actors) have a secondary obligation to support the realization of capabilities in other states as well.³⁴⁵ This partial theory of global justice is a result of grounding the fiduciary theory and the human rights-based capabilities approach in the principle of the equal, universal and inherent dignity of the human person.

It has been repeatedly acknowledged at an international level that recognition of the dignity and human rights of all individuals is the foundation of peace and justice in the world and is thus of international concern.³⁴⁶ In particular, the *Vienna Declaration and Programme of Action* expressly reaffirms the role of the international community (including states, international organizations and non-governmental organizations) in creating conditions favourable to the full enjoyment of human rights at the national, regional and international levels, and requests that increased efforts be made to assist countries in securing these conditions.³⁴⁷ Thus respect for the inherent dignity of the human person is not circumscribed by national boundaries or by citizenship. The fiduciary duty of a host state to secure human rights-based capabilities to refugees within its territory imposes a requirement that the state act in the interests of its beneficiaries: this arguably includes an obligation to request and to accept assistance in realizing its fiduciary obligations where it cannot do so on its own. Similarly, the primacy of human dignity as a guiding principle with respect to state action could be seen to suggest that other states have a responsibility to provide necessary assistance when possible to protect the dignity of individuals in other states. The precise content and form of this general overarching duty

³⁴⁵ Nussbaum, *Frontiers of Justice*, *supra* note 279 at 316.

³⁴⁶ See e.g. *Universal Declaration*, *supra* note 224; *ICCPR*, *supra* note 73.

³⁴⁷ *Vienna Declaration*, *supra* note 10.

would obviously need to be determined contextually but its existence is supported by current international human rights law and theory.

V. Conclusion

The purpose of this chapter has not been to propose an absolute theory of state responsibility for human rights but to construct a conceptual framework that can be used to guide both the form and objectives of refugee assistance in practice. On the one hand, the human rights-based capabilities approach instructs us to focus on the lived reality of human rights, on what individuals can be and do in practice rather than on the rights set out on paper. The purpose of state action then, including with respect to refugee assistance, should be to expand the range of human rights-based capabilities that individuals have access to with the objective of raising every person above a basic threshold level of capability. On the other hand, the fiduciary theory of state legal authority informs the way in which we perceive these capabilities as entitlements and their correlative obligations. Arising as a product of the fiduciary relationship between the state and those subject to its discretionary authority, human rights-based capabilities are legal claims that the state is under a legal duty to satisfy.

Combining the human rights-based capabilities approach with the fiduciary theory of state legal authority allows us to draw at least three important conclusions. First, while not excluding the possibility of justifiable differential treatment, the fiduciary theory explicitly recognizes that the formal moral and legal equality of all individuals subject to state authority with regards to the respect for human rights, including that of non-citizens, is a key component of state sovereignty and legitimacy. Second, the human rights-based capabilities that form the basis of this integrated approach are independent of domestic legislation or international treaties and exist regardless of state action. Third, both theories highlight participation, public debate and deliberation as a function of human dignity and as a crucial means of protecting that dignity.

In the end, the human rights-based capabilities approach outlined in this chapter provides a partial theory of justice setting out the basic conditions that a state must meet in order to be considered minimally just. Using this framework, the coming chapters will demonstrate how the inherent dignity of refugees and the legal rights and obligations that flow from this dignity can only truly be respected and satisfied by a fundamental change in our understanding and approach to refugee assistance. The dignity of refugees and the prohibitions against instrumentalization

and domination by powerful actors require that refugees no longer be seen as helpless beneficiaries of charity, but be empowered to assume their place as legal actors and agents in their own lives.

Chapter 3 - Making a Tragic Choice: Legal Empowerment as an Enabling Central Capability³⁴⁸

I. Introduction

The assertion that states hosting protracted refugee populations have a moral, political and legal duty to ensure the conditions necessary for a life with dignity sadly goes hand in hand with an acknowledgement that most states and aid providers are unable to fully meet this obligation and are thus forced into the position of making tragic choices. Balancing the benefits of security, of health, of education and of employment (to mention only a few), or the needs of different populations against one another in the context of the allocation of scarce resources is regrettably an inherent part of international assistance. In the previous chapter, it was explained that the state's legal obligation to ensure human rights-based capabilities arises as a function of the fiduciary relationship that exists between the state and refugee populations under its jurisdiction. The adoption of this capabilities-based approach embodies the acknowledgement that the formal existence and recognition of the human rights of refugees is insufficient; refugees must be able to effectively access and use those rights or the state's legal obligations have not been met. According to this theoretical framework then, once basic security and survival is assured in a given refugee situation, the state and other aid providers must decide how best to employ limited resources in order to secure a threshold level of human rights-based central capabilities, of meaningful "beings and doings" to all refugees.

In this chapter and those that follow, it is argued that the legal empowerment of refugees in protracted refugee situations, in other words enabling refugees to use the law and legal mechanisms to secure both their rights and control over their lives, should be embraced as a critical central capability in itself, a crucial enabling mechanism for the realization of other important "beings and doings" and ultimately a means for host states to meet their fiduciary obligations. It is well accepted that the law and legal institutions and mechanisms play an

³⁴⁸ Portions of this chapter have been adapted from Anna Lise Purkey, "A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations" (2014) 27:2 *Journal of Refugee Studies* 260.

important role in ensuring that every individual within a society is able to live a dignified life in which her rights are fully realized. What is surprising and dismaying is how little impact this knowledge has had on the way in which states and the international community at large address the condition of individuals caught in protracted refugee situations, situations of profound insecurity and vulnerability.

As previously noted, refugees share many of the characteristics of other marginalized groups including poverty, discrimination, lack of access to services, social exclusion, dependence, voicelessness and routine and systemic human rights violations, along with the added challenge of lacking an effective citizenship and/or formal legal status in the country in which they are living. Although their rights are enshrined in many international legal instruments, refugees in protracted situations are often unable to effectively claim and benefit from the full range of rights to which they are legally entitled. Nor are they able to obtain redress when their rights are violated due to their lack of citizenship, their precarious legal and political situation and the substantial barriers that stand between refugees and the legal processes that they could use to make strong successful claims. Legal empowerment offers a way of breaking down those barriers and of increasing refugees' control over their own lives.

To this end, this chapter examines the current understanding of empowerment generally and legal empowerment specifically and proposes a definition of legal empowerment that is applicable in protracted refugee situations. It is further posited that an emphasis on legal empowerment is a vital part of an effective human rights-based capabilities approach. Not only can legal empowerment help refugees to translate their human rights entitlements into legal claims, but it is a necessary precondition to any functioning human rights system; legal empowerment is part of an enabling framework for the realization of human rights as capabilities. Last but not least, legal empowerment contributes to the process of public reasoning and social discussion that defines and prioritizes capabilities and to the non-instrumentalization and non-domination of refugees that is fundamental to the integrity of the state-refugee fiduciary relationship.

A. Setting the Stage: The Backdrop to Legal Empowerment in Protracted Refugee Situations

While the true potential and importance of legal empowerment for individuals caught in protracted refugee situations will be illustrated throughout this chapter, there are several specific

aspects of PRS that are worth noting at the beginning as they provide the backdrop to the analysis that follows. Familiar as they may be, these points highlight the particular precariousness of refugees in protracted situations and, consequently, help to justify the need for an approach that adopts a legal empowerment focus.

First, lacking citizenship in the country in which they find themselves, refugees are often subject to a wide range of restrictions on their rights. For example, refugees in camps may be prohibited from leaving the camps, their ability to seek employment outside of the camp may be restricted, they may be subject to limitations on their right to protest or to express themselves freely and, as non-citizens, they are unable to participate in the political life of the state in which they reside.

Second, as a result of the restrictions on their rights and their inability to participate in the political life of the state, refugees are largely voiceless. They generally lack the opportunity and the standing to participate effectively in the discussions pertaining to their own immediate circumstances, not to mention those pertaining to broader considerations (development, repatriation, peace negotiations in their homeland, etc.). In this case, as in many other cases, voice requires more than simply the ability to speak, it requires the ability to contribute to establishing the parameters of the conversation and to be both listened to and heard by those that exercise power. The participation of refugee communities is a key element in any human rights-based approach and, as such, is increasingly a feature of intervention in refugee situations.³⁴⁹ Nevertheless, the effectiveness of this participation, the extent to which refugees are actually able to be heard and to influence policy and practice in a meaningful way, varies greatly. A recent example highlighting these problems are the discussions concerning the repatriation of Burmese refugees from Thailand. For several years rumors and unofficial statements have hinted at plans for imminent repatriation without any meaningful consultation with the refugee communities themselves.³⁵⁰

Third, refugees face high levels of insecurity in camps and with respect to the attitudes and policies of the host state. Refugees are more likely to be arrested for minor infractions and to

³⁴⁹ For example, see UNHCR's Community-based Approach in UNHCR Operations. UNHCR, *A Community-Based Approach in UNHCR Operations* (Geneva: UNHCR, 2008), online: www.refworld.org/pdfid/47da54722.pdf [UNHCR, *Community-Based Approach*].

³⁵⁰ See e.g. Burma Partnership. *Nothing About Us Without Us*, video (Burma Partnership: 2012), online: www.burmapartnership.org/nauwu/; Saw Yan Naing, "Burmese Refugees Criticize Thailand's Push for Quicker Repatriation" *The Irrawaddy* (15 July 2014), online: www.irrawaddy.org/burma/burmese-refugees-criticize-thailands-push-quicker-repatriation.html.

face greater punishments. For instance, in 2010 Human Rights Watch produced a report that described extensive abuse of refugees by police in Dadaab camp as well as unlawful restrictions on the right to freedom of movement of refugees and abusive use of criminal sanctions such as imprisonment.³⁵¹ In the Burmese refugee camps in Thailand, camp residents are prohibited from leaving the camps without permission and from working outside of the camps. A camp resident caught outside the camp without permission may be considered to have forfeited his claim to protection and risks arrest, detention and deportation and/or may be forced to pay a bribe to be released.³⁵²

Fourth, refugees in protracted situations also face uncertainty with regards to their current and long-term status as they have little hope of a durable solution. They cannot return home to a country that is still unsafe, they cannot move on to a third country, as none have offered them resettlement, and they cannot establish themselves permanently in the country of first asylum because of resistance to integration on the part of the host state.³⁵³

Fifth and finally, refugees in protracted situations are subject to a complicated and often *sui generis* system of governance involving community leaders, international organizations (including but not limited to UNHCR), aid providers, and the host state authorities. As host states frequently abdicate or are unable to fulfill their responsibilities with regards to assisting and governing refugee communities, refugees may find themselves in situations where non-state actors such as UNHCR or other aid providers exercise state-like administrative and governance powers over them, including playing a role in the administration of justice.³⁵⁴

For all of these reasons, refugees are particularly at risk for violations of their human rights. As a result, refugees have a great deal to gain from legal empowerment, even though these same factors make the process of legal empowerment especially challenging. In her seminal essay “The Decline of the Nation-State and the End of the Rights of Man”, Hannah Arendt refers to stateless persons and refugees, who are *de facto* stateless, as being “rightless”

³⁵¹ Human Rights Watch, “Welcome to Kenya” *Police Abuse of Somali Refugees* (New York: Human Rights Watch, 2010), online: www.hrw.org/sites/default/files/reports/kenya0610webwcover.pdf.

³⁵² See generally UNHCR, *Analysis of Gaps in Refugee Protection Capacity – Thailand* (November 2006), online: www.refworld.org/docid/472897020.html; Human Rights Watch, *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers* (New York: Human Rights Watch, 2012) online: www.hrw.org/reports/2012/09/12/ad-hoc-and-inadequate.

³⁵³ See Julie Veroff, “Crimes, Conflicts and Courts: the administration of justice in a Zambian refugee settlement” (2010) UNHCR Policy Development and Evaluation Service, *New Issues in Refugee Research*, Research Paper No 192, online: www.unhcr.org/4cd7bfa99.html.

³⁵⁴ See *ibid.*

and as being denied “a place in the world which makes opinions significant and actions effective.”³⁵⁵ Arendt claims that the downfall of these people “is not that they are not equal before the law, but that no law exists for them.”³⁵⁶ Although we have, for the most part, moved beyond Arendt’s extreme skepticism about the existence of human rights independent of state membership, her assertions highlight the importance of law in *ensuring* human rights in practice. Legal empowerment has the potential to bring refugees out of a state of *de facto* rightlessness into the realm of legality; to ensure that their rights not only exist on paper but are also effective.

B. A Lacuna: Situating the Legal Empowerment of Refugees in the Current Scholarship and Practice

Reviewing the academic literature on protracted refugee situations, as well as operational manuals and guiding principles, reveals a serious gap in both scholarship and policy development as they pertain to justice in protracted refugee situations. The first important policy document or set of guidelines on justice in refugee camps by UNHCR, and the only major review of the administration of justice in refugee camps, was a study commissioned by UNHCR and written by Rosa da Costa in 2006.³⁵⁷ Apart from that study, the literature is limited to a small handful of articles and reports, generally pertaining to specific case studies, for example focussing on the Sudanese Bench Courts in Kakuma or sexual violence in refugee camps in Guinea.³⁵⁸ As Julie Veroff has noted, what little scholarship exists tends to be overly legalistic, focussing on the specific procedural aspects of justice as opposed to adopting a more open-ended analysis.³⁵⁹

The limited and piecemeal academic and practitioner scholarship on justice in refugee camps and settlements mirrors the way in which justice has been addressed on the ground. This is not to say that there are no justice initiatives within refugee camps and settlements, only that there has been no consistent and comprehensive focus on the role of justice in refugee situations.

³⁵⁵ Arendt, *supra* note 2 at 296.

³⁵⁶ *Ibid* at 295.

³⁵⁷ Da Costa, *Administration of Justice*, *supra* note 8.

³⁵⁸ Griek, *supra* note 8; Farmer, *supra* note 8. One important contribution to this field is the newly published book by Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism*, *supra* note 6, which consists of an extensive case study of the Karen refugee camps on the Thai-Burmese border but also provides insights that would be useful in other contexts.

³⁵⁹ See Veroff, *supra* note 353.

Additionally, empowerment initiatives in protracted refugee situations have largely focussed on economic empowerment through activities such as income-generating initiatives, with little effective discussion of the potential benefits of legal empowerment. The fragmented approach of both practice and scholarship are demonstrative of the failure of the international aid community and host states to fully recognize legal empowerment and justice as important, not to mention necessary, parts of a comprehensive response to protracted refugee situations.

With little guidance available pertaining specifically to refugees, it is necessary to turn to the body of knowledge on legal empowerment that has been produced by the development sector. Although many development actors have long understood the important role that empowering vulnerable individuals to access and use legal and justice mechanisms plays in raising them out of poverty, the emphasis placed on legal empowerment in development is relatively recent and can largely be attributed to the work of the Commission on Legal Empowerment for the Poor an independent international organization hosted by the United Nations Development Programme between 2005 and 2008 with the mission to investigate the connections between poverty and the law and to make legal protection and economic opportunity the right of all people.³⁶⁰ By studying the role that legal empowerment has been given in development theory, we are able to realize to what extent responses to protracted refugee situations have fallen short.³⁶¹

³⁶⁰ Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone – Volume One* (New York: Commission on Legal Empowerment of the Poor, 2008) [CLEP, *Volume One*]; Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone – Volume Two* (New York: Commission on Legal Empowerment of the Poor, 2008) [CLEP, *Volume Two*].

The CLEP's 2008 report is joined by other reports including those by the Asian Development Bank [Stephen Golub and Kim McQuay, "Legal Empowerment: Advancing Good Governance and Poverty Reduction" in *Law and Policy Reform at the Asian Development Bank* (Manila: Asian Development Bank, 2001); Asian Development Bank, *Legal Empowerment for Women and Disadvantaged Groups*, Final Report (Manila: Asian Development Bank, 2009)], the International Development Law Organization [Stephen Golub, "What is Legal Empowerment? An Introduction" in Stephen Golub ed, *Legal Empowerment Practitioners' Perspectives* (Rome: International Development Law Organization, 2010) 9 [Golub, "An Introduction"]], the UNDP [UNDP, *Programming for Justice*, *supra* note 220], and finally by the UN Secretary-General's Report on *Legal Empowerment of the Poor and Eradication of Poverty* [*Legal Empowerment of the Poor and Eradication of Poverty: Report of the Secretary-General*, UN GAOR, 64th Sess., A/64/133 (2009) [Secretary-General, *Eradication of Poverty Report*]] that together make up a rich body of knowledge and expertise that can be used to inform a new legal empowerment-based approach to protracted refugee situations.

³⁶¹ There have been attempts to implement development-inspired approaches to refugee assistance however these initiatives have generally adopted a narrow and traditional understanding of development in which the primary objective is to reduce poverty. This economic bias still permeates much of the development framework despite a growing body of scholarship that recognizes that a comprehensive understanding of development means not focusing simply on putting money into people's pockets but on expanding their freedoms and capabilities, and

II. Understanding Power and Empowerment

The recognition that most cases of marginalization and exclusion are products, at least in part, of voicelessness and powerlessness has pushed the concept of empowerment to the forefront of social movements. But what exactly is meant by empowerment? How do we know when empowerment has been achieved? Can a person simultaneously be empowered and disempowered? Is empowerment a legitimate objective for development, humanitarian assistance or any other social program? And what is the difference between the various forms of empowerment: social, political, economic, legal, etc.? Not all of these questions have clear answers; many will depend upon the particular context in which they are asked. Nevertheless, a brief overview of the concept of empowerment provides a good backdrop to the discussion of legal empowerment that follows.

A. Empowerment: A Range of Definitions

Depending on the context, empowerment has been linked to many different concepts: self-respect, choice, dignity, independence, capacity, decision-making, autonomy, self-confidence, control, power...³⁶² It seems unlikely that any one definition could effectively capture the complexity of this concept. In fact, a very brief review of some of the literature reveals that many different definitions have been proposed in the development context. Some definitions adopt a more personal understanding of empowerment focusing on restoring a sense of one's own value and ability to address problems, while others emphasize the centrality of power relations.³⁶³ The following are just a few of the definitions that exist:

- “the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives”³⁶⁴
- “the process of enhancing an individual’s or group’s capacity to make purposive choices and to transform those choices into desired actions and outcomes”³⁶⁵

ultimately their rights. It is this understanding of development that must inform the application of development theory, including that pertaining to legal empowerment, to protracted refugee situations.

³⁶² See Deepa Narayan ed, *Empowerment and Poverty Reduction: A Sourcebook* (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2002).

³⁶³ See Dan Banik, “Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication” (2009) 1 *Hague Journal on the Rule of Law* 117 at 127 [Banik, “Legal Empowerment”].

³⁶⁴ Narayan, *supra* note 362 at vi

³⁶⁵ Ruth Alsop, Mette Frost Bertelsen & Jeremy Holland, *Empowerment in Practice: From Analysis to Implementation* (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2006) at 1, online: siteresources.worldbank.org/INTEMPowerment/Resources/Empowerment_in_Practice.pdf.

- “a dynamic process, of the expansion of freedom of choice and action and the ability to influence the behaviour of other agents and social arrangements”³⁶⁶
- the “expansion in people’s ability to make strategic life choices in a context where this ability was previously denied to them.”³⁶⁷

Although the wording of these definitions varies, their essence remains largely the same; empowerment is about increasing the control that individuals have over their own lives. As such, empowerment can be seen as being closely related to the capabilities approach discussed earlier. Given that the objective of the capabilities approach is to expand the freedom (and capability) of people to enjoy “valuable beings and doings”, in other words, to make the choices that matter to them, the capabilities approach itself embodies the idea of empowerment.

B. Agency and Opportunity Structure: The Core of Empowerment

Many elements influence the level of empowerment of a particular individual or group but these can be largely organized according to a framework composed of two parts: agency and opportunity structure.³⁶⁸ Empowerment depends then upon the interaction between the capacities of individuals and groups to make purposive choices and the social, political and institutional context within which those choices are made.³⁶⁹

Agency

The concept of agency, already mentioned several times in this dissertation, refers to the ability of individuals or groups to make “purposeful choices”, that is to be able to envisage their options and choose among them or to act on behalf of what they value and have reason to value.³⁷⁰ As agents, individuals and groups are understood as active participants in their own lives with diverse goals and values. Agency is instrumentally valuable as it enables individuals and groups to bring about change, but it is also intrinsically valuable. The agency of an actor, whether an individual or a group, is largely dependent upon their available assets and capacities,

³⁶⁶ Arjun Sengupta, “The Political Economy of Legal Empowerment of the Poor” in Dan Banik ed, *Rights and Legal Empowerment in Eradicating Poverty* (Surrey: Ashgate Publishing Ltd, 2008) 31 at 32.

³⁶⁷ Naila Kabeer, “Resources, Agency, Achievements: Reflections on the Measurement of Women’s Empowerment” (1999) 30 *Development and Change* 435 at 436.

³⁶⁸ See generally Alsop, Bertelsen & Holland, *supra* note 365; see also Solava Ibrahim and Sabina Alkire, *Agency & Empowerment: A Proposal for Internationally Comparable Indicators*, (2007) OPHI Working Paper No 4, online: Oxford Poverty & Human Development Initiative www.ophi.org.uk/working-paper-number-04/.

³⁶⁹ Patti Petesch, Catalina Smulovitz & Michael Walton, “Evaluating Empowerment: A Framework with Cases from Latin America” in Deepa Narayan, ed, *Measuring Empowerment: Cross Disciplinary Perspectives* (Herndon, VA: World Bank Publications, 2005) 39 at 41.

³⁷⁰ See generally Alsop, Bertelsen & Holland, *supra* note 365; see also Solava & Alkire, *supra* note 368; *ibid* at 42.

their “asset endowment”, which includes material, human, financial, social, informational and organizational resources, including organizational capacity.³⁷¹ There is also an important psychological component to agency. A certain level of consciousness is needed in order for individuals to be able to envision the options available to them based on their assets and to make choices.³⁷² A culturally-dependent conception of this factor has been referred to as the “capacity to aspire.”³⁷³ Whether it is a woman’s acceptance of the husband’s right to beat her or a Dalit’s acceptance of upper caste discrimination, passive acceptance of coercive forms of violence and other adaptive preferences may be deeply engrained in some groups to the extent that a psychological change must occur before individuals or groups are able to act as agents regardless of other assets at their disposal.³⁷⁴

Opportunity Structure

Even when actors have the capacity to make purposeful choices, their ability to use that agency effectively, to realize those options or to effect change through their actions, will depend upon the broader social and political framework within which they are acting; in other words, the opportunity structure.³⁷⁵ The opportunity structure component of empowerment can be defined as “those aspects of the institutional context within which actors operate that influence their ability to transform agency into action.”³⁷⁶ The opportunity structure includes the social and political structures in which people live and which set the rules for how agency is exercised by shaping and constraining individual choice and interaction. These structures may be formal, such as the laws and regulations that govern the operation of public services, the markets and political processes, or they may be informal such as the rules and incentive structures that govern relationships within organizations, communities and even families, including cultural norms and practices, value systems and other social norms of behaviour.³⁷⁷

In particular, Petesch, Smulovitz and Walton suggest that the opportunity structure in a given situation is the product of three influences: the openness or permeability of formal and informal institutions, the unity, ideology and behavior of powerful actors and the state’s implementation capacity, in other words the effectiveness with which government can implement

³⁷¹ See generally Alsop, Bertelsen & Holland, *supra* note 365; see also Solava & Alkire, *supra* note 368.

³⁷² Alsop, Bertelsen & Holland, *supra* note 365 at 11.

³⁷³ Petesch, Smulovitz & Walton, *supra* note 369 at 42.

³⁷⁴ Alsop, Bertelsen & Holland, *supra* note 365 at 11.

³⁷⁵ For an in-depth discussion of opportunity structure, see Petesch, Smulovitz & Walton, *supra* note 369 at 45ff.

³⁷⁶ Alsop, Bertelsen & Holland, *supra* note 365 at 10.

³⁷⁷ *Ibid* at 13.

policies that have been adopted.³⁷⁸ Obviously the exercise of agency by marginalized groups, and thus their empowerment, will be much more difficult and less likely to meet with success in a state characterized by a strong, unified dominant group with an entrenched history of patronage and bias as opposed to a state where members of the middle class are themselves willing to challenge the status quo, or where the elite is fragmented. Similarly, the exercise of agency can be made easier either by a strong governmental implementation capacity where the state embraces inclusive values or by weak implementation capacity where the laws to be enforced are discriminatory. For example, empowerment and the effective exercise of agency in Burma in the 1990s would be extremely difficult given the existence of a motivated and unified elite with strong oppressive ideologies, an exceptional capacity to enforce their policies through an extensive security apparatus, and a very fragmented ethnic opposition.

Whether it is the requirement that individuals be represented by lawyers in courts, the corruption of police officers, the value placed on oral contracts, the existence of institutional bias in favour of a dominant ethnic group or the social pressure exerted on women to defer to their husbands, the opportunity structure will influence the ability of individuals to translate their choices and preferences into action as well as the outcomes of those actions. In a particular case, the opportunity structure may facilitate the ability of certain individuals to convert their valuable choices (agency) into outcomes or it may impede them doing so. In the latter cases, the opportunity structure can be seen as analogous to Amartya Sen's idea of conversion difficulties, that is, the difficulties that some people may have in converting resources into "doings and beings" that they value.³⁷⁹

According to this model, the empowerment of individuals depends on both their agency and the opportunity structure and, more specifically, on the interaction between these two. It follows then that individuals and groups can be empowered through the enhancement of either or both (depending on the circumstances) agency and opportunity structure. Consequently, the objectives of empowerment initiatives must be both to increase the freedom and ability of individuals to make choices, as well as to create an opportunity structure that allows people to translate their assets and capabilities into effective and valuable results. Just like the capabilities approach, empowerment looks to what actors are actually able to do and to become. The goal of

³⁷⁸ Petesch, Smulovitz & Walton, *supra* note 369 at 45.

³⁷⁹ See Sen, *Development as Freedom*, *supra* note 153 at 88.

empowerment then is not just to achieve a transfer of resources, it is to create “sound legal and political frameworks which specifically address the needs of poor and vulnerable groups in the population and hold political and administrative leaders to account for policy failure.”³⁸⁰

C. Power: the Currency of Empowerment

Of course it would be a gross oversight to pursue a discussion of empowerment without at least a brief mention of the concept of power itself. There are many different understandings and theories of power, and a review of them all is beyond the scope of this dissertation and is not necessary to the understanding of a legal empowerment-based approach. There are, however, some basic observations about power that can enrich this discussion.

1. Power as Setting the Rule of the Game

Power, its exercise and its possession, is not always obvious. Some definitions of power focus on the ability of one individual, group or community to get another to do something that is against its interests.³⁸¹ A community leader, the head of the household, a wealthy landowner, a policeman and a judge may all exercise this type of overt power.³⁸² But this is only part of the picture. This overt power can be understood as the power that one has in ‘playing the game’ but it is preceded by the power that is exercised in ‘setting the rules of the game.’ Consider as an example a game of poker: the player with four aces in his hand may have more “power” than the player with four threes but only because somewhere along the way it was decided that aces were high. Power is exercised not just in winning an argument but in deciding what is being argued in the first place, in shaping the story being told and the discussions being held. In this way, power can be understood as being linked to the opportunity structure discussed above; the opportunity structure will often reflect the power dynamics of a community as the opportunity structure represents to some extent the “rules” that control the exercise of agency. At the extreme, in discussing the exercise of power in this type of ‘unobservable conflict’, Steven Lukes asserted that

³⁸⁰ Banik, “Legal Empowerment”, *supra* note 363 at 118.

³⁸¹ Jo Rowlands, *Questioning Empowerment: Working with Women in Honduras* (Oxford: Oxfam (UK and Ireland), 1997) at 9.

³⁸² Note that the power possessed by the policeman and the judge is a type of legitimate or positional power in that it is held by the individual by virtue of his position within organized society. Ideally, this is a type of formal power that is delegated to the position, as opposed to the individual who occupies that position. In practice, this legitimate power is often susceptible to exploitation and misuse.

the most effective and insidious use of power is to prevent...conflict arising in the first place ... by shaping [people's] perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable or because they value it as divinely ordained and beneficial.³⁸³

This more subtle exercise of power can also be seen in situations where individuals have consistently been denied access to power and influence in society. In many such cases, those individuals may end up internalizing the messages that they receive from society about what their interests are and what they are meant to be and to do either out of habit or as a survival mechanism.³⁸⁴ Referred to as 'internalised oppression', evidence of this process can be seen in the case of domestic violence where women may come to believe that it is acceptable for a husband to beat his wife if she does not cook his dinner properly and in the case of the Dalits in India where some individuals accept the rampant abuse and discrimination that they are subject to as the proper order of society. A similar example found in refugee camps is discussed by Barbara Harrell-Bond in the article "Can Humanitarian Work with Refugees be Humane?"³⁸⁵ All too often, refugees are portrayed as being helpless, vulnerable victims with little agency of their own. While this conception may have benefits for organizations in terms of extracting aid from international donors, it can have a very negative impact on refugees' self-perception as well as their capabilities. If the "good" refugee, the one that will receive assistance, is passive and vulnerable, individuals will adopt this role and ingratiate themselves to camp authorities in order to survive. As explained by Hyndman, instead of directing energy towards the development of their capabilities and self-sufficiency, energy is then directed towards manipulating aid providers.³⁸⁶ Furthermore, Hyndman goes on to assert with respect to Somali refugees in Kenyan camps that the refugees have represented themselves to donors as helpless victims for so long that they have actually managed to convince themselves as well.³⁸⁷

³⁸³ Steven Lukes, *Power: a Radical View* (London: Macmillan, 1974) at 23.

³⁸⁴ Rowlands, *supra* note 381 at 11.

³⁸⁵ Harrell-Bond, "Humanitarian Work", *supra* note 3.

³⁸⁶ Jennifer Hyndman, *Geographies of Displacement: Gender, Culture and Power in UNHCR Refugee Camps, Kenya* (PhD Thesis, University of British Columbia, 1996) [unpublished], cited in Harrell-Bond, "Humanitarian Work", *supra* note 3 at 58.

³⁸⁷ *Ibid.*

2. A Typology of Power

Given the quantity of scholarship and the range of theories on the subject, there is little success to be had in trying to elucidate a unitary definition of power. Perhaps the best understanding of the complexity of power comes through an examination of its main typologies: power over, power to, power with and power within.

The first type of power, “power over”, is likely the most familiar. “Power over” refers to controlling power or the ability to act upon a person or thing.³⁸⁸ A has power over B when A can get B to do something against his/her own interests. According to this conception, there is a finite amount of power which means that this is a zero-sum game: a power gain by one party corresponds to an equivalent power loss by another. As a result, “power over” is conflictual and relational in that it pits one party against another and is only evident when the different parties interact with one another. As noted above, conflict is not always overt and so “power over” may take many forms, some more invisible than others (force, discrimination, coercion, repression...).³⁸⁹ Thus “power over” can be seen as being closely linked to the ideas of rule setting, hegemony and domination. In this context hegemony refers to “understanding the way the world is as being the only way the world could be.”³⁹⁰ Those with “power over” are able to order society around them in such a way that it is difficult for others, specifically those without power, to envision an alternative.

The exercise of “power over” can be met with compliance, resistance or manipulation.³⁹¹ Through resistance individuals can either seek to directly challenge the existing hegemony or they can seek to merely make life better for themselves within it; they can challenge the exercise of this power or they can challenge its existence and the very structures (institutions and beliefs) that support it.³⁹² With respect to this type of power, empowerment seeks to bring those who

³⁸⁸ Rosalind Eyben, “Linking Power and Poverty Reduction” in Ruth Alsop, ed, *Power, Rights, and Poverty: Concepts and Connections* (Washington DC: The International Bank for Reconstruction and Development/The World Bank and the Department of International Development, 2004) 15 at 19.

³⁸⁹ Fruzsina Csaszar, “Understanding the Concept of Power” in Ruth Alsop, ed, *Power, Rights, and Poverty: Concepts and Connections* (Washington DC: The International Bank for Reconstruction and Development/The World Bank and the Department of International Development, 2004) 137 at 144.

³⁹⁰ Eyben, *supra* note 388 at 21.

³⁹¹ Csaszar, *supra* note 389 at 144; Rowlands, *supra* note 381 at 13.

³⁹² See Eyben, *supra* note 388 at 21.

have been excluded from the decision-making process into it so that they can contribute to “setting the rules.”³⁹³

Unlike “power over”, the three remaining types of power are more consensual: they do not presuppose that power is linked to conflict, or that it is necessarily a zero-sum game. The second type of power, and the first of these three, is “power to” or generative or productive power.³⁹⁴ It is the power to create change or to prevent change from happening, the power of each individual to shape her life and the world around her. In short, it is “the capacity to have an effect.”³⁹⁵ Interestingly for the purposes of this discussion, “power to” can be linked to the capabilities approach. If the objective of the capabilities approach is to expand the capabilities of individuals to achieve the beings and doings that they value, then the “power to” (effect change) of those individuals must also be increased. But “power to” is not only about the ability to effect change, it also about the *recognition* by individuals of their real interests and of their power or ability to create a situation that is more favourable to them and thus requires knowledge and analytical skills. The idea of real interests here can be distinguished from the interests that exist solely as a product of the “power over” exercised by others and the hegemonic power structures of society. For example, an individual born into a low caste may believe that his/her interests lie in submitting to a life of degradation and discrimination in order to gain merit in another life or simply to maintain the stability of society when in fact the individual’s real interests may lie in gaining an education, seeking better employment, seeking redress for injustices, etc. Obviously there are other factors both external (risk of retaliation) and internal (internalised oppression) that may make it difficult to distinguish between an individual’s “real” interests and those that are the result of existing power structures. Empowerment then is concerned with the processes by which individuals become aware of their own “real” interests and their ability to effect change as well as their efforts to actually achieve that change.³⁹⁶

The third type of power is “power with”. This power is collaborative; it embodies the idea that the whole is greater than the sum of its parts. “Power with” is achieved through the development of collective strength through mutual support and shared strategies, skills and knowledge. “Power with” is tied to the idea of organization and collective action based on shared

³⁹³ Alsop, Bertelsen & Holland, *supra* note 365 at 232.

³⁹⁴ Rowlands, *supra* note 381 at 13.

³⁹⁵ Eyben, *supra* note 388 at 17.

³⁹⁶ See Alsop, Bertelsen & Holland, *supra* note 365 at 232.

values and solidarity but can also be found to some extent in any informal association of individuals who join together for a particular purpose. “Power with” multiplies the power of each individual and can be used to resist “power over”. A typical example is the power held and exercised by labour unions. On their own, each individual worker is vulnerable and the imbalance in power between the employer and the employee is such that free negotiation is virtually impossible. A union however, representing hundreds or even thousands of workers, can not only negotiate favourable working conditions but change the very framework through which power is exercised. The same is true to a greater or lesser extent in the context of other types of community organizing, whether it is a march organized by student groups to protest tuition increases or a letter-writing campaign organized by Amnesty International to call for the release of political prisoners.

The final element in this typology is “power within” or “power from within”. “Power within” relates to a person’s self-worth and self-knowledge and involves the acknowledgement of oneself as able and entitled to make decisions about one’s life.³⁹⁷ This type of power is linked to the conceptualization of the self as a person with dignity and is based on an individual’s self-acceptance and self-respect, and by extension the acceptance and respect of others as equals.³⁹⁸ In some ways, “power within” is a basic requirement of any other form of power; before one can organize and collaborate (“power with”) or strive to effect change in one’s life (“power to”), not to mention try to control others (“power over”), there must be an acknowledgement of oneself as being worthy of and entitled to exercise power.

It follows then that if “power over” can be seen as being related to opportunity structure, the combination of the three remaining types of power can be understood as relating to the concept of agency.³⁹⁹ “Power to” may be the type of power that is most explicitly linked to agency in that it concerns an individual’s intentions and ability to act and to change the world but in order to get to this point it is necessary to also have “power within”, the self-acceptance and consciousness of self as being a power holder. While agency can be exercised in isolation, in many situations the agency of an individual, the ability to actually make choices and act upon them, can be strengthened by collaboration and organization, by “power with”.

³⁹⁷ See generally Eyben, *supra* note 388 at 22; see also Csaszar, *supra* note 389 at 145.

³⁹⁸ Alsop, Bertelsen & Holland, *supra* note 365 at 233; Rowlands, *supra* note 381 at 13.

³⁹⁹ Csaszar, *supra* note 389 at 145.

3. What Do We Know?: Power and Knowledge

Another important point to consider is the relationship between knowledge and power. Whether one believes as Foucault did that all knowledge is socially constructed and therefore cannot be objective or, as Lukes does that there is some body of knowledge that is objective and free from power, what cannot be denied is that power has the capacity to conceal and to distort knowledge.⁴⁰⁰ Our knowledge and the way in which we understand the world are shaped by our position in it and by the power relations that affect our lives. Those who have power, particularly those who exercise “power over”, are able to shape the common discourse in a manner that is beneficial to their interests (for example emphasizing the dominance of one race, gender or social group over another).⁴⁰¹ In this way the exercise of power actually creates a particular understanding of social reality. Power also enables certain individuals to control the generation and dissemination of knowledge. For an example, one has only to consider the way in which CNN or Fox News is able to dictate not only what the public sees but also what it believes to be the truth. Likewise, a powerful interest group can affect how research monies are spent and thus control what new knowledge is created.

While control over knowledge can be used to buttress existing power structures, knowledge itself plays a vital role the individual’s ability to resist and recreate them. Deconstructing the current discourse and revealing it as the socially constructed entity that it is, is a first key step in changing the power relations and structures within a society.⁴⁰² A shared understanding of culture, identity, social roles and institutionalized systems provides the foundation for existing power relations. A new shared understanding, however, can be created when individuals come together to cooperate, for example in the context of exercising “power with”. This new shared understanding provides the link between individual agency and social change.⁴⁰³ Just as a new shared understanding can provide the basis for social change, as the power dynamics within a society change, whether naturally or because of the exercise of power, a new discourse and a new understanding of social reality can emerge and what is “known” changes. Thus the relationship between power and knowledge is mutually constitutive.

⁴⁰⁰ See e.g. Lukes, *supra* note 383; Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Colin Gordon ed (New York: Pantheon Books, 1980).

⁴⁰¹ See Csaszar, *supra* note 389 at 139.

⁴⁰² Eyben, *supra* note 388 at 23.

⁴⁰³ See Marianne T Hill, “Development as Empowerment” (2003) 9(2-3) *Feminist Economics* 117 at 126.

4. What Do We Have?: Acquiring Power as Empowerment

A much more detailed discussion of empowerment can be found elsewhere in this chapter but there is one point that merits direct reference here as it arises as a function of the typology of power previously discussed: true power is never “given”, it must come from within. Any attempt at empowerment that is based on the premise that power can be conferred on individuals and communities by others is merely masking existing power structures and an attempt to maintain control.⁴⁰⁴ Power that is given can just as easily be taken away and does not ultimately change the existing power dynamics.⁴⁰⁵ Real empowerment involves gaining control not only over one’s own life within the context of existing power structures but also gaining some control over, and the capability to change, those structures themselves. These conclusions have important implications for the design of empowerment initiatives and provide a justification for a critical focus on agency and participation in those programmes. Aid workers, humanitarian organizations and other actors that work in the field of empowerment should be providing support and guidance, but the real “work” needs to be accomplished by the individual or community seeking empowerment itself.

III. Legal Empowerment: Using Law to Change the Balance of Power

Using the concepts of empowerment and power as a backdrop, we can now begin to construct a more complete understanding of legal empowerment and what a legal empowerment-based approach would entail, remembering that the value of legal empowerment lies primarily in the important role that law, defined broadly, plays in defining, securing and enforcing human rights claims.

A. The Development Studies Understanding of Legal Empowerment

Given the range of definitions of empowerment, it is no surprise that there are diverse interpretations of legal empowerment as well. Legal empowerment has been variously defined as:

⁴⁰⁴ Rowlands, *supra* note 381 at 16. Note that this discussion does not pertain to positional power that can indeed be bestowed upon an individual by virtue of his/her position or role in society.

⁴⁰⁵ See *ibid* at 12.

- “[T]he use of legal services and related development activities to increase disadvantaged populations’ control over their lives.”⁴⁰⁶
- “[T]he ability [of disadvantaged groups] to use legal and administrative processes and structures to access resources, services, and opportunities.”⁴⁰⁷
- “[T]he use of law to increase disadvantaged populations’ control over their lives.”⁴⁰⁸
- Occurring “when the poor, their supporters, or governments – employing legal and other means – create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization.”⁴⁰⁹
- “[T]he uses of law to bolster human agency.”⁴¹⁰
- “[T]he process through which the poor become protected and are enabled to use the law to advance their rights and their interests, vis-à-vis the state and in the market. It involves the poor realising their full rights, and reaping the opportunities that flow from that, through public support and their own efforts as well as the efforts of their supporters and wider networks. Legal empowerment is a country and context-based approach that takes place at both the national and local levels.”⁴¹¹
- “[T]he process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors. It is a means to an end but also an end in itself.”⁴¹²

It is the last two definitions that carry the most weight: the definition of the Commission on the Legal Empowerment of the Poor (CLEP) and the definition adopted by the United Nations Secretary General that is based on the findings of the CLEP. According to the Secretary General’s report, legal empowerment is rooted in a human rights-based approach to development and strives to empower and strengthen the voices of individuals and communities from the ground up. The report acknowledges the importance of both the rule of law and of access to

⁴⁰⁶ Stephen Golub, “Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative” (2003) Carnegie Endowment for International, Peace Rule of Law Series, Democracy and Rule of Law Project Working paper No 41. at 25 [Golub, “Rule of Law Orthodoxy”].

⁴⁰⁷ Asian Development Bank, *supra* note 360 at viii.

⁴⁰⁸ Golub & McQuay, *supra* note 360 at 25.

⁴⁰⁹ John W. Bruce, et al. *Legal Empowerment of the Poor: From Concepts to Assessment* (Washington, D.C.: USAID, 2007) cited in Golub, “An Introduction”, *supra* note 360 at 10.

⁴¹⁰ Vivek Maru, “Access to Justice and Legal Empowerment: A Review of World Bank Practice” (2009) World Bank Justice and Development Working Paper No 9/2009, online: openknowledge.worldbank.org/bitstream/handle/10986/18102/518430NWP0Acce10Box342050B01PUBLIC1.pdf?sequence=1 [Maru, “Access to Justice”].

⁴¹¹ CLEP, *Volume One*, *supra* note 360 at 26.

⁴¹² Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 3.

justice for each individual in combatting deprivation, exclusion and vulnerability and in strengthening democratic governance and accountability.

In addition to the rule of law and access to justice, the Secretary General's report reemphasizes the three other "pillars of legal empowerment" identified by the CLEP: property rights, labour rights and business rights.⁴¹³ According to the Commission, these four pillars form the core of national and international legal empowerment efforts. The first pillar, legal empowerment and access to justice, provides the enabling framework for the other pillars and reflects both the need for a functioning and legitimate justice system and for all members of society to have access to that system. Legal empowerment will be unsuccessful if individuals are prevented from accessing and using the justice system, but it will be equally impossible if the system itself is corrupt or unjust, whether or not vulnerable groups have access to it.⁴¹⁴ Thus, according to this understanding, legal empowerment requires measures such as a system of laws and regulations that are just and non-discriminatory, recognition of legal identity, legitimate decision-making institutions, reform of informal and customary procedures, support for alternative dispute resolution, facilitation of access to formal institutions through civil society organizations, legal aid, paralegals, and others, support for consistent application of laws and effective enforcement of judgments by the state.⁴¹⁵

The second pillar, property rights, refers to the absence or insecurity of property rights which is considered to be a central cause of poverty.⁴¹⁶ The Commission identifies the importance of property rights as relating not only to their value as economic assets but also to the identity, dignity and stability that they bring.⁴¹⁷ Thus it is not enough for individuals have the right to own property, there must also be a system that recognizes both individual and collective property rights, including customary rights, a system of registration, a functioning market for the exchange of assets and a system for the resolution of disputes.⁴¹⁸

Labour rights are identified as the third pillar by the Commission. These rights may be particularly important to poor and marginalized groups as their labour may be their greatest

⁴¹³ See Secretary-General, *Eradication of Poverty Report*, *supra* note 360.

⁴¹⁴ CLEP, *Volume One*, *supra* note 360 at 5.

⁴¹⁵ *Ibid* at 5.

⁴¹⁶ Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 8.

⁴¹⁷ CLEP, *Volume One*, *supra* note 360 at 34.

⁴¹⁸ See *ibid* at 7.

asset.⁴¹⁹ The labour rights that require protection and development in a legal empowerment approach include the enforcement of basic labour standards such as freedom of association (the right to form and join trade unions), adequate working conditions (in terms of hours, pay, healthy and safe working conditions...), absence of discrimination and the elimination of forced and child labour. The Commission also refers to the need to improve medical care and health insurance, to expand social protections for workers and to increase access to employment opportunities in the market economy.⁴²⁰

Finally, the last pillar that the Commission and the Secretary General refer to is that pertaining to self-employment and business rights. This pillar acknowledges the fact that many poor people work as entrepreneurs in the informal economy which means that they do not have access to the benefits of the formal economy (financing opportunities, the ability to contract, tax breaks...) and are more insecure and vulnerable to corruption and to burdensome public regulations because they lack legal protection. The Commission suggests that addressing this pillar may include initiatives to promote the availability of financial services for entrepreneurs, to guarantee basic business rights (the right to vend, to access infrastructure, etc.) and to facilitate access to business opportunities and markets.⁴²¹

B. Contrasting Legal Empowerment and the Rule of Law Orthodoxy

The rise in popularity of the concept of legal empowerment is, in some respects, a reaction to traditional legal and justice development initiatives that represent what Stephen Golub refers to as the rule of law orthodoxy; thus it is important to explain the distinction between these two approaches.⁴²² The rule of law orthodoxy, consists of those ideas and strategies linked to globalization that are aimed at bringing about the rule of law as a means of achieving objectives such as economic growth and good governance.⁴²³ The problem is that these initiatives tend to define legal problems and solutions narrowly and to focus on state institutions and the formal justice system. This top-down approach is dominated by elite actors (professionals, foreign experts, etc.) and leaves little room for the agency of disadvantaged groups. This approach also often overlooks the fact that perhaps up to 90% of the law-related

⁴¹⁹ Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 9.

⁴²⁰ CLEP, *Volume One*, *supra* note 360 at 7.

⁴²¹ CLEP, *Volume One*, *supra* note 360 at 8.

⁴²² See Golub, "Rule of Law Orthodoxy", *supra* note 406.

⁴²³ Golub, "Rule of Law Orthodoxy", *supra* note 406 at 7.

problems involving disadvantaged individuals are addressed outside of the context of the formal legal system.⁴²⁴

In contrast, legal empowerment includes both top-down and bottom-up components and emphasizes the importance of partnership between different actors and the participation of vulnerable groups. The scope of legal empowerment is also not confined to the formal justice system but includes informal legal mechanisms as well as non-judicial strategies that “transcend narrow notions of legal systems, justice sectors and institution building.”⁴²⁵ Where the rule of law orthodoxy is traditionally driven by elite actors and the formal state institutions, legal empowerment is person and rights-driven and embraces a broad range of institutions that ensure that social forces are channelled into recognizable and accessible social, political or legal processes and not left to the will of powerful individuals.

C. Critique of the Current Definitions of Legal Empowerment

The work of the CLEP and the endorsement of the concept by the Secretary General and other UN bodies can be largely credited with the recent surge in popularity of the concept of legal empowerment both in scholarship and in practical implementation.⁴²⁶ Nevertheless, similar strategies have existed for years under various titles such as public interest law, cause lawyering, social justice, women’s empowerment or alternative lawyering. By defining legal empowerment explicitly and popularizing the concept, the CLEP has provided a focal point for these initiatives and has increased awareness of the potential of law for the development and protection of vulnerable groups. However, the understanding of legal empowerment employed by the CLEP and the Secretary General is not above critique and is not, some might argue, as big a departure from traditional approaches as it first appears.

The first criticism is that despite its focus on empowerment, the Commission’s approach is still fundamentally top-down and state-centric and depends too heavily on convincing states and other powerful elites of the merits of implementing legal empowerment programmes (even though these initiatives may involve acting against their own interests).⁴²⁷ Thus, although the

⁴²⁴ *Ibid* at 16.

⁴²⁵ *Ibid* at 4.

⁴²⁶ See Golub, “An Introduction”, *supra* note 360 at 10.

⁴²⁷ See Stephen Golub, “The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice” (2009) 1 *Hague Journal on the Rule of Law* 101 [Golub, “One Big Step”]; Banik, “Legal Empowerment”, *supra* note 363.

Commission broadens the scope of the discussion by including property, labour and business rights, it still places too much emphasis on the type of formal institutional action and reform that is characteristic of the rule of law orthodoxy (for example, relying overwhelmingly on legislative and regulatory reform and integration into the formal justice and market systems).⁴²⁸ The importance of civil society is acknowledged in the CLEP report, but that recognition is not effectively translated into a call for action when different initiatives are proposed.

The second major criticism relates to the content of the CLEP's legal empowerment-based approach and specifically its economic focus. Obviously, when discussing legal empowerment in the context of poverty, there will necessarily be a focus on economics as poverty is most simply defined as a lack of money or other assets. The CLEP report is based on the premise that individuals are held back and poverty is caused primarily by the insecurity and the lack of productivity of the assets of the poor.⁴²⁹ As Banik notes, this premise is consistent with Hernando de Soto's idea that "what really separates the developed from the developing world, is the existence (or lack of) legally enforceable transactions on property rights."⁴³⁰ Unfortunately, by focusing on these propositions, other equally if not more important causes of poverty and inequality are overlooked.

This economic focus is continued in the discussion of the four pillars of legal empowerment. The report describes why they are important but never truly explains why these four pillars, specifically the three pertaining to property, labour and business rights, were chosen or should be given priority over other rights and issues such as gender, education and health, discrimination and social exclusion?⁴³¹ Thus, the approach proposed by the CLEP's report is still fundamentally a market-based approach that reflects a traditional economic bias.⁴³² The language used in the definitions set out above makes this bias manifestly clear; the CLEP refers to advancing's one's rights and interests vis-à-vis "the market" while the Secretary General's definition refers specifically to individuals as "economic actors." The language and choice of focus suggest that the discussion of legal empowerment is still strongly influenced by a narrow, largely pecuniary, conception of poverty and development as opposed to the more expansive

⁴²⁸ See generally CLEP, *Volume One*, *supra* note 360.

⁴²⁹ *Ibid* at 1.

⁴³⁰ Banik, "Legal Empowerment", *supra* note 363 at 119.

⁴³¹ *Ibid* at 125.

⁴³² See generally Sengupta, *supra* note 366 at 31.

understanding that views development as the process of expanding a broad range of freedoms, capabilities and ultimately rights.

The dominance of the economic, market-based dimension of CLEP's legal empowerment also has an impact on how the report addresses the role of human rights which is the third criticism noted here. The report does acknowledge a conceptual link between legal empowerment and human rights and between a legal empowerment-based approach and a human rights-based approach but does not explain these interconnections sufficiently.⁴³³ It is unclear to what extent the absence of the full range of human rights is understood as a cause of poverty as well as the extent to which the realization of these rights are truly an objective of the CLEP's legal empowerment. For example, in suggesting at one point that the market both reflects basic freedoms and generates the resources to realize and enforce the full range of human rights, the report would appear to place too much faith in the market economy given its many evident failures.⁴³⁴ If we accept that human rights are indeed universal, interdependent and interconnected, then the realization of property, labour and business rights without regard to the other categories of human rights will be unlikely to result in much substantive change. Consequently, to maximize the effectiveness of a legal empowerment-based approach, there needs to be a full examination (and explanation) of the links between legal empowerment and human rights both at a conceptual and at a practical level.

D. A Definition of Legal Empowerment Appropriate to Protracted Refugee Situations

Drafted with the objective of addressing domestic poverty, the definitions of legal empowerment outlined by the CLEP and the Secretary General do not apply easily to protracted refugee situations. To begin with, the Secretary General refers specifically to the advancement of rights and interests "as citizens and economic actors".⁴³⁵ Refugees are not citizens of the country in which they reside and so are immediately excluded from this definition, and while the reference to "economic *actors*" (emphasis added) could be interpreted as an acknowledgement that what is important is what individuals can actually *be* and *do*, as opposed to what they have, it still displaces the proper focus of empowerment which should be on the rights of individuals

⁴³³ *Ibid* 31; Banik, "Legal Empowerment", *supra* note 363 at 122.

⁴³⁴ CLEP, *Volume One*, *supra* note 360 at 3.

⁴³⁵ Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 3.

merely as human beings, regardless of their other roles. Even if one does accept (which we do not) that the main focus in addressing poverty should be on economic activities, the same cannot be said of refugee situations. Certainly refugees may be poor, and economic initiatives may be of great use in increasing integration and self-sufficiency, but dependence on aid, as well as restrictions on employment, freedom of movement and other rights, mean that refugees may not in fact be economic actors within the host state, even if they possess the potential to be so. Furthermore, the emphasis on property rights as one of the four main focal points of legal empowerment has much less resonance in refugee situations given their (theoretically) temporary nature.

In short, without ignoring the important role that economic activities can play in refugee assistance, what is needed is a definition of legal empowerment that is specifically tailored to the refugee context and that embodies a rights-based approach to refugee assistance. Drawing on the definitions and characteristics of legal empowerment found in the academic literature and various other reports, legal empowerment in the refugee context can be understood as *the process through which refugees and protracted refugee populations become able to use the law and legal mechanisms and services to protect and advance all of their rights and to acquire greater control over their lives, as well as the actual achievement of that increased control.*

This definition has several important features, some of which are shared with other conceptions of legal empowerment and others that are more unique. First is the recognition that legal empowerment is both a process and a goal.⁴³⁶ It is a process through which the rights of refugees can be achieved, and it is also the actual realization of those rights, of enhanced control over their own lives and the decisions that affect them.

Second, reference to the use of law and legal mechanisms and services emphasizes that legal empowerment is not just about legislation and the formal court system. In this context law must be understood in a pluralistic and broad manner to further include regulations, administrative processes, alternative dispute resolution, traditional and/or religious justice systems and other informal systems of communal regulation and dispute resolution particularly as it is these quasi-legal structures that most often govern the issues of relevance to the lives and well-being of refugees. This broad approach is consistent with the objective of offering an alternative to the rule of law orthodoxy. By including mechanisms and processes, as well as

⁴³⁶ Golub & McQuay, *supra* note 360 at 26; Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 26.

bodies of knowledge, that are not necessarily under the control of the elite, legal empowerment is not only more responsive to the needs of the disempowered but they are also able to take a more active and dominant role in the process.⁴³⁷

Third, unlike the definitions of legal empowerment of the poor examined above, this definition of legal empowerment focuses on the expansion of human rights and well-being without any specific reference to economics. The objective of this silence is not intended to suggest that economics are not important in protracted refugee situations; indeed a degree of self-sufficiency and the ability to afford the things necessary to a dignified life are essential to ensuring that a refugee situation meets human rights standards, not to mention vital for the achievement of any durable solution. The reference in this definition to human rights necessarily includes economic rights, but does not presume to give them priority over other considerations.

The fourth point is that the most important concept in legal empowerment is not law but power.⁴³⁸ In legal empowerment, law is being used as a vehicle for modifying the balance of power. Although they can be corrupted and co-opted, law and legal processes provide the foundation on which socio-economic and political institutions are built and legitimized, a platform to amplify the voices of those who have little political power and a framework through which fundamental rights can be claimed and protected.⁴³⁹ In the language of power, legal empowerment seeks both to increase the agency of individuals and groups and to reform the opportunity structure in which that agency is exercised. According to this definition, legal empowerment in protracted refugee situations has as one of its objectives increasing the control that individuals have over their own lives; that is, their power to, power within and power with.

The final point, and one that grows out of the observations made above, is that this definition of legal empowerment gives center stage to the individuals who are actually in need of empowerment: in this case, refugees and protracted refugee communities. This emphasis carries with it several important implications.

To begin with, focusing on specific disadvantaged groups in the definition implies that legal empowerment initiatives must directly address the needs, interests and concerns of the disadvantaged, in this case refugees, as opposed to the type of generic legal reform that is

⁴³⁷ Consider as an example the unexpected entrepreneurship and growth that occur entirely outside of the formal system in places like Kibera Kenya; “Boomtown Slum” *The Economist* 405:8816 (22 December 2012) 75.

⁴³⁸ Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 7.

⁴³⁹ See especially CLEP, *Volume One*, *supra* note 360 at 3.

characteristic of the rule of law orthodoxy. Marginalized groups may benefit from non-specific reforms just as the general population may benefit from targeted strategies, but the starting point of legal empowerment will be to focus specifically on those groups most in need and in the most precarious situations.

More specifically, however, this definition acknowledges the agency of the targeted groups and individuals by focussing specifically on what refugees are able to achieve themselves, as opposed to what others can achieve on their behalf. Obviously empowerment does not happen spontaneously in a vacuum; marginalized communities will generally require some external assistance (whether for funding or expertise) to achieve legal empowerment, but the emphasis that legal empowerment places on the agency of the disadvantaged is indicative of a rights-based paradigm shift. Disadvantaged persons are not objects of the debates and policies anymore but subjects in the political discussion; they are not people *to whom* development happens, they are active participants in their own lives and development.⁴⁴⁰ As such, refugees are not being *given* more control over their lives; they are themselves claiming that control through judicial and law-related mechanisms.

Thus, when we look at the definition of legal empowerment as a whole, we can see that by placing primary emphasis on the capabilities of individuals, on the ability of refugees to actually access and use the law and legal processes to claim entitlements and rights, as opposed to focusing only on the formal institutions of justice, we are acknowledging that the existence of adequate legal institutions is a necessary but insufficient condition for either true justice or true empowerment.

E. Access to Justice, Accountability and the Rule of Law: Dimensions of Legal Empowerment

The decision to use the language of legal empowerment is a deliberate and important choice. Existing scholarship on justice in refugee situations has used different terminology: Rosa da Costa, for example, refers to the “administration of justice”⁴⁴¹ in her seminal UNHCR report,

⁴⁴⁰ See generally Golub, “Rule of Law Orthodoxy”, *supra* note 406; Secretary-General, *Eradication of Poverty Report*, *supra* note 360.

⁴⁴¹ Da Costa, *Administration of Justice*, *supra* note 8.

while other scholars have used the terms “access to justice” and the “rule of law”⁴⁴² or “accountability.”⁴⁴³ While each of these concepts plays an important role in a holistic understanding of justice, on their own, none of them fully encompasses the comprehensive, rights-based, person-centered approach to protracted refugee situations that legal empowerment has the potential to be. The content of legal empowerment is more than just incorporating the rule of law, it is more than just facilitating access to appropriate justice mechanisms, and it is more than ensuring that authorities are held to account for their actions: it is all of these together. Legal empowerment requires that we ensure that the law and its mechanisms be formulated so as “to produce desirable and fundamental values of an equitable and just society”⁴⁴⁴ and that they function to actually achieve those outcomes. It is not enough that the law exists; as the title of the CLEP report states, it must “work” for everyone.⁴⁴⁵ To this end, access to justice, accountability and the rule of law constitute important components that will feature in legal empowerment approaches to a greater or lesser extent depending upon the context. Although this discussion will be limited to a few brief remarks about each component, an in depth examination of their application to protracted refugee situations can be found in the following chapters.

1. Access to Justice

In one of its reports on empowerment, the UNDP made an important observation, namely that “[e]quality before the law does not automatically translate into equality in access and obtainment of justice.”⁴⁴⁶ Even if individuals are granted formal equality and rights by law, it does not necessarily follow that they benefit from them in practice. One can even take this a step further and assert that equality before the law cannot truly exist without equality in access and obtainment of justice.

In fact, it is generally acknowledged that vulnerable groups (the poor, refugees, children, minorities, etc.) have disproportionately more difficulty in accessing both the justice system

⁴⁴² Joel Harding et al., “Access to Justice and the Rule of Law” (2008) 30 *Forced Migration Review* 28.

⁴⁴³ Anita Ho & Carol Pavlish, “Indivisibility of Accountability and Empowerment in Tackling Gender-Based Violence: Lessons from a Refugee Camp in Rwanda” (2011) 24:1 *Journal of Refugee Studies* 88.

⁴⁴⁴ Sengupta, *supra* note 366 at 32.

⁴⁴⁵ CLEP, *Volume One*, *supra* note 360.

⁴⁴⁶ UNDP, *Envisioning Empowerment: A Portfolio of Initiatives for Achieving Inclusion and Development* (UNDP, 2009) at v, online: www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/envisioning-empowerment/Envisioning%20Empowerment_full.pdf. [UNDP, *Envisioning Empowerment*]

(whether a formal or informal legal system) and justice itself.⁴⁴⁷ This difficulty can be caused by a multitude of factors: illiteracy, lack of legal knowledge, distrust of formal legal institutions, lack of legal representation and legal aid, absence of alternative dispute resolution systems, cultural differences, discrimination and bias in the adjudicative and enforcement institutions, geographic location, lack of financial capacity, corruption... These factors may affect the ability or willingness of individuals to use the law and the legal system or they may affect the quality of justice obtained through those institutions and mechanisms.

Ensuring access to justice, understood as the “ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards,”⁴⁴⁸ is one of the primary objectives of legal empowerment because, in addition to being a basic human right itself, access to justice, in combination with the rule of law, forms the foundation and enabling framework for the realization of other rights by facilitating their enforcement and protection. Whether it is a default in the process or in the outcome, an absence of effective access to justice makes the realization and enjoyment of the full range of human rights impossible.⁴⁴⁹

2. Accountability

The second component, accountability, is a term that is often used and rarely defined. While there is no consensus on an international definition, at very least accountability can be understood as requiring that states and other duty-bearers be answerable to stakeholders for the exercise of their powers including their policies, actions and inaction, and the use of resources.⁴⁵⁰ Accountability can be achieved in many ways and most often requires a combination of strategies; for example through the use of elections, national human rights institutions, internal

⁴⁴⁷ See e.g. Ineke van de Meene & Benjamin van Rooij, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Cooperation* (Amsterdam: Leiden University Press, 2008); Da Costa, *Administration of Justice*, *supra* note 8; UNDP, *Programming for Justice*, *supra* note 220.

⁴⁴⁸ UNDP, *Programming for Justice*, *supra* note 220 at 5.

⁴⁴⁹ See e.g. Martin Abregú, “Barricades or Obstacles: The Challenges of Access to Justice” in Rudolf V. Van Puymbroeck, ed, *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2001) 53; Van de Meene & van Rooij, *supra* note 447; Nlerum S Okogbule, “Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects” (2005) 3 SUR - Intl J on Hum Rts 95.

⁴⁵⁰ The UNDP has defined accountability as “the requirement that officials answer to stakeholders on the disposal of their powers and duties, act on criticisms, or requirements made of them and accept (some) responsibility for failure, incompetence or deceit.” Bhavna Sharma, “Voice, Accountability and Civic Engagement: A Conceptual Overview” Commissioned by Oslo Governance Center, Bureau for Development Policy, UNDP (Overseas Development Institute, 2008) at 6.

checks and balances, freedom of information legislation, auditing, naming and shaming, public education, legal action...⁴⁵¹ In addition, accountability is an intrinsic part of legal empowerment. Essentially, a legal empowerment-based approach seeks to empower individuals to demand accountability and, by extension, to enhance the transparency and accountability of those mandated or able to respond to their claims, as part of the project to enable individuals to claim entitlements, obtain remedies and gain control over their lives.

The justice system, understood formally, is one means to ensure accountability but it is not the only one. Other remedies may be necessary or more appropriate depending on the context.⁴⁵² Indeed in order for the justice system to be able to provide accountability, it must itself be accountable. Thus in addition to actions in the courts or before administrative tribunals and boards, accountability will involve many other mechanisms that may or may not have any explicitly legal dimension. However, legal empowerment is still concerned with these alternatives because all forms of accountability are based, to some extent, on the idea that power must not be exercised arbitrarily which is the core premise of the rule of law.

3. The Rule of Law

Although legal empowerment is presented as an alternative to the traditional rule of law approaches embodied by Golub's rule of law orthodoxy, the rule of law itself still has an important role to play in legal empowerment. A distinction must be made between the traditional rule of law approach, or the rule of law orthodoxy, which is a set of ideas, activities and strategies that place inordinate importance on top-down reforms and formal state institutions, and the rule of law itself which is an essential part of the foundation of a just society. Once again, there is no single internationally accepted understanding of the rule of law but it has been defined by the UN Secretary General as referring to:

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,

⁴⁵¹ See Narayan, *supra* note 362 at 17.

⁴⁵² See generally UNDP, *Programming for Justice*, *supra* note 220.

separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”⁴⁵³

The strength of legal empowerment lies in part on the understanding that power is subject to law: by enabling individuals to use the law, we are enabling them to mitigate the unequal distribution of power and the misuse of power by those who exercise control over them. Legal empowerment’s potential depends upon there being at least a nominal conception of the rule of law within society. To that extent, the understanding of legal empowerment proposed here is consistent with that of the CLEP; together the rule of law and access to justice constitute “the fundamental and enabling framework” without which other human rights cannot be realized.⁴⁵⁴

Ensuring the rule of law also helps to add a forward-looking dimension to legal empowerment. Traditionally, both access to justice and accountability have been primarily concerned with dispute settlement and the resolution of grievances. Focusing only on these aspects of the justice process overlooks the important role of prevention.⁴⁵⁵ To have a significant impact, legal empowerment must be proactive and not limited to responding to problems that already exist and disputes that have already occurred. The rule of law is a central part of the opportunity structure through which power is exercised in society and, as such, has the potential to be used to mitigate conflict and abuse of power before they occur.

What has been presented here is a fairly cursory overview of the way in which the more traditional approaches to justice, access to justice, accountability and the rule of law, fit conceptually into the legal empowerment-based approach. In the following chapter we will examine how these different concepts find their place in the practical implementation of legal empowerment, but for now what is important is to recognize that a legal empowerment-based approach includes at very least promoting the rule of law, ensuring access to justice and enhancing accountability.

⁴⁵³ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UNSCOR, UN Doc S/2004/616 (2004) at 4 [Secretary General, *Transitional Justice Report*].

⁴⁵⁴ CLEP, *Volume One*, *supra* note 360 at 27.

⁴⁵⁵ See generally Van de Meene & van Rooij, *supra* note 447.

IV. Focussing on Legal Empowerment in the Human Rights-based Capabilities Approach

At the beginning of this chapter, legal empowerment was presented as both a central capability in itself and as a critical enabling mechanism for the realization of other human rights-based capabilities. This emphasis may appear confusing given that the list of central capabilities identified in the previous chapters consists of the rights contained in the International Bill of Rights and includes no mention of legal empowerment. We can understand legal empowerment to be a central capability by breaking it down into its constituent parts: access to justice, equality before the law, procedural fairness, freedom of expression, accountability, right to a life with dignity, freedom from discrimination, etc., all of which are central capabilities in and of themselves. As human rights and central capabilities that are essential for a life with dignity, each of these components of legal empowerment, and by extension legal empowerment itself, is a *legal* entitlement that arises out of the fiduciary relationship between the state (and arguably other power-wielding authorities) and the individuals subject to that power. As legal entitlements, these components also involve corresponding legal obligations. The question remains: why should legal empowerment as both an objective and a process be given a decisive role in the implementation of a human rights-based capability approach? The answer to that question lies primarily in the relationship between legal empowerment and human rights.

A. Strengthening Legal Empowerment by Adopting a Human Rights Framework

As noted above, one of the criticisms of the Commission on Legal Empowerment of the Poor was that it failed to adequately explore (and explain) the link between legal empowerment and human rights⁴⁵⁶ and yet this connection is a very fundamental and mutually beneficial one. To put it simply, legal empowerment can be understood as a strategy for implementing a human rights-based approach and as a human rights-based approach itself. Specifically, it is a human rights-based approach that employs the law and legal processes to effect empowerment, where empowerment is “the ability or opportunity [of refugees] to claim and exercise their rights” and thereby to gain the power to “influence the behaviour of other agents and social

⁴⁵⁶ See e.g. Banik, “Legal Empowerment”, *supra* note 363 at 122; Sengupta, *supra* note 366.

arrangements.”⁴⁵⁷ In other words, as a process legal empowerment promotes and enforces human rights, and as an outcome it requires the realization of many specific human rights. Legal empowerment is not the only type of human rights-based approach possible, but it is a particularly important one due to the close connection between human rights and the law and because it offers a strategy for the practical implementation of human rights-based approaches which exist too often only in rhetoric.

Framing the discussion of legal empowerment in the language of human rights has a number of very tangible benefits. To begin with, it opens up the possibility of using existing international human rights instruments and principles to support legal empowerment.⁴⁵⁸ One of these principles is that states have an obligation to incorporate international human rights into their domestic legal systems and are thus bound to help to realize these rights, and by extension, legal empowerment. Thus the international human rights system shifts the burden of fulfilling rights as well as justifying any violations onto the state.⁴⁵⁹ A second relevant principle is that the obligation to support and fulfill human rights extends beyond the territory of the state and includes all members of the international community that have recognized these rights and assumed the responsibility for helping to realize them.⁴⁶⁰ This principle is particularly important in the refugee context where the lack of resources is often used as an excuse for inaction by the host state and where the importance of international cooperation and responsibility-sharing has been repeatedly highlighted.

In addition to these principles, approaching legal empowerment from a human rights perspective also gives access to the enforcement mechanisms that are available under international human rights law such as complaints before the Human Rights Committee, the Universal Periodic Review and the special procedures of the Human Rights Council. Although the real effectiveness of these mechanisms is often questioned, they do provide some oversight and at least the possibility of drawing international attention to failings in the domestic legal system. Being able to call on international human rights treaties that have received the endorsement of the international community at large can help to overcome many arguments

⁴⁵⁷ Sengupta, *supra* note 366 at 32.

⁴⁵⁸ *Ibid* at 35.

⁴⁵⁹ See Jack Donnelly, “The Virtues of Legalization” in Saladin Meckled-Garcia & Başak Çali, eds, *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (New York: Routledge, 2006) 67 at 68 [Donnelly, “Legalization”].

⁴⁶⁰ Sengupta, *supra* note 366 at 35.

about definitions and appeals to culture or tradition that might otherwise derail legitimate claims.⁴⁶¹

Emphasizing human rights in the context of legal empowerment also discourages a limited focus on the implementation of the rule of law and demands an examination of the content and results of the relevant laws and mechanisms. As mentioned above, it is not enough that a legal system exist and that people have access to it, it must also be consistent with the values of an equitable and just society, specifically with human rights principles.⁴⁶²

Another advantage of human rights over other types of norms is that human rights create legitimate claims.⁴⁶³ Unlike appeals to charity or even to morality, a human right carries with it a certain normative force that helps establish a conceptual space where money, status and influence hold less power. In that way, human rights can help to provide a mechanism for accountability.⁴⁶⁴ Additionally, in recognizing human rights claims, human rights-based approaches support the idea of corresponding duties and seek to identify specific duty-bearers.⁴⁶⁵ As we have noted, whether human rights are contained in international treaties or arise as a function of the fiduciary nature of state legal authority, it is the state that bears primary responsibility for their realization and enforcement. Logically then, the state has an obligation to facilitate legal empowerment as well.

The focus on human rights in legal empowerment is not altogether unproblematic. In a discussion of the legalization of human rights, Jack Donnelly raises several criticisms, the most important of which is that “the existing international legal consensus [regarding human rights] is not only often shallow but also frequently less broad than it first appears.”⁴⁶⁶ Evidence supporting this assertion can be found in the many reservations that states have made to international human rights treaties. The language of treaties is also often left open to some degree of interpretation. For example, while the Convention definition of a refugee requires a fear of persecution, there is no internationally recognized definition of “persecution” and, as Donnelly

⁴⁶¹ See generally Donnelly, “Legalization”, *supra* note 459.

⁴⁶² See Sengupta, *supra* note 366 at 33.

⁴⁶³ Dan Banik, “Rights, Legal Empowerment and Poverty: An Overview of the Issues” in Dan Banik ed, *Rights and Legal Empowerment in Eradicating Poverty* (Surrey: Ashgate Publishing Ltd, 2008) 11 at 25 [Banik, “An Overview”].

⁴⁶⁴ UNDP, *Programming for Justice*, *supra* note 220 at 3.

⁴⁶⁵ See e.g. Banik, “Legal Empowerment”, *supra* note 363 at 128; *ibid* at 11; UNHCR, *Operational Protection in Camps and Settlements: A Reference Guide of Good Practices in the Protection of Refugees and Other Persons of Concern* (Geneva: UNHCR, 2006) at 17 [UNHCR, *Operational Protection*].

⁴⁶⁶ Donnelly, “Legalization”, *supra* note 459 at 70.

notes, controversy remains regarding what constitutes “cruel, inhuman or degrading treatment of punishment” under international law.⁴⁶⁷ Furthermore, the methods of implementation and enforcement of these rights are also largely left up to the designs of states. The result is that what may seem initially like a strong international consensus on a concrete right, may in fact be subject to a number of qualifications and variations in content and form which can, in some cases, undermine the claims based on that right. For example, the consensus regarding the equality of all human beings falters in some societies when it is applied to the inheritance rights of women or the freedom of expression of homosexuals. Similarly, while virtually all states prohibit torture, whether waterboarding or sleep deprivation constitute torture arguably depends upon the specific understanding of the concept under domestic law.

Nevertheless, the deliberate abstraction and one might even say vagueness of international human rights legal provisions serves two important purposes. On one hand, it allows for some degree of consensus to exist which protects at least a minimal standard of rights and creates an opportunity for discussion and strengthening of that consensus. On the other hand, the generality of these principles also helps to ensure that human rights remain “a progressive force”⁴⁶⁸ that has the potential to apply equally to states with a more developed system of human rights and those that are more regressive. Furthermore, by remaining purposefully broad, international human rights legal standards can adapt to changing practices and understandings over time without necessarily requiring the enactment of new instruments. As a result, even though international human rights law may not provide a definitive answer to every question, it does provide an authoritative framework of standards which support legal empowerment.

As much as human rights constitute a key component of legal empowerment, a functioning justice system is an essential precondition to a functioning human rights system. To realize the promise of human rights, society must do more than recognize their existence; it must also create an atmosphere and establish mechanisms to enable the enjoyment and exercise of rights. As most, if not all human rights are also legal rights, a fair system of law and justice that is accessible to all, and thus by extension legal empowerment, is one way to achieve this end.

⁴⁶⁷ *Ibid* at 70.

⁴⁶⁸ *Ibid*.

B. The Special Nature of Law and Legality⁴⁶⁹

To fully understand the role and value of the law in a discussion of human rights we must begin from the position, often repeated, that for human rights to be meaningful they must be able to be enjoyed and guaranteed, and this is only possible when the law functions for everyone; when it defines and enforces the rights and obligations of everyone regardless of their authority, status and resources.⁴⁷⁰ Although the law is most often considered in the context of the formal justice system or other legal enforcement mechanisms, its authority exists separately from these institutions and can lend its weight in many different contexts. By using the fiduciary theory of state legal authority to translate the political and moral imperatives of the human rights-based capabilities approach into legal obligations, we have already recognized the importance of the normative force of the law.

To begin with, law has a normative force that is different and in many ways superior to that of other types of claims. A legal claim will most often trump claims based on tradition, social utility or mere preference and while the law interacts with morality and politics, it is separate from both of those.⁴⁷¹ As remarked by Donnelly, “[l]aw is a matter of authority, of right, not simply an expression of self-interest or power.”⁴⁷² There is a difference between saying that something is illegal and saying that it is undesirable. The ability to appeal to the law gives weight to a claim. This normative force gives the law power that can be transferred to the subject of a particular claim.

As a consequence, law can play an important role in power dynamics. An individual with a legal claim has more practical power to control his or her destiny than one who merely has a moral claim.⁴⁷³ The ability to invoke the law to support one’s claim, for example by threatening litigation, can act as a counterweight to power. In addition to conferring power on particular claims, law has the capacity to constrain power. As expressed by Dan Banik, “law provides the ‘platform’ on which important socio-economic and political institutions exist, ‘and to be

⁴⁶⁹ As explained in the introduction to this thesis, “law” is understood here in a broad and pluralistic manner encompassing both formal and informal mechanisms and institutions.

⁴⁷⁰ CLEP, *Volume One*, *supra* note 360 at 3; Banik, “Legal Empowerment”, *supra* note 363 at 120; see also Okogbule, *supra* note 449.

⁴⁷¹ Donnelly, “Legalization”, *supra* note 459 at 69.

⁴⁷² *Ibid.*

⁴⁷³ This is not to say that a moral claim may not carry more weight from an ethical or philosophical standpoint, merely that the legal claim is imbued with a more practical authority.

legitimate, power itself must submit to the law.⁴⁷⁴ Power that is held or exercised in violation of the law cannot be considered to be legitimate and this applies equally to individuals and to the apparatus of the state.

The law's normative force and its importance in power dynamics is based substantially on the principle that every individual, whether a citizen or not, and every institution within a state is equal before and subject to the law. Just as the law is an equalizing force, the justice system provides a setting where parties can (theoretically) meet on an equal playing field, one of the few places where the rich and the poor, the influential and the marginalized are subject to the same rules. It also has the potential to be an important forum where the voices of marginalized groups and individuals can be heard and must be listened to. In contrast to the political arena where the strength of one's voice often corresponds to the depth of one's purse and the disempowered can be largely ignored, equality before the law means that the voices of the less powerful are given formal recognition. Consequently the legal system is one of the few places where the injured can present their grievances directly to their antagonists.

This characteristic of law is particularly important for refugees who often live and function in a state of *de facto* illegality. In *The Origins of Totalitarianism*, Hannah Arendt spoke of how stateless individuals were actually better off if they committed a crime because through the criminal legal process they were brought back under the ambit of the law and were afforded a minimal set of rights.⁴⁷⁵ The situation of refugees may not be quite so dire today but it is still true that being able to use the law has the capacity to bring people more squarely into the realm of legality. Through the law individuals may claim rights, entitlements and status to which they are entitled but which they have been denied. Given that, as non citizens, refugees do not have access to the traditional political mechanisms of accountability, the legal system is often the only formal way in which they can make their voices heard. Through the law, refugees can claim a place within the decision-making system.

The law also connects individuals to a wider network. In the case of refugees, bringing a legal claim can establish connections between the refugee community and the host state, the legal representatives, potentially international observers and even refugees in other countries. In addition to providing access to human resources outside of the immediate environment, the law

⁴⁷⁴ Banik, "Legal Empowerment", *supra* note 363 at 120; CLEP, *Volume One*, *supra* note 360 at 3.

⁴⁷⁵ Arendt, *supra* note 2 at 286, 295.

also provides access to codified international legal standards that can complement or supplement the law of the state and against which government action or inaction can be measured.⁴⁷⁶ Thus, even though the law varies widely from state to state, there are certain consistent basic principles that can be referred to as an indication of the legitimacy of a state's legal system and potentially of the state as a whole.

These are only some of the strengths of the law yet even this small selection highlights the major criticism of dependence on the law, namely that all of these benefits depend on the existence of a functional and relatively "just" justice system. Although the purpose of law is to dispense fair justice between unequal parties, that very inequality (in terms of money, power, authority, position) too often contaminates the process.⁴⁷⁷ The result is that instead of being egalitarian, the law ends up merely reflecting the interests of the powerful. Too often the laws that protect and enforce the rights of marginalized groups either do not exist or exist only on paper. So while the law has the potential to be used as an instrument of power by the disenfranchised when it sets out their rights, it can also be, and is perhaps more frequently, used as an instrument of oppression by the powerful. If the laws being applied are biased or unjust or the legal institutions corrupt or incompetent, then the benefits of the law will be lost. As a consequence, the effectiveness of law depends substantially upon the political and administrative systems. Even the best laws and court system can be undermined by political actors that ignore or fail to enforce and implement recommendations and rulings by the courts or who pass discriminatory or abusive laws. Similarly, a lack of funding and support for legal aid and the legal system as a whole may either weaken the authority of the law generally or at very least make equality before the law impossible.

The vulnerability of the institution of the law is one of the reasons that legal empowerment is to be given priority over the rule of law orthodoxy. By focusing on both the formal institutions and mechanisms of the law as well as more informal or quasi-legal devices, and by concentrating on grassroots, bottom-up action as well as enlisting the support of the higher levels of authority, legal empowerment remains relevant and has the potential to make progress even when faced with the most defective justice system.

⁴⁷⁶ See Banik, "Legal Empowerment", *supra* note 363 at 128.

⁴⁷⁷ See Vivek Maru, "Allies Unknown: Social Accountability and Legal Empowerment" (2010) 12:1 Health and Human Rights 83 at 84 [Maru, "Allies Unknown"].

This brings us to one last comment regarding the law: law, even the best law, is not equivalent to justice. Law does not protect all possible valuable rights and interests, nor adequately shield individuals from all forms of suffering. Even the international human rights treaties that are often held up as ideals may be more indicative of the lowest common denominator than the highest aspirations.⁴⁷⁸ And while the law is a living body that possesses the capacity to grow and to change in reaction to new circumstances, those changes take time and so the formal law may lag behind societal perceptions of justice. Yet it is that capacity to grow and to change that is law's saving grace. So long as we recognize that the law is not inviolable and is in a constant process of evolution, the law will remain a central focus of efforts to fulfill and protect human rights justifying a focus on legal empowerment, which seeks not only to use the law but also to change it.

C. Reconciling the Legal Empowerment of Refugees and the Human Rights-based Capabilities Approach

Thus, after a somewhat lengthy detour, we come back to the initial question: why should legal empowerment be a central focus of a human rights-based capabilities approach to protracted refugee situations? To answer this question we must recall the objective of the human rights-based capabilities approach which is to expand the abilities and opportunities of refugees to promote and achieve valuable beings and doings; in other words, to expand their central capabilities, embodied in the basic human rights set out in the International Bill of Rights and made legal through the fiduciary theory of state legal authority.

1. Prioritizing Capabilities

Although the universal and interrelated nature of these central capabilities speaks against the existence of any formal hierarchy among them conceptually, from a practical viewpoint it will be necessary to prioritize the implementation of certain capabilities over others as few states will be able to realize all of them at the same time. As discussed in chapter 2,⁴⁷⁹ the proper approach when seeking to prioritize capabilities is to choose the intervention that is most likely

⁴⁷⁸ Donnelly, "Legalization", *supra* note 459 at 71.

⁴⁷⁹ Chapter 2, Part IV. Operationalizing the Integrated Human Rights-based Capabilities Approach in Protracted Refugee Situations at 97, above.

to create a future where such choices need not be made.⁴⁸⁰ In practice, this means giving priority to those capabilities that are most necessary and useful to the realization of other capabilities. This strategy of prioritization is very similar to that which has been used in the context of human rights. All human rights (just like all human rights-based capabilities) are important; nevertheless certain rights may be identified as basic and their implementation given priority because without their realization, it may be very difficult to ensure other rights.⁴⁸¹ Nevertheless, the prioritization of certain human rights-based capabilities for practical purposes does not translate into the creation of a hierarchy of rights. Ultimately, each fundamental right must be realized for a society to be considered minimally just.

2. Legal Empowerment as a Central Capability

These approaches to prioritization provide a solid justification for focusing on legal empowerment in a human rights-based capabilities approach. As noted earlier, as a goal, legal empowerment is a capability in its own right: it is the freedom and ability to use law and legal processes to further one's own interests and achieve greater control over one's life. As a process, legal empowerment is a mechanism by which other capabilities can be realized. The realization, protection and fulfillment of human rights, and by extension the capabilities based on those human rights, is not possible without a functioning and accessible system of law and justice. It is not enough to recognize the existence of human rights in some international document, individuals must actually be able to use and enjoy them: this ability is the difference between human rights and human rights as capabilities. Legal empowerment is necessary to turn those bare human rights into capabilities.

In chapter 2, it was mentioned that one of the reasons for the discrepancy between human rights on paper and human rights in practice (or for our purposes, capabilities) was the existence of conversion difficulties: the difficulties some people have in converting resources into valuable functionings.⁴⁸² As an equalizing force that is applicable to every actor, the law should be seen as a key mechanism for overcoming those conversion difficulties; however, this objective can only be achieved if the individuals subject to those challenges are able to access and use the law.

⁴⁸⁰ Nussbaum, *Creating Capabilities*, *supra* note 29 at 39.

⁴⁸¹ Sengupta, *supra* note 366 at 33.

⁴⁸² See chapter 2 II.C. The Supplementary Role of Capabilities at 73, above. See also Sen, *Development as Freedom*, *supra* note 153 at 88.

Moreover, it must be remembered that the human rights-based capabilities referred to here are not only moral or political claims, they are also legal entitlements. The purpose of translating central capabilities into legal obligations via the fiduciary theory is, at least in part, to facilitate and encourage their realization by giving individuals a greater role to play, more control over the process and outcome and by making the state more accountable. None of this is possible if individuals are not empowered to use the legal system to hold the state to account and to make their claims. The Commission on Legal Empowerment of the Poor itself was based largely on the idea that by being excluded from the law, people were being denied the opportunity and freedom to improve and shape their own lives.⁴⁸³ This is particularly true in the case of refugees who generally do not have access to the normal political mechanisms of accountability. Without being empowered to use the legal system and mechanisms, it is extremely difficult for refugees to achieve their full potential and to realize their capabilities.

Legal empowerment earns its place as a central capability despite the fact that it is not explicitly mentioned in the International Bill of Rights because its constituent parts are specifically featured: access to justice, equality before the law, judicial fairness, freedom of expression, accountability, etc. Additionally, it takes very little research to discover the extent to which there is a consensus regarding its importance, remembering that the ability to form the basis of an overlapping consensus is one of the criteria for central capabilities. Although the term “legal empowerment” is not always used, its premise has been endorsed by states, international organizations, civil society organizations, scholars and individuals around the world.

3. Legal Empowerment as a Product of and Forum for Public Reasoning

Legal empowerment also plays an important role in the process of public reasoning, social discussion and democratic deliberation that Amartya Sen emphasizes in his capabilities approach.⁴⁸⁴ Certainly the recognition of the importance of legal empowerment is the product of public debate and reasoning that has taken place in numerous forums: in the drafting of the *International Covenant on Civil and Political Rights*, at the United Nations through the Secretary General’s statements and initiatives, through the work of the CLEP which was made up of experts from around the world and in the legal aid and justice civil society organizations that exist in every country. What is perhaps more significant is that legal empowerment facilitates the

⁴⁸³ See CLEP, *Volume One*, *supra* note 360.

⁴⁸⁴ See generally Sen, “Human Rights and Capabilities”, *supra* note 187.

process of collective reasoning by enabling vulnerable groups and individuals to access the justice system which is itself a forum for public debate and the locus of inter-institutional dialogue between governments, parliaments, the judiciary and the people. As previously noted, refugees are generally excluded from the democratic processes of the state where this kind of debate usually takes place. Restrictions on freedom of movement and organization, lack of and inability to access resources and insecurity in terms of status further exacerbate this voicelessness. Refugees are often not consulted or permitted to participate in the forums where their rights are being determined, and their interests are often only represented through the intermediary of international aid providers and advocates which, though valuable in some cases, is not a satisfactory replacement for actual participation in the deliberations. Through legal empowerment, however, refugees become able to use the law and legal mechanisms to participate actively in the process of public debate and, consequently, in determining the course of their own lives.

4. Legal Empowerment as Insurance against Domination and Instrumentalization

In addition to fitting neatly within the framework of the human rights-based capabilities approach as a whole, a preliminary emphasis on legal empowerment is also supported by the fiduciary theory of state legal authority on its own. Remember that one of the consequences of the fiduciary relationship between refugees and the state is that, in order to be legitimate, state power cannot be exercised indiscriminately. Instead, the exercise of power by the state is limited by the duties of fairness and reasonableness and by the limitations that flow from the principles of non-instrumentalization and non-domination. The obligations to respect, protect and fulfill human rights are corollaries of the state's duty to secure conditions consistent with these principles.

Legal empowerment is of particular importance in that the law is one of the few mechanisms that ensures that individuals are not subject to the domination of states and other power-holders. Through legal empowerment, individuals are able to hold the state to account and to obtain remedies for any arbitrary exercise of power which provides protection against domination. The active participation of individuals that is a central feature of legal empowerment also helps to mitigate the specter of domination. Finally, where traditional rule of law approaches emphasize formal mechanisms and institutions that often embody the interests of those in power,

legal empowerment can help to prevent the instrumentalization of the weakest members of society by prioritizing the needs and concerns of disadvantaged individuals and groups and by supporting the role of civil society. Accordingly, the legal empowerment of those subject to state power, whether citizens or not, is a key feature of ensuring the integrity of the fiduciary relationship and, by extension, the legitimacy of the state's claim to govern.⁴⁸⁵

Although achieving a minimum level of all central capabilities is necessary, giving priority to legal empowerment should be a key feature of a human rights-based capabilities approach both because legal empowerment strengthens the framework of this approach by assisting in the prevention of domination and instrumentalization, and because legal empowerment plays a vital role in identifying and supporting the realization of other central capabilities by providing a forum for public discussion and a mechanism to ensure accountability.

V. Conclusion

In this chapter we have discussed power and empowerment, and law and human rights and how they interact to create the framework for all social interactions, yet we have barely mentioned the concept that lies at the heart of this discussion: human dignity. In the end, whether we are talking about freedom, human rights or capabilities, we are talking the conditions necessary for human beings to flourish and live a dignified life. Power as it is traditionally understood, as “power over”, is too often an instrument of oppression that demeans individuals and subjects them to great indignity as opposed to a means through which people can realize their full potential. Similarly, when structured and used properly, law has the unique capacity to counteract the abuse of power and yet can just as easily be co-opted and constitute an obstacle to justice. This is the balancing game that is played out every day in communities around the world, a game where refugees are uniquely disadvantaged due to their voicelessness and the precariousness of their situation. By focussing on legal empowerment, however, we are able, if not to skew the balance in favour of the disadvantaged, at least to help even out the playing field. Legal empowerment is one strategy for realizing the conditions necessary for a life with dignity.

⁴⁸⁵ This is supported by the HRCA according to which central capabilities must be achieved for a state to be considered even minimally just. See Nussbaum, *Creating Capabilities*, *supra* note 29 at 32; see generally Nussbaum, “Capabilities as Entitlements”, *supra* note 211.

It is not the only such strategy, but as a unifying approach that seeks the fulfillment of human rights and reorientation of power relations and that is supported by the normative force of the law, it is an essential and extremely valuable one.

Chapter 4 - The Faces of Legal Empowerment in Protracted Refugee Situations

Legal Empowerment in protracted refugee situations is the process through which refugees and protracted refugee populations become able to use the law and legal mechanisms and services to protect and advance all of their rights and to acquire greater control over their lives, as well as the actual achievement of that increased control.

I. Introduction

In the previous chapter we explored why the capacity of disadvantaged groups to access justice and to effectively use the law to claim rights and secure their enforcement, in short legal empowerment, is critical to ensuring that their human rights can be enjoyed and are meaningful.⁴⁸⁶ Legal empowerment is a mechanism that can help protect the dignity of individuals by increasing their agency and the control that they have over their lives. It is ultimately about more than just law; it is about power as a dynamic, shifting force that governs relationships within a society. In this context, the importance of legal empowerment is twofold: first, the level of legal empowerment of each segment of society is one indicator of the distribution of power within that community, and second, the process of legal empowerment represents an important mechanism through which those power dynamics can be altered in favour of the disadvantaged. Furthermore, as an enabling mechanism for the realization of other important capabilities, including fundamental human rights, and the protection of the individual against domination and instrumentalization by the state, legal empowerment is a practical manifestation of the recognition under law of the equal value and inherent dignity of every human being.

Having situated legal empowerment within the human rights-based capabilities approach and the fiduciary theory of state legal authority, at a point of intersection between law, politics and human rights, this chapter explores the role that legal empowerment can play in ensuring that refugees in protracted refugee situations are able to live with dignity. Drawing in part on the

⁴⁸⁶ See Abregú, *supra* note 449.

dimensions of legal empowerment mentioned in the previous chapter,⁴⁸⁷ three separate but overlapping facets of legal empowerment in protracted refugee situations are identified and examined here. First, legal empowerment has the potential to enhance the administration of justice within protracted refugee situations. This dimension can be viewed as relating primarily to dispute resolution and concerns itself with improving both access to justice institutions as well as the quality of justice accessed, whether it is within the refugee community itself or before the justice mechanisms of the host state. Second, legal empowerment has the potential to enhance the justice of the administration. This dimension relates to questions of accountability and governance of the leadership of the refugee community, of the host state authorities and of aid providers supplying services and assistance within refugee camps. Third, legal empowerment has the potential to facilitate the implementation of durable solutions, in particular by enhancing refugee participation in transitional justice mechanisms and by facilitating integration (or re-integration).

As each of the faces of legal empowerment is reviewed, it is important to keep in mind that one of the more practical objectives of legal empowerment and of empowerment generally is to bring individuals into the decision-making process by giving them both a voice within the process and some control over the process itself.⁴⁸⁸ This objective is reflected in the general focus on remedying grievances that characterizes the literature on legal empowerment. To focus exclusively on dispute resolution, however, is to underestimate the promise of legal empowerment; legal empowerment also has the potential to contribute to the prevention of disputes and human rights violations.⁴⁸⁹

It is scarcely possible to do justice to the complexity of these different facets of legal empowerment in a single chapter. What is presented here is necessarily an imperfect overview. Divisions and categories have been made for the sake of clarity where in practice there is overlap and recurrence. Generalizations are drawn from examples that are provided in order to illustrate findings and options, but in reality every case is context-specific that we are forced into the unenviable position of engaging in a degree of speculation. Certainly, there are patterns identified here from which conclusions can be drawn, but this analysis should be viewed as an

⁴⁸⁷ See chapter 3 III.E. Access to Justice, Accountability and the Rule of Law: Dimensions of Legal Empowerment at 137, above.

⁴⁸⁸ See Csaszar, *supra* note 389; See also Elisheva Sadan, *Empowerment and Community Planning: Theory and Practice of People-Focused Social Solutions* (Tel Aviv: Hakibbutz Hameuchad Publishers, 1997).

⁴⁸⁹ Van de Meene & van Rooij, *supra* note 447 at 15.

effort to outline in broad strokes the potential of legal empowerment in protracted refugee situations and to provide an inspiration for designing interventions in specific situations as opposed to a general prescription.

II. Legal Empowerment Can Enhance the Administration of Justice⁴⁹⁰

The well-being and dignity of refugees caught in protracted situations is not only dependent upon their rights being formally recognized and respected at the state and international levels, but also upon the conditions of day-to-day life in the camps and settlements and the complex web of interactions and relationships that are mediated by legal and quasi-legal norms and processes. Within this context, two potential forums for legal empowerment can be identified, that relating to dispute resolution and the functioning of relevant justice mechanisms, which is the one explored here, and that related to governance and accountability which will be examined in the following section.

The ability to facilitate the effective administration of justice in refugee camps is legal empowerment's most traditional and narrowly "legal" dimension, but is nonetheless critically important. An effective system of administration of justice is a fundamental necessity in any functioning society. In particular, as noted previously, human rights cannot be truly enjoyed or meaningful if there is no way of claiming them and securing their enforcement, and the most important mechanism for accomplishing this end is the justice system.

A. The Administration of Justice as a Response to Specific Vulnerabilities

An effective system for administering justice is particularly important to refugees in protracted situation for a variety of reasons. First, lacking access to political processes, the justice system may be one of the only mechanisms available to refugees to ensure that their rights are respected, not only in their interactions with the authorities of the host state, but also in their interactions with aid providers, citizens of the host state and even other refugees. Refugees are virtually entirely subject to the discretionary power of the host state, UNHCR and various NGOs. Although the existence of a fiduciary duty would suggest that the authorities should act in

⁴⁹⁰ Some of the information in this section is adapted from the author's Masters thesis: Anna Purkey, *Whose Right to What Justice? Humanitarian Intervention and the Administration of Justice in Refugee Camps* (LLM Thesis, University of Toronto, 2008) [unpublished].

the interests of the refugee community, experience has shown that that is often not what occurs. Recourse to the justice system is one of the few means refugees can use to mitigate their dependence and the power that others have over them, to protect themselves against domination.

Second, in addition to human rights violations, the UNDP has concluded that members of disadvantaged groups, such as refugees, are more likely to be victims of crime and illegal acts and that those acts are likely to have a greater and more lasting impact on them. One reason for this is that marginalized individuals are less able to secure redress.⁴⁹¹ Thus, enhancing the administration of justice can help to counter the substantial vulnerability and insecurity of refugees. By definition, refugees have already been subject to violations of their rights, both as a result of persecution and as a result of being forced to leave their homes. Once they seek refuge, they are immediately plunged into a situation that is defined by precariousness and that exacerbates the risks they face. In addition to the insecurity of uncertain legal status and the legal vulnerability that that carries with it, refugees are also subject to numerous forms of physical insecurity including violence perpetrated against them during displacement and bias, discrimination, exploitation and abuse within the host state. Conditions within refugee camps are also an exacerbating factor. Poverty, overcrowding, lack of basic necessities, dependence, lack of privacy, co-habitation of different ethnic, social, cultural and religious groups, presence of militant factions within the camp, and perhaps above all, the breakdown of traditional family and community support structures all combine to create a situation characterised by insecurity.⁴⁹² Research has shown that these features also contribute to an increase in crime rates during displacement, further undermining the safety that refugee camps are intended to provide.⁴⁹³ Additional considerations such as the demographic make-up of the population (for example, a large number of children and women-headed households or a large proportion of youth with no job or education prospects) and changes in gender roles that upset the traditional distribution of power can also have a negative impact on security.⁴⁹⁴ Ultimately, while refugee camps can also be sites of industry and initiative,⁴⁹⁵ the situation in long-term refugee camps is one that is

⁴⁹¹ Secretary-General, *Eradication of Poverty Report*, *supra* note 360.

⁴⁹² See generally Da Costa, *Administration of Justice*, *supra* note 8; *The Camp Management Toolkit* (Oslo: Norwegian Refugee Council/The Camp Management Project, 2008) [*Camp Management Toolkit*]; UNHCR, *Operational Protection*, *supra* note 465.

⁴⁹³ UNHCR, *Operational Protection*, *supra* note 465 at 27; *Camp Management Toolkit*, *supra* note 492 at 356.

⁴⁹⁴ See *Camp Management Toolkit*, *supra* note 492 at 343ff; Da Costa, *Administration of Justice*, *supra* note 8 at 7.

⁴⁹⁵ See e.g. Dale Gavlak, "Zaatari Syrian refugee camp fertile ground for small businesses" *BBS News* (29 July 2014), online: www.bbc.com/news/world-middle-east-28541909; Dann Okoth, "IT entrepreneurs find surprise

predominantly characterized by the violation of human rights, precariousness and insecurity, all of which undermine the effective administration of justice and at the same time make it all the more important.

In this context, access to a fair, effective system of justice can help to provide a degree of protection and stability. Within the civil realm, there need to be mechanisms that ensure that entitlements are respected, agreements enforced and disputes resolved in a manner that is acceptable to all parties. Without such mechanisms, whether informal or formal, the system of social transactions breaks down. A refugee who provides labour to a host state citizen in return for promised remuneration must have some recourse if compensation is later denied. Neighbours within the camp who have a disagreement over the ownership of property must be able to resolve their dispute before it spirals out of control. On the criminal side, the administration of justice needs to be able to hold individuals accountable for their actions, punish crimes when required, and generally prevent the appearance of impunity. At best, an effective system of justice can act as a deterrent to anti-social behaviour and assist in restoring the dignity and well-being of victims of illicit acts; at the very least, the justice system can offer some degree of protection for victims by punishing perpetrators and/or removing them from the community. In all cases, the administration of justice can contribute to the development of social norms of behavior and civic education. Although justice systems perform these functions in any community, their role is particularly important in the refugee context given the precarious situation of refugees and the conditions associated with living in refugee camps.

B. The Administration of Justice: A Multi-phase Process

The administration of justice discussed in this section can largely be equated with a broad understanding of access to justice. Access to justice is defined by the United Nations Development Programme as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards.”⁴⁹⁶ This definition can be divided into two parts: first, that pertaining to the ability of people to *seek* remedies,

success in Kenya’s Dadaab refugee camps” *The Guardian* (4 July 2012), online: www.theguardian.com/global-development/2012/jul/04/entrepreneurs-kenya-dadaab-refugee-camps.

⁴⁹⁶ UNDP, *Programming for Justice*, *supra* note 220 at 5.

which refers to access to justice institutions and mechanisms. Second, that pertaining to the ability of people to *obtain* remedies, which relates to the quality of justice accessed.⁴⁹⁷

Despite the apparent simplicity of the UNDP definition, access to justice or the effective administration of justice is in fact a complex process that involves numerous actors, institutions and capabilities that combine to enable an individual to obtain a satisfactory remedy for a grievance. The process can be envisioned as follows.⁴⁹⁸

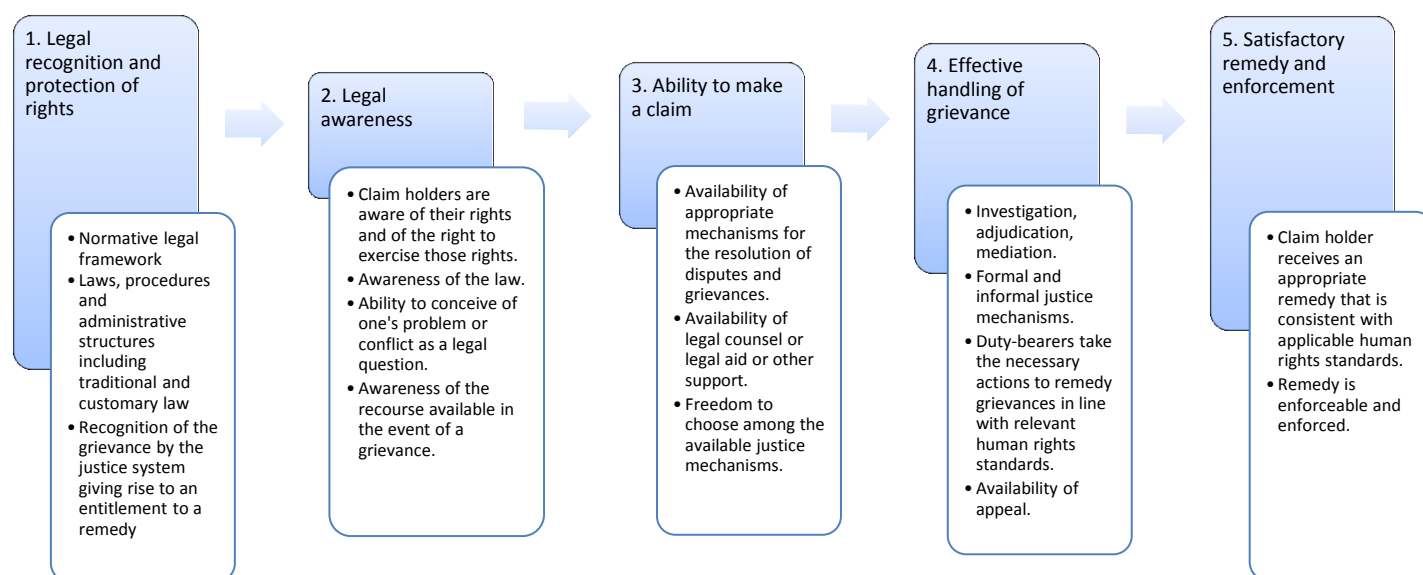


Figure 1. The Process of Legal Empowerment

At each stage there are innumerable factors that have the potential to obstruct the process and undermine the effective administration of justice. Obstacles to access to justice can be divided into two main categories: operational and structural. Operational obstacles are those that relate to the efficiency and effectiveness of the justice system (for example: cost, language barriers, lack of legal aid, etc.), while structural problems relate to the basic nature and organization of the justice system within a society (ex: bias, power imbalances, lack of legal awareness, cultural differences, etc.).⁴⁹⁹ These barriers to justice, the actual justice mechanisms and even the understanding of justice itself, are heavily influenced by the particular social, cultural and

⁴⁹⁷ See generally Okogbule, *supra* note 449.

⁴⁹⁸ This figure is adapted from the following sources: UNDP, *Programming for Justice*, *supra* note 220 at 6; Ewa Wojkowska, *Doing Justice: How Informal Justice Systems can Contribute* (Oslo: United Nations Development Programme, Oslo Governance Centre, 2006) at 30; and Rima Das Pradhan & Pauline Tweedie, *Legal Empowerment and Access of Women to Justice Assessment: February-March 2008* (Washington DC: USAID, 2008) at 14 and annex 1.

⁴⁹⁹ Abregú, *supra* note 449 at 57ff.

political context and must necessarily be taken into consideration. Legal empowerment initiatives can help to identify and address these impediments from a human rights perspective and to thereby enhance both the ability of individuals to demand justice and the ability of justice institutions to provide it.

C. The Administration of Justice in Refugee Camps: A Case of Competing Systems⁵⁰⁰

As noted before, refugee camps represent a unique legal space in that they are often subject to a *sui generis* system of governance which necessarily affects the administration of justice to which refugees are subject. While each camp has its own individual character, there are certain common features that recur in many cases and which we can use to paint a general picture of the state of justice within refugee camps.

The types of disputes or legal issues that arise within refugee camps are the same as in any community and can include everything from the violation of camp by-laws regarding curfews and raising animals, to inheritance and property disputes, and from divorce and child custody cases to drug trafficking, accusations of sorcery, and murders. Generally speaking, studies have found that the two most prevalent justice issues reported in refugee camps are theft and sexual and gender-based violence.⁵⁰¹ These disputes may arise between residents of the refugee camp, but may also involve citizens of the host state or other individuals present in the camp (aid workers, local staff of organizations, host state authorities, etc.). Even when a grievance is between two members of the refugee community, the situation may be further complicated if the parties come from different ethno-cultural groups.

The variety of justice issues and potential parties is almost matched by the range of applicable laws and justice mechanisms. Formally, refugees are subject to the law of the host state and have a duty under international law to conform to its laws and regulations.⁵⁰² In practice, host states do not always have the capacity or the political will to enforce their laws within refugee camps. As a result, residents of refugee camps often find themselves subject (formally or informally) to multiple overlapping legal and quasi-legal regimes. In addition to the laws of the host state, these systems of rules can include camp by-laws, regulations and codes of

⁵⁰⁰ For the most comprehensive review of the administration of justice within refugee camps currently available, see Da Costa, *Administration of Justice*, *supra* note 8.

⁵⁰¹ *Ibid* at 10.

⁵⁰² *Refugee Convention*, *supra* note 72, art 2.

conduct, religious or traditional laws and mores, informal codes of conduct and gender roles and expectations, the laws of the country of origin that refugees bring with them and international laws and standards. Where a camp population is heterogeneous, different ethno-cultural groups may be subject to different systems of law, and in all cases the law that applies to refugees may not be the same as that which applies to citizens of the host state or international aid providers.

Given the diversity of these systems of law, it is not surprising that there are also a range of different dispute resolution mechanisms within most refugee camps. Like the systems of law, the justice mechanisms applicable in protracted refugee situations are context-specific and vary from camp to camp. For the sake of simplicity, these mechanisms can be divided into two overarching categories: refugee dispute resolution systems (RDRS) and the formal host state justice system (HSJS).

Within refugee camps, the vast majority of disputes, whether civil or criminal, are addressed by informal justice mechanisms (in this case the RDRS) as opposed to the formal state justice system.⁵⁰³ This preference is the result of a combination of the advantages of the informal system (both perceived and real) and the barriers that impede access to the formal justice system. However, given the informal status of these dispute resolution systems, they can often only address disputes that arise within the refugee camp between members of the refugee community.

The RDRSs vary widely in terms of their formality, structure and procedures. While many of these mechanisms are influenced by the customary and traditional practices from the country of origin, others are unique to the refugee camp context and may represent a hybrid of different traditions. These dispute resolution mechanisms can be as simple as referring any conflict to the community leader to mediate or they can be quite sophisticated. For example, there are at least six different Bench Courts operating in Kakuma refugee camp and applying Sudanese customary law. These include county courts, a General Bench Court, an Appeals Court and a Special Court.⁵⁰⁴ Additionally, a particular dispute resolution mechanism might apply to the camp as a whole (for example a grievance committee) or it may be unique to a specific sub-

⁵⁰³ Da Costa, *Administration of Justice*, *supra* note 8 at 50; see also, Department for International Development, *Safety, Security and Accessible Justice: Putting Policy into Practice* (UK: 2002) at 58; Golub, "Rule of Law Orthodoxy", *supra* note 406 at 16.

The use of the informal refugee dispute resolution systems may be viewed as desirable by the host state as it reduces the economic and other burden on the State justice system.

⁵⁰⁴ Griek, *supra* note 8 at 2.

population of the camp (an ethnic or religious group).⁵⁰⁵ The RDRSs are generally established at the initiative of the refugee population, even if the host state authorities, UNHCR or other actors become involved later on. These systems are often closely linked to the power structures within the refugee community and may be presided over by community leaders (cultural, political or religious). As a result, RDRSs may benefit from a high degree of community involvement and legitimacy.

As with many other informal dispute resolution systems, the RDRSs generally operate outside of the formal state justice system. The RDRSs are more accessible to refugees as they are located within the camps, and they tend to be inexpensive, familiar and quick. As they are locally-rooted and often culturally based, RDRSs are likely to be viewed as being more culturally appropriate by the refugee community in terms of the rules they apply, the norms they enforce, their procedures and the potential outcomes. Like most informal justice mechanisms, these processes are largely voluntary and do not require any specialized legal representation. Individuals are generally able to explain their positions themselves and decisions are reached by agreement and enforced by social pressure.⁵⁰⁶ Additionally, unlike formal justice mechanisms, RDRSs include a strong emphasis on social harmony and consequently, broader community involvement.

While the role that refugee dispute resolution mechanisms play in the administration of justice in refugee camps is admittedly a vital one, these systems are not without problems. Many of the concerns relating to these systems are explained in depth in Rosa da Costa's 2006 report on the administration of justice in refugee camps and will thus be only briefly mentioned here.⁵⁰⁷ In particular, there is concern regarding the lack of consistency between the laws and standards of the host state and the workings of the RDRS.⁵⁰⁸ Refugee dispute resolution systems may criminalize activities that are not offenses under the domestic laws of the state and they often impose sanctions that are too severe, too lenient or entirely inappropriate when compared with the formal justice system. For example, in Burmese refugee camps in Thailand, adultery is treated as a serious offense and those found guilty of it are liable to a term of detention, while

⁵⁰⁵ Da Costa, *Administration of Justice*, *supra* note 8 at 39.

⁵⁰⁶ Banik, "An Overview", *supra* note 463 at 15.

⁵⁰⁷ Da Costa, *Administration of Justice*, *supra* note 8.

⁵⁰⁸ *Ibid* at 43.

under Thai law, adultery is not a crime.⁵⁰⁹ Similarly, rape is regarded in many cultures as a crime of honour against the family that may be resolved (and community harmony restored) by having the rapist marry the survivor.⁵¹⁰ Although the focus on community and re-establishing social harmony is useful and may even be necessary given the nature of protracted refugee situations, in certain cases this focus can result in a miscarriage of justice by prioritizing the well-being of the community over the fundamental rights of the individual.

Another shortcoming of the RDRSs that has been identified is that these mechanisms are not representative.⁵¹¹ Women generally have little or no representation in these systems and minority religious or ethnic groups may also lack voice.⁵¹² As a consequence, these groups may not receive fair treatment by the dispute resolution system. This problem is particularly evident in the treatment of cases of sexual and gender-based violence by male-dominated justice mechanisms.⁵¹³ Other criticisms of the RDRSs relate to the absence of appeal mechanisms, the absence of record-keeping (and thus precedent and consistency) and uncertainty with respect to procedures and applicable law. The decision-makers may not have the training, expertise or capacity and the RDRSs are most often not an appropriate forum for dealing with very serious cases, cases of sexual and gender-based violence and cases involving children. Given the close links that frequently exist between the dispute resolution systems and the camp leadership, these mechanisms are also vulnerable to elite capture and may lack transparency, independence and impartiality, and may simply reflect existing power hierarchies within the camp.⁵¹⁴ Despite these weaknesses, the flexibility and accessibility of refugee dispute resolution systems make them a key element in ensuring access to justice in protracted refugee situations.

In contrast to the flexibility of the refugee dispute resolution mechanisms, the host state justice system (HSJS) is a formal system ostensibly based upon the rule of law and featuring a clearly defined set of laws and procedures. Claimants before the host state justice system require legal representation and decisions are made by professionally-trained adjudicators. These

⁵⁰⁹ See McConnachie, *supra* note 6 at 76; Interview of International Rescue Committee Legal Assistance Center Mediation Specialist (12 May 2011), Mae Sot Thailand [on file with author].

⁵¹⁰ See e.g. Griek, *supra* note 8 at 4.

⁵¹¹ Da Costa, *Administration of Justice*, *supra* note 8 at 45.

⁵¹² For example, not only are women not represented on the Somali Maslaxad committee in Dadaab refugee camp, they are also denied the right to speak on their own behalf even if they are the victims of a crime. Griek, *supra* note 8 at 4.

⁵¹³ See generally Da Costa, *Administration of Justice*, *supra* note 8; Griek, *supra* note 8.

⁵¹⁴ See e.g. Da Costa, *Administration of Justice*, *supra* note 8 at 47.

systems generally permit decisions to be appealed and, given the existence of oversight mechanisms as well as their public profile, may be more likely to conform to international human rights standards.⁵¹⁵ On the other hand, the formal legal system is also expensive, complex, bureaucratic and subject to long delays. Refugees may be unable to access the formal justice system due to legislative restrictions or as a result of more mundane obstacles such as distance, cost, the need to obtain official permission to exit the camp, and language barriers. The lack of resources for legal aid and translation are also obstacles that impede access to the host state justice system, as are the lack of legal awareness and the unfamiliarity of formal systems generally and the HSJS specifically. Even if the HSJS is accessible, refugees may avoid this system because they view it as being culturally inappropriate or because they fear that they will be subject to discrimination or bias. Formal justice systems may also lack legitimacy within the refugee community either because they are viewed as being corrupt or because of the negative experiences of refugees with other host state authorities. Finally, individuals may be under pressure from within the refugee community not to resort to the formal justice system or they may avoid it for fear of reprisals either from other community members or from the host state against the refugee community as a whole.⁵¹⁶

Despite these substantial obstacles, refugee communities, aid providers and the host state have generally accepted that in many situations a combination of formal and informal justice mechanisms is both necessary and unavoidable.⁵¹⁷ It has also been recognized that the most serious crimes should only be addressed by the formal state justice system, as it has the required resources and expertise, while other civil cases and minor criminal offenses may be brought before the refugee dispute resolution mechanisms.⁵¹⁸ Although there is no absolute consensus on which crimes are “most serious”, generally speaking these offenses will include murder, rape, serious assault causing bodily harm, and other offenses that may result in substantial sentences, particularly extended terms of detention.⁵¹⁹

⁵¹⁵ In fact, the lack of resources often presents a very real challenge, undermining the State’s ability to respect international obligations and standards. UNHCR, *Operational Protection*, *supra* note 465 at 28.

⁵¹⁶ See generally Da Costa, *Administration of Justice*, *supra* note 8; UNHCR, *Operational Protection*, *supra* note 465 at 30.

⁵¹⁷ See e.g. UNHCR, *Operational Protection*, *supra* note 465 at 32.

⁵¹⁸ See e.g. Da Costa, *Administration of Justice*, *supra* note 8 at 40.

⁵¹⁹ See e.g. UNHCR, *Operational Protection*, *supra* note 465 at 32. The issue of whether or not to include less serious incidents of sexual and gender-based violence in this category is more controversial and has been examined by the author in Anna Purkey, *Whose Right to What Justice? Humanitarian Intervention and the Administration of Justice in Refugee Camps*, *supra* note 490. For more discussion on sexual and gender-based violence, see UNHCR,

D. Legal Empowerment: Enhancing the Capacity to Demand *and* to Provide Justice

The aim of legal empowerment is to enable individuals to make full use of the existing law and legal mechanisms in order to take control of their lives and to secure their rights. By definition then, the process of legal empowerment will enhance the capacity of refugees to access and demand justice, which is important in interactions with both the host state and the refugee justice systems. What is more, legal empowerment of the refugee population also has the potential to enhance the ability of the refugee community to *provide* justice through the RDRSs.

Given the variety of obstacles faced by refugees in protracted situations, it is impossible to review all of the possible legal empowerment interventions that can assist in ensuring access to justice and improving the administration of justice. As a result, perhaps the best way to illustrate the potential of legal empowerment to address these barriers is to review examples where such initiatives have been used.

Project	Legal empowerment initiatives	Outcomes
<p>International Rescue Committee’s Legal Assistance Center Programme (LAC) in Burmese refugee camps in Thailand⁵²⁰</p> <p>With the cooperation of the host state authorities, LAC works with representatives of the refugee communities to facilitate access to the host state justice system and improve the administration of justice within the refugee camps.</p>	<ul style="list-style-type: none"> • Legal education: LAC runs training programmes for the refugee population on Thai law, the Thai court system, the different dispute resolution mechanisms, human rights and civic education • Training programmes on Thai law, human rights, mediation and dispute resolution provided to refugee authorities and RDRS decision-makers. Go-see visits bringing refugee authorities to 	<ul style="list-style-type: none"> • Increased legal awareness of the refugee population (awareness of the laws that apply to the refugee population and the outcomes of violations, as well as options for legal recourse) • Demystification of the formal justice system • Increased awareness of human rights standards and the areas of conflict between culture and legal standards (ex: with respect to the treatment of domestic violence or adultery) • Increased capacity of RDRS to provide justice remedies that are culturally appropriate but still consistent with Thai law and human rights standards • Perception of increased

Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response (May 2003) at 62, online: www.unhcr.org/3f696bcc4.html; UNHCR, *Operational Protection*, *supra* note 465 at 85.

⁵²⁰ The information presented here is based on the interviews conducted by the author in Mae La Refugee Camp and Mae Sot, Thailand, Spring 2011.

	<p>observe the host state justice system. Training sessions with members of the Thai legal community (including the police)</p> <ul style="list-style-type: none"> • Law reform: LAC and refugee authorities, including representatives of different religious groups and community-based organizations, have been drafting a set of camp by-laws and procedures to facilitate the administration of justice. • Use of camp-based paralegals (Members of the camp community are trained to provide legal education and advice and to monitor the RDRS) • Direct legal counsel: LAC provides legal advice and when a case goes before the Thai justice system, they will provide or arrange for accompaniment, translation, legal representation and transport 	<p>trustworthiness of RDRSs</p> <ul style="list-style-type: none"> • Increased familiarity of refugees with the host state system • Increased familiarity of host state justice officials with the situation of refugees. • Creation of important links with the host state justice system • Provision of a forum for negotiating cultural restrictions such as those pertaining to the participation of women, sexual and gender-based violence, youth marriage, etc. • Higher degree of certainty and consistency • Increased legal awareness (refugees know exactly what behaviour is acceptable in the camp and results are to be expected) • Empowerment of minority groups (religious groups, women...) • Empowerment of key refugee actors • Increased sustainability as refugee paralegals are able to provide legal information and advice • Accountability of the RDRS • Increased accessibility of the formal host state legal system
<p>Asylum Access⁵²¹</p> <p>Asylum Access works in the legal empowerment of refugees in Ecuador, Tanzania and Thailand.*</p> <p>5 Tools:</p> <ul style="list-style-type: none"> - Individualized legal counsel and representation - Community legal empowerment - Policy advocacy 	<ul style="list-style-type: none"> • Provision of individualized legal aid in cases involving asylum, protection from abuse and exploitation in the workplace, access to education and healthcare, protection from sexual violence and equality before the law. • “Know your rights” legal education workshops 	<ul style="list-style-type: none"> • Increased access to the host state justice system • Increased legal awareness and knowledge of rights and

⁵²¹ See “Asylum Access,” online: Asylum Access asylumaccess.org/AsylumAccess/.

<ul style="list-style-type: none"> - Strategic litigation - Global movement-building <p>*Asylum Access’s work does not necessarily take place in refugee camps but its initiatives could be transplanted into the camp environment</p>	<ul style="list-style-type: none"> • Training of refugees to serve as legal interpreters and community legal advocates (to provide basic legal services, accompaniment and referrals) • Women’s Empowerment Group (Tanzania): created to support and empowerment women refugees in Dar es Salaam. Mainstreaming of rights-based training with information about micro-finance, financial empowerment, skills training and counselling support. 	<p>applicable law.</p> <ul style="list-style-type: none"> • Improved access to justice • Empowerment of community members • Increased legal awareness of a vulnerable group (women) • Empowerment of women • Increased organizational capacity
<p>Mobile Court System</p> <p>Mobile Court Systems are in place in Dadaab refugee camp in Kenya,⁵²² in Meheba Refugee Settlement in Zambia⁵²³ and in Nakivale Refugee Settlement in Uganda.⁵²⁴</p>	<ul style="list-style-type: none"> • A court of the host state justice system sits in the refuge camp or settlement at regular intervals (ex: in the case of Nakivale refugee Settlement, the courts will hold three sessions a year, each lasting between 15 and 30 days⁵²⁵). 	<ul style="list-style-type: none"> • Increased accessibility of the host state justice system • Increased familiarity of the refugee community with the formal justice system • Provision of a forum for education both about the justice system and about the law (for example, in Dadaab the court uses the opportunity of cases involving women and children to talk about women and children’s rights)⁵²⁶
<p>Refugee Consortium of Kenya Legal Aid and Policy Development Centre⁵²⁷</p>	<ul style="list-style-type: none"> • Establishment of legal aid clinics in Nairobi, Dadaab and Kakuma. RCK provides free legal aid to refugees on matters of security, immigration, sexual and gender-based violence, employment and asylum status through the use of RCK legal officers and pro-bono lawyers. RCK also provides psychosocial counselling for refugees. • Trainings on refugee protection for duty-bearers including police officers, immigration officials, children’s officers and members 	<ul style="list-style-type: none"> • Increased legal awareness • Increased access to the host state justice system • Creation of links with host state legal professionals • Increased capacity of the host state justice system to provide justice

⁵²² UNHCR, *Operational Protection*, *supra* note 465 at A11.

⁵²³ Veroff, *supra* note 353.

⁵²⁴ Refugee Law Project, “Mobile Court Launched in Nakivale Refugee Settlement” (2013) online: www.refugeelawproject.org/others/13_05_02_mobile_courts.pdf.

⁵²⁵ *Ibid.*

⁵²⁶ UNHCR, *Operational Protection*, *supra* note 465 at A12.

⁵²⁷ Refugee Consortium of Kenya, *RCK Annual Report 2012*, online: www.rckkenya.org/index.php/resources/resources2.

	<p>from the Kenya Judges and Magistrates Association, Court User Committee members and provincial and local administration⁵²⁸</p> <ul style="list-style-type: none"> • Community-based protection monitoring. RCK engages monitors from both the refugee and host communities to provide reports on human rights violations within their communities. RCK also uses paralegals to gather information about arrests, court cases and deportation orders. 	<ul style="list-style-type: none"> • Increased security • Increased access to justice and increased capacity to provide just remedies.
<p>Refugee Law Project, School of Law, Makerere University, Uganda⁵²⁹</p>	<ul style="list-style-type: none"> • RLP Legal Aid Clinic: Provision of free legal assistance to the refugee population including legal representation in court. Provision of mediation in disputes in domestic and tenancy issues.⁵³⁰ • Training sessions on community policing (educating refugees about crime prevention, their rights and the opportunities available to them under Ugandan law) • Training of stakeholders on refugee law and policy. Includes training provided to police and internships for university law students. 	<ul style="list-style-type: none"> • Increased access to justice through the facilitation of access to the host state justice system and to alternative dispute resolution mechanisms. • Increased capacity of the refugee community to administer justice • Increased capacity of host state authorities to administer justice in an effective and rights-sensitive manner.
<p>Information, Counselling and Legal Assistance (ICLA) programmes of the Norwegian Refugee Council⁵³¹</p> <p>Active in 16 countries including Pakistan, Afghanistan, Mali, Burkina Faso, etc. Specific activities depend upon the country context.</p> <p>Focuses on 5 themes:</p> <ul style="list-style-type: none"> • Housing, land and property rights 	<p>Examples of activities:</p> <ul style="list-style-type: none"> • Regional ICLA training on collaborative dispute resolution: 5 day training on how to provide assistance through negotiation and mediation for housing, land and property disputes related to displacement. • Operation of mobile teams that ensure refugees and IDPs who cannot visit a centre can benefit 	<ul style="list-style-type: none"> • Increased capacity to provide accessible and effective justice remedies. • Increased ability of displaced persons to access justice

⁵²⁸ *Ibid.*

⁵²⁹ Refugee Law Project, online: Refugee Law Project www.refugeelawproject.org/ [Refugee Law Project website].

⁵³⁰ Refugee Law Project, *Access to Justice Programme*, online: refugeelawproject.org/our-work/access-to-justice.html [Refugee Law Project, *Access to Justice*].

⁵³¹ Norwegian Refugee Council, “Information, Counselling, and Legal Assistance”, online: www.nrc.no/?aid=9137054.

<ul style="list-style-type: none"> • Legal identity • Citizenship and statelessness • Procedures for refugee status determination • Procedures for registration of IDPs 	<p>from ICLA's activities</p>	
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Table 3. Legal Empowerment Initiatives

Although not all of these programmes service refugees within refugee camps, they provide a good overview of different types of legal empowerment initiatives and the impacts that they can have on the administration of justice and represent activities that could be transplanted into the camp context. In particular, we can identify three trends. First, and most importantly, is an emphasis on education, developing legal literacy, and awareness-raising. As the old adage goes, “knowledge is power” and so it is not surprising that empowerment be closely linked with the transfer of knowledge. Knowledge is also a significant factor in the effective administration of justice. Referring back to the process outlined at the beginning of this section, knowledge is key to step 2 (legal awareness), step 3 (ability to make a claim) and step 4 (effective handling of grievance). As refugees acquire knowledge about their rights, the applicable laws and the available procedures, they become better able to claim those rights and use those legal mechanisms. As noted above, legal awareness requires that individuals have some knowledge about their rights and entitlements and the laws that apply to them, that they have a right to claim a remedy in the case of an infringement and that they be able to conceptualize some of their own problems in these terms.⁵³² Providing accessible information and education opportunities to refugees increases this legal awareness.⁵³³

However, even in situations where refugees are aware of their right to a remedy, they may not know how to obtain one. Thus one dimension of the ability to make a claim is also to know where the claim should be directed, what mechanisms are available and what procedures are involved, and to be able to make an educated decision about how to proceed. Information sessions about the host state justice system, the refugee dispute resolution systems and the legal

⁵³² UNDP, *Programming for Justice*, *supra* note 220 at chapter 5.

⁵³³ Accessibility is a particularly important consideration. Information must be provided in the refugees' language and in an accessible format taking into consideration factors such as the level of literacy of the community, the formality of the language use, etc. For example, as the author found during her fieldwork, in the Burmese refugee camps in Thailand, certain community announcements are issued in picture form in order to address the illiteracy of many camp members. Community theatre and radio programmes are other options, as is providing refugees with a simplified translation of the laws of the host state.

assistance available can help to ensure that refugees have the necessary knowledge to make informed choices.

Despite its fundamental role, knowledge on its own is insufficient. For the administration of justice to function effectively, refugees need to be able to convert their knowledge into action.⁵³⁴ This conversion is facilitated by the two other trends identified in legal empowerment strategies: the provision of services and assistance to meet the legal needs of refugees, and law and institutional reform activities. After education and awareness-raising activities, the provision of direct legal services is perhaps the most common form of legal initiative to reach refugees. There is little need to elaborate much on these services as their role and importance is fairly evident: without legal representation refugees are unlikely to be able to make use of the formal justice system and may be vulnerable to mistreatment by that system. It can also be very difficult, if not impossible, for refugees to acquire these services on their own. A refugee may not have the money to pay a lawyer; there may be no or insufficient legal aid available; the remoteness of many refugee camps may make it difficult to find a lawyer even if funds are available; refugees may encounter bias and discrimination in the legal system, etc.

In addition to the provision of direct legal aid and assistance, an interesting feature of many of the initiatives described in the table above is their use of paralegals and refugee community members to provide legal services including translation, education and legal advice. As well as lowering costs, the use of refugee paralegals has multiple other advantages: it empowers both individuals and the community, increases the legal awareness and capacity of the community, increases the accessibility of legal services and increases the sustainability of these projects as certain services are able to be maintained even in the absence of external aid providers. Furthermore, the refugee community is empowered when its members acquire the skills and tools to “do for themselves”, to become active participants in the justice process, as opposed to being dependent on third parties for assistance. Using members of the refugee community as paralegals also eliminates the linguistic and cultural barriers. Community-based workers are familiar with the social and cultural context of the refugee camp and can act as a bridge between the legal system and the refugee community as well as a conduit for information. These paralegals may have greater access to the refugee community, and in turn, members of the

⁵³⁴ See Golub & McQuay, *supra* note 360 at 69; CLEP, *Volume Two*, *supra* note 360 at 22; Asian Development Bank, *supra* note 360 at 51.

community may be more willing to approach local paralegals for assistance than the staff of an aid organization or a lawyer from the host state.⁵³⁵

Box 1. Camp-based Assistants

In the Burmese refugee camps along the Thai-Burmese border, the International Rescue Committee's Legal Assistance Center project trains members of the refugee community to act as camp-based assistants (CBAs). Some CBAs help Burmese, Thai and foreign staff members provide legal training to camp residents while others are trained to conduct interviews with refugees seeking legal assistance and to help provide them with legal counsel. CBAs are also trained to monitor hearings within the camp justice system and the use of detention within the camp. This role is particularly important as most hearings take place in the evenings after the non-refugee staff is required to leave. Ultimately, the objective is for CBAs to eventually be able to take over most of the functions of the Legal Assistance Centers.

Fieldwork conducted by author (May 2011) Mae Sot, Thailand [on file with author].

Meeting the legal needs of refugee communities also means making the host state justice system more accessible, for example by providing transport, translation and accompaniment or by bringing the courts to the refugees through a system of mobile courts. These are strategies that address the most basic understanding of access to justice, access to the justice institutions themselves, and provide the framework in which the knowledge and skills of refugees can be exercised and justice administered.

Finally, legal empowerment initiatives may include law and institutional reform activities that seek to improve the quality of the justice on offer, as well as its accessibility. At a high level, these strategies may include public-interest litigation, advocacy campaigns, administrative advocacy, monitoring, and accountability activities.⁵³⁶ More often, institutional reform happens in a more subtle manner and consists of education and training activities for both government and refugee leaders and justice actors. Community leaders and justice actors within the refugee community need to know about human rights and the law, but can also benefit from training on the justice systems, mediation, negotiation, etc. Similarly, to ensure that refugees are treated fairly by the formal justice system, host state authorities (administrators, judges, lawyers and police) need to have a basic understanding of refugee and human rights law, as well as the realities of the refugee context.

⁵³⁵ UNDP, *Programming for Justice*, *supra* note 220 at 148.

⁵³⁶ See e.g. Maaïke de Langen & Maurits Barendrecht, "Legal Empowerment of the Poor: Innovating Access to Justice" in Jorrit de Jong & Gowher Rizvi, eds, *The State of Access: Success and Failure of Democracies to Create Equal Opportunities* (Washington DC: Brookings Institution Press, 2008) 250 at 262; Asian Development Bank, *supra* note 360 at 40; Maru, "Allies Unknown", *supra* note 477 at 85.

Although there are legal empowerment strategies currently being used to facilitate the administration of justice in refugee camps, there remains substantial room for improvement in this area. In particular, with the exception of the Legal Assistance Center project, there are few initiatives that directly aim to improve the ability of the informal justice systems within the camps to provide justice. This is perhaps evidence of reluctance on the part of aid providers to engage with informal justice mechanisms that do not necessarily conform to international standards and that may provide less than ideal outcomes. The importance of engaging with *all* justice mechanisms is addressed in the following chapter, but suffice it to say that this is one area where there is potential for immense growth and improvement. The other strategies presented here are also subject to criticism. For example, while the mobile court system may eliminate physical barriers to access, it does not address the reality that the host state justice system may still be unattractive to the refugee population and unable to compete with the RDRS. Similarly, while the provision of direct legal representation by aid providers is necessary in many cases, it creates a system that is dependent on the continued presence of external actors to act as intermediaries and on external funding.

Nevertheless, legal empowerment strategies clearly have the potential to increase the agency of refugees with regards to the administration of justice and to modify the opportunity structure in which that agency is exercised. As legal awareness and access to justice increase, so does the capacity and willingness of individuals to claim their rights and demand justice and to hold justice systems to account. Not only do individuals demand justice, they demand a higher standard of justice which in turn can improve the overall quality of justice provided.

III. Legal Empowerment Can Enhance the Justice of Administration

In discussing the role of legal empowerment in facilitating access to justice and enhancing the administration of justice, the focus was primarily on disputes occurring on a day-to-day basis between relatively equal parties. The administration of justice is also important, however, in situations where conflict occurs between members of the refugee community and actors that exercise control or power over them such as the host state authorities, UNHCR, humanitarian actors and even refugee community leaders. In these cases, the real issue is one of accountability; another forum where legal empowerment can play a crucial role. The general relationship between legal empowerment and accountability was discussed briefly in chapter 3

but this section will explore how legal empowerment can enhance accountability and thereby improve governance in protracted refugee situations specifically.

A. Accountability, Governance and Power: Three Inter-related Concepts

When we talk about accountability, we are talking about the obligation of power-holders and duty-bearers to account or take responsibility for their policies, actions and inaction; it is a means of upholding certain standards and expectations of those in authority, making them answerable for any deviation and providing the possibility of redress.⁵³⁷ Within a human rights framework, accountability ensures that human rights are enforceable obligations and not merely empty rhetoric by converting passive beneficiaries into active rights-holders, thus identifying the duty-bearers whose responsibility it is to fulfill these entitlements and against whom claims can be made.⁵³⁸

There are many different types of accountability and of accountability mechanisms. Perhaps the most familiar accountability mechanism, though not necessarily the most effective, is the electoral process. Although elections are a cornerstone of accountability in any democracy, their effectiveness is limited by the fact that they affect only a very thin layer of authority (as opposed to the entire bureaucracy of a state), occur only periodically, require constituents to choose from a limited number of options and do not allow the people to hold authorities responsible for specific decisions or actions.⁵³⁹ Other accountability mechanisms can be either internal or external to the institutions in question. Internal accountability mechanisms include the separation of powers, financial audits, codes of conduct, public oversight, ombudsmen, special parliamentary commissions, internal disciplinary procedures, etc. External accountability mechanisms include complaint mechanisms, legal and quasi-legal mechanisms (including recourse to adjudication) and social accountability mechanisms such as the use of the media, monitoring by non-governmental organizations, advocacy campaigns, public demonstrations and public interest lawsuits.

⁵³⁷ See Ho & Pavlish, *supra* note 443 at 90.

⁵³⁸ See *ibid*; see also Alicia Ely Yamin, “Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health” (2008) 10:2 Health and Human Rights 1 at 1.

⁵³⁹ Carmen Malena, Reiner Forster & Janmejay Singh, “Social Accountability: An Introduction to the Concept and Emerging Practice” (December 2004) Social Development Papers – Participation and Civic Engagement, Paper No 76 (Washington DC: Social Development Department – The World Bank, 2004) at 3.

A truly comprehensive system of accountability will likely employ a variety of different mechanisms, both internal and external, that satisfy three different functions: collection and distribution of information, oversight/monitoring, and redress. Accountability is impossible without access to information and consequently some level of transparency. Pertinent information needs to be gathered and provided to the relevant parties so that they can determine whether obligations of both process and result have been satisfied. The use of formal oversight or monitoring mechanisms is one way to gather information that can also play an important role in deterring undesirable behaviour and identifying it in situations where the outcome is not well-represented by the abstract data (for example in situations where the process may be defective even though the results are not clearly problematic). Internal oversight mechanisms can help to foster a culture of accountability within an organization while external oversight or monitoring enables public participation. Lastly, accountability can only be achieved if there are mechanisms through which redress can be demanded and if it is not forthcoming, compelled.

Seen through the lens of a discussion of ombudsmen, complaint procedures, administrative regulations and codes of conduct, accountability can appear to be quite a formalistic and mechanical requirement. It is only when we understand its relationship to power that we can grasp accountability's full import. Accountability is ultimately about controlling how power is exercised (through the drafting of laws, implementation of policies, enforcement of norms, etc.) by the powerful over those subject to their power. The more uneven the distribution of power, the more important accountability is. Accountability and its associated mechanisms are perhaps the best protection that individuals have against instrumentalization and domination by any powerful actor but especially by the state. If we understand the state as having certain obligations under the fiduciary theory to act in the best interests and on behalf of those subject to its power, accountability can be viewed as the insurance policy to make certain that the state lives up to those obligations. Without strong mechanisms to hold all levels of the state accountable, from the head of state down to the lowly bureaucrat, the fiduciary theory, including the obligation to respect, protect and fulfill human rights, is little more than a theoretical flourish. It is here that we can also see the connection between accountability and good governance. Simply put, accountability is a critical feature of good governance.⁵⁴⁰ A government that is accountable is a government that is responsive to those subject to its power and that does not

⁵⁴⁰ See *ibid* at 5; UNDP, *Programming for Justice*, *supra* note 220 at 27.

abuse that power. Accountability mechanisms have the capacity to reduce conflict and enhance the legitimacy of the governance by increasing transparency in decision-making and by providing opportunities for people to take an active role in these processes.⁵⁴¹

B. Accountability as a Safeguard for the Rights of Refugees

In keeping with the rise of human rights-based approaches, the actors that assist and service refugee communities, whether they are inter-governmental organizations, non-governmental organizations or host state authorities, should perform their functions in a manner that is consistent with the human rights of refugees and respectful of their agency both as individuals and as communities. In reality, the assistance provided to refugees is too often dependent upon policy and budget constraints that have little to do with their well-being or rights. As aid providers are viewed as being accountable to their donors and host states to their citizens, refugees become regarded as beneficiaries of charity rather than as rights-holders.⁵⁴² In this context, legal empowerment becomes a key tool for ensuring that duty-bearers can be held to account at least to some degree by the refugee community.

Instead of relying on the thin soil of citizenship or financial obligation, accountability in protracted refugee situations should be driven by the recognition of the inherent humanity, dignity and equality of refugees as rights-holders. Faced with the particular vulnerability of refugees to the exercise of power, legal empowerment has the potential to enhance accountability by strengthening the voice of refugees and their capacity to demand accountability and engage in a constructive and informed manner with power-holders.

1. Accountability of External Power-holders: The Host State, UNHCR and Humanitarian Actors

When we talk about accountability in protracted refugee situations, we are primarily talking about accountability for the respect, protection and fulfillment of refugee rights and human rights obligations.⁵⁴³ This accountability is owed by every duty-bearer but especially by those that exercise a broad range of powers over individuals in precarious situations. Indeed, the need for a focus on accountability in protracted refugee situations is directly linked to the insecurity of

⁵⁴¹ See generally Ho & Pavlish, *supra* note 443; UNDP, *Programming for Justice*, *supra* note 220.

⁵⁴² See Harrell-Bond, “Humanitarian Work”, *supra* note 3.

⁵⁴³ States may have additional legal obligations set out in their domestic legislation in which case they may also be held accountable for meeting these.

refugees and their lack of political power. As non-citizens with little or no economic clout and faced with restrictions on freedom of movement and language and cultural barriers, refugees are far removed from the political decision-making processes that concern them and are thus largely unable to affect or to fully benefit from the political process.⁵⁴⁴ In addition, as we have mentioned before, refugees in these situations are often dependent upon the host state and humanitarian actors for security and protection as well as for the basic necessities of day-to-day life in some cases. The power differential between refugees and those exercising authority over them means that refugees may be unable or unwilling to use accountability mechanisms even if they are available, though all too often they are not.⁵⁴⁵



Figure 2. Cartoon created by Saad Murtadha for The Sphere Project to acknowledge that aid providers must be accountable to those they seek to assist. www.sphereproject.org

It is those specific factors that are characteristic of protracted refugee situations, including insecurity, precariousness and dependence, which make accountability all the more important in these cases. Although there may be some justification for prioritizing security and immediate assistance over the full respect and fulfillment of human rights in emergency situations, no such justification can be made in protracted refugee situations which can persist for decades. As these situations linger on, donor and assistance fatigue may result in fewer resources and less intervention which can undermine refugee protection within the host state. The prolonged nature of PRSs also means that they may become subject to less international scrutiny over time, thus increasing the importance of effective accountability mechanisms. Finally, the situation is further complicated by the complete absence of any international legal standards that recognize and address the specific conditions and concerns associated with situations of long-term asylum.

⁵⁴⁴ See Ho & Pavlish, *supra* note 443 at 96.

⁵⁴⁵ See *ibid* at 95.

Not only does the existence of effective accountability mechanisms in protracted refugee situations contribute to the protection of and respect for human rights, it also provides refugees with an outlet where grievances can be aired and hopefully resolved. By giving community members forums where their views can be expressed, accountability mechanisms can amplify the voice of refugees, facilitate their involvement in decision-making and help them to take a more active role in their own fates. This in turn can contribute to increasing stability and security within refugee camps since individuals are less likely to engage with formal processes and more likely to resort to extreme, and ultimately desperate, measures when they feel that they are not being respected, are not being heard and have no control over their lives.⁵⁴⁶

Obligations of accountability towards the refugee community arise in a number of different ways. As primary responsibility for refugee protection lies with the host state, its obligation the greatest. While in many refugee situations the host state delegates a substantial portion of its duties with regards to the day-to-day functioning of refugee camps to UNHCR and other aid providers, delegating operational responsibilities does not include the delegation of legal responsibility.⁵⁴⁷ The state's obligations of accountability to refugees arise as consequences of its duties to respect, protect, promote and fulfill the human rights of *all* individuals within its jurisdiction which is a function of its obligations under international human rights treaty law, international customary law and the fiduciary duty that exists between the state and refugees.⁵⁴⁸ Additionally, obligations of accountability also arise as a function of the state's refugee obligations either under domestic law, regional treaties or the *Refugee Convention*.

UNHCR owes refugees a duty of accountability as a result of its own human rights obligations. Although the extent of those obligations is not entirely settled, at the very least, most scholars agree that UNHCR has a duty not to violate human rights principles and at least a limited responsibility to enforce human rights norms.⁵⁴⁹ Likewise, other humanitarian actors have at a minimum a basic obligation not to violate human rights norms in the performance of their duties. In the case of both UNHCR and other humanitarian actors, accountability is important because, in addition to the possibility that these actors might commit human rights violations themselves, their actions and functions have the potential to exacerbate the situation of

⁵⁴⁶ For examples of some of the infantilizing and degrading treatment that refugees are subject to, see e.g. Harrell-Bond, "Humanitarian Work", *supra* note 3.

⁵⁴⁷ Farmer, *supra* note 8 at 75.

⁵⁴⁸ Ho & Pavlish, *supra* note 443 at 91.

⁵⁴⁹ Farmer, *supra* note 8 at 77.

refugees in such a way as to make them more vulnerable to human rights abuses.⁵⁵⁰ Every decision, whether it concerns the provision of medical services, the presence of security personnel or the hiring processes for local staff may have an impact on the lives and rights of refugees.

Box 2. Little decisions with big impacts:

- ❖ In a 2003 report, Human Rights Watch found that the practice of listing Bhutanese refugee women on the ration cards of their husband, father or brother, as opposed to providing them with cards in their own right, impeded the women's equal and independent access to aid entitlements and had the potential to put their security at risk. Without her own ration card, a woman may be forced to choose between being able to provide for herself and her children or being able to escape an abusive relationship.
Human Rights Watch, *Trapped by Inequality: Bhutanese Refugee Women in Nepal* (New York: Human Rights Watch, 2003).
- ❖ In the Burmese refugee camps in Thailand, prior to 2001 food distribution was traditionally organized by men because rice was provided in 100kg bags which were too heavy for women to manage. After the introduction of 50kg bags, women became substantially more involved in the unloading and distribution of food supplies.
Burmese Border Consortium Relief Programme, *Programme Report for the Period January to June 2001* (August 2001) at 46, online: www.theborderconsortium.org/media/10028/2001-6-mth-rpt-jan-jun-1-.pdf.

Whether we are discussing authorities of the host state, UNHCR or other aid providers, power-holders must be accountable to the refugee population for their conduct or performance as well as the outcomes; in essence for what they do (or fail to do) and for how they do it.⁵⁵¹ Duty-bearers must be accountable for everything from high-level policy decisions such as the choice of admission criteria for refugees, to the most basic provision of services such as the quality of rations provided. Explicit violations of rights, such as occurrences of sexual assault by aid workers or the failure to provide adequate food and shelter or essential medical services, are comparatively easy to recognize. In those cases it is also relatively easy to establish who should be held accountable. What is more challenging to address, but equally important, are the structural and institutional factors that can result in violations of the human rights of refugees or the failure to fulfill duties. Whether it is a question of the asymmetric relationship between refugees and aid providers,⁵⁵² a culture of impunity within an organization, or the division of

⁵⁵⁰ See *ibid* at 80.

⁵⁵¹ See generally Malena, Forster & Singh, *supra* note 539 at 2; Yamin, *supra* note 538 at 3.

⁵⁵² See Harrell-Bond, "Humanitarian Work", *supra* note 3 at 55.

responsibilities among aid providers, these factors have an immense impact on the ability of refugees to live a dignified life and yet are too often overlooked.

Despite the recognized importance of accountability in international law and policy, one of the shortcomings of the international refugee assistance regime is the lack of beneficiary-based accountability mechanisms. Given that the state must balance its role as host to refugees with a multitude of other functions, not least its responsibilities towards its

own citizens, it is not surprising that few host states have made any special effort to ensure that refugees have access to accountability mechanisms (not that that makes it acceptable). However, it is extremely disappointing that even aid providers in general and UNHCR in particular have not made more progress in ensuring that they are accountable to their beneficiaries given that many of these organization exist solely for the purpose of assisting refugees. Where else in society can you find an institution that is established for the purpose of servicing a single client group and yet has virtually no way to assess or respond to client dissatisfaction?⁵⁵³ If refugees were paying clients, this situation would never be accepted. The reality is that despite the rise in popularity of human rights-based approaches and the lip service paid to accountability, in

Box 3. A Failure of Accountability

Although not related to a refugee situation, one of the most egregious examples of lack of accountability of an international aid provider is the United Nations' consistent refusal to acknowledge its responsibility for the cholera epidemic in Haiti. This outbreak has been traced back to the contamination of Haiti's water sources caused by improperly constructed sanitation infrastructure at a UN base occupied by, among others, UN troops from Nepal who arrived in Haiti shortly after a major cholera outbreak in their own country. Despite substantial evidence, the UN has refused to accept responsibility and, moreover, denied victims any form of redress by refusing to establish a claims commission in violation of the terms of its contractual agreement with Haiti. This lack of accountability represents a violation of the principles of international humanitarian aid as well as the UN's obligations under international human rights law.

Transnational Development Clinic, Jerome N. Frank Legal Services Organization Yale Law School, et al, *Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic* (Yale University, 2013).

⁵⁵³ UNHCR does have a number of accountability mechanisms including a code of conduct, policies pertaining to age, gender and diversity mainstreaming, an internal financial control framework, an Inspector General's Office, the Results Framework and the relatively new Global Management Accountability Framework. In addition to these mechanisms (which are largely internal), UNHCR's rights-based approach has emphasized the importance of refugee participation as a means to strengthen UNHCR's accountability. (See generally Volker Turk & Elizabeth Eyster, "Strengthening Accountability in UNHCR" (2010) 22:2 Intl J of Refugee L 159, at 167.) However, as with other humanitarian organizations, the incorporation of human rights norms, including those related to accountability, appears much stronger at the policy level than in practice. (See Farmer, *supra* note 8 at 83.) See also KRC Research & Consulting Inc. (1991) "A Communications Strategy for the Office of the United Nations High Commissioner for Refugees: Executive Summary", report prepared by Mark Malloch-Brown for the UNHCR at 8: "We work for no other organization in the political, governmental, or commercial world which has such an absence of mechanisms for determining citizen or consumer satisfaction."

practice refugees are still largely treated as beneficiaries of charity as opposed to rights-bearers with accountability then being owed to donors rather than to the beneficiaries themselves.

2. Accountability Mechanisms in Protracted Refugee Situations: Diverse but Insufficient

Although accountability is still sorely lacking in protracted refugee situations, some efforts have been made to improve the situation. One such initiative is the Sphere Project which was established in 1997 by a group of humanitarian non-governmental organizations and the International Red Cross and Red Crescent Movement as a voluntary initiative to bring humanitarian agencies together to improve the quality and accountability of humanitarian assistance.⁵⁵⁴ This project drafted a *Humanitarian Charter* and established a set of minimum standards for humanitarian responses. The basis for the work of the Sphere project is an acknowledgement that “all people affected by disaster or conflict have a right to receive protection and assistance to ensure the basic conditions for life with dignity” and an emphasis on three core rights: the right to life with dignity, the right to receive humanitarian assistance and the right to protection and security.⁵⁵⁵ Organizations that adopt the *Humanitarian Charter* also commit themselves to making their responses accountable through transparency, monitoring and collaboration with affected populations.⁵⁵⁶ The Core Standards set out by the Sphere Project define the minimal level of response that humanitarian agencies must meet and involve a strong accountability component by focusing on the need for representative participation, feedback mechanisms, information sharing and complaints mechanisms.⁵⁵⁷

Another important accountability initiative is the Humanitarian Accountability Partnership (HAP) which evolved out of the Humanitarian Ombudsman Project hosted by the British Red Cross.⁵⁵⁸ HAP is the humanitarian sector’s first international self-regulatory body. Like the SPHERE Project, it is a voluntary, multi-agency initiative that has as its objective improving the accountability of humanitarian actors, specifically with regards to their

⁵⁵⁴ The Sphere Project, *The Sphere Project in Brief*, online: www.sphereproject.org/about/.

⁵⁵⁵ *The Sphere Project: Humanitarian Charter and Minimum Standards in Humanitarian Response*, 2011 ed (Bourton on Dunsmore, Rugby, UK: The Sphere Project, 2011) at 20-21, online: www.ifrc.org/docs/idrl/I1027EN.pdf [*Humanitarian Charter*].

⁵⁵⁶ *Ibid* at 24.

⁵⁵⁷ “The Core Standards” in *Humanitarian Charter*, *supra* note 555 at 57.

⁵⁵⁸ Humanitarian Accountability Partnership, online: www.hapinternational.org/default.aspx [HAP website].

beneficiaries.⁵⁵⁹ To this end, HAP has developed the HAP Standard in Accountability and Quality Management.⁵⁶⁰ The HAP Standard is a tool that aims to help organizations design, implement and improve accountable programming. The Standard sets out a series of commitments, basic principles and requirements, as well as benchmarks that must be achieved in order to obtain HAP certification which include such elements as establishing an appropriate procedure for handling complaints from beneficiaries and ensuring that beneficiaries have timely access to relevant information about the organization and its activities. In addition to the Standard, HAP offers a variety of services including training on accountability and quality management, on complaints and response systems, and on designing an accountability framework. HAP also has a process of certification for humanitarian actors and will accept and investigate complaints against HAP member organizations who fail to comply with the HAP Standard. Finally, HAP has developed a Roving Team that can be deployed in humanitarian crises to help provide accountability by working with organizations to identify accountability needs and develop appropriate mechanisms and to facilitate and support collaboration between organizations and consultations with affected communities.⁵⁶¹ For example, in 2010 the Roving Team was deployed to Dadaab refugee camp at the request of the UNHCR and six HAP members. During that deployment, the Roving Team assisted with a multi-day Inter-agency Mapping and Action Planning Exercise which resulted in the formation of the Dadaab Accountability and Quality Working Group which allows agencies to discuss accountability and plan joint activities.⁵⁶²

In addition to these international initiatives, aid providers in refugee camps employ a variety of different mechanisms to achieve some degree of accountability. In Dadaab, aid agencies are supporting the creation of a community-run radio station that will help give refugees access to relevant information. A small newspaper called *The Refugee* has also appeared in the

⁵⁵⁹ *Ibid* at “About us”.

⁵⁶⁰ Humanitarian Accountability Partnership, *The 2010 HAP Standard in Accountability and Quality Management* (Geneva: HAP International, 2010), online: www.hapinternational.org/pool/files/2010-hap-standard-in-accountability.pdf.

⁵⁶¹ HAP website, *supra* note 558.

⁵⁶² Maria Kiani, “Collective Efforts to Improve Humanitarian Accountability and Quality: the HAP Deployment to Dadaab” (2011) Humanitarian Exchange Magazine 50, online: www.odihpn.org/humanitarian-exchange-magazine/issue-50/collective-efforts-to-improve-humanitarian-accountability-and-quality-the-hap-deployment-to-dadaab.

camp.⁵⁶³ Community radio is also used in Thailand to allow aid providers to issue announcements and provide information to the camp residents. Information boards, newsletters and comment boxes can be found in most refugee camps, though these initiatives can be problematic in situations where there are a very low literacy rates. In those cases, information is sometimes provided through the use of illustrated posters.⁵⁶⁴ Codes of conduct can also contribute to increased accountability. In Kakuma refugee camp in Kenya, at least 26 agencies have signed on to the Code of Conduct for Humanitarian Workers⁵⁶⁵ while in Thailand, the Karen Refugee Committee has adopted a code of conduct and set up a Code of Conduct Committee to oversee its enforcement.⁵⁶⁶ Increasing the involvement of refugees in camp management committees and sub-committees and programme planning, and specifically the representation of women and minority groups can also be used to enhance the accountability and transparency of the refugee leadership and of the aid agencies managing the camps.⁵⁶⁷

Nevertheless, despite the apparent proliferation of accountability mechanisms, both anecdotal evidence and some evaluation reports suggest that expectations with regards to accountability are not being met and there is a fairly high level of dissatisfaction with the performance of many aid agencies.⁵⁶⁸ The specific reasons for these failures vary from case to case. For example, communications strategies often rely heavily on refugee leaders to transmit information from aid agencies to the refugee community; by putting refugee leaders in the position of gatekeepers, aid providers are endowing them with great power and the result may be an uneven dissemination of information. Complaints mechanisms have their own set of

⁵⁶³ “Are They Listening? Aid and Humanitarian Accountability”, *IRIN, In-Depth*, (July 2012) at 8, online: www.irinnews.org/in-depth/95731/97/are-they-listening-aid-and-humanitarian-accountability [“Are They Listening”].

⁵⁶⁴ See e.g. Martin Fletcher, “A window into East African refugees’ pain”, (21 October 2009) *NBC News World Blog*, online: WardheerNews.com wardheernews.com/News_09/October/22_a_window_into_E_African_refugee_pain.html.

⁵⁶⁵ “Are They Listening”, *supra* note 563 at 12.

⁵⁶⁶ Interview of Manager of the International Rescue Committee’s Legal Assistance Center Project in Tak Province (May 2011) Mae Sot, Thailand [on file with author].

⁵⁶⁷ See examples from Sierra Leone in UNHCR, *Operational Protection*, *supra* note 465 at E9 and E11.

⁵⁶⁸ See e.g. Internews, “Report: Serious Communications Gaps at Camps for Somali Refugees are Putting Lives at Risk”, (September 15, 2011), online: www.internews.org/our-stories/program-news/report-serious-communications-gaps-camps-somali-refugees-are-putting-lives-; “Are They Listening”, *supra* note 563 at 17; Andy Featherstone, “Improving Impact: Do Accountability Mechanisms Deliver Results?”, (June 2013), a joint Christian Aid, Save the Children, Humanitarian Accountability Partnership report, at 9, online: www.christianaid.org.uk/images/accountability-impact-report-2013.pdf; Allen Sophia Asiimwe, “NRC Sri Lanka: Promoting the Rights of Displaced Persons Through Legal Aid”, (March 2008), Norwegian Refugee Council Evaluation Report, at 11, online: www.norad.no/no/resultater/publikasjoner/gjennomganger-fra-organisasjoner/publikasjon?key=134689.

problems. A longstanding criticism of humanitarian agencies is that they tend to deal with complaints about their staff members internally even in situations where complaints should rightly be submitted to the criminal justice system of the host state.⁵⁶⁹ Not only is this kind of preferential treatment potentially a violation of the law, it reinforces the perception of the impunity of aid workers and can act as a disincentive for others to bring forward complaints.⁵⁷⁰ Accountability mechanisms often require individuals to leave a comment in a box or to make a complaint to a single individual and thus the effectiveness of the procedure depends upon each individual taking the complaint seriously and passing it up the chain of command. Beneficiaries may never know whether their comment or complaint was acted on or what the outcome was, especially if complaints are submitted anonymously. If complaints are not anonymous, then concerns regarding security and confidentiality arise.⁵⁷¹ Similarly, access to any of these mechanisms can be impeded by many of the same factors involved with access to justice: community pressure, cultural considerations, insecure status, physical insecurity and fear of reprisal, fear of reprisal against the community as a whole, lack of awareness and knowledge with regards to violations and available mechanisms of redress, etc.

In the end, the issue of accountability in protracted refugee situations is a complicated one. While little progress has been made with regards to host states, humanitarian actors have recognized the importance of accountability in service delivery and have implemented a variety of initiatives. However, the success of these strategies is somewhat more questionable. Importantly, accountability is largely voluntary and there is an overwhelming absence of legal frameworks or standards capable of holding humanitarian actors to account or ensuring that redress is available.⁵⁷² Thus accountability sometimes seems to be viewed as a side-benefit that is charitably being granted to refugees as opposed to a right to which they are entitled.

⁵⁶⁹ See Jan Rachel Reyes, “Deliver Us from Our Protectors: Accountability for Violations Committed by Humanitarian Aid Staff Against Refugee Women and Children” (2009) 44 USFL Rev 211.

⁵⁷⁰ For a discussion of human rights abuses committed by humanitarian actors and how they are addressed see e.g. Harrell-Bond, “Humanitarian Work”, *supra* note 3; see also *ibid*.

⁵⁷¹ See e.g. Kirsti Lattu, *To Complain or Not to Complain: Still the Question* (Humanitarian Accountability Partnership: 2008) at 49, online: [www.hapinternational.org/pool/files/bbc-report-lowres\(2\).pdf](http://www.hapinternational.org/pool/files/bbc-report-lowres(2).pdf).

⁵⁷² See generally Humanitarian Accountability Partnership, *2013 Humanitarian Accountability Report* (2013), online: www.hapinternational.org/pool/files/2013-har.pdf; see also Michael Jennings, “International NGOs Must Address Their Accountability Deficit” (9 February 2012) *Poverty Matters* (blog), *The Guardian*, online: www.guardian.co.uk/global-development/poverty-matters/2012/feb/09/ngos-accountability-deficit-legal-framework.

3. The Importance of Holding Refugee Authorities to Account

So far this section has addressed the accountability of external authorities in protracted refugee situations but it is also very important that there be mechanisms to hold powerful actors within the refugee community accountable. Depending upon the organization of a particular refugee camp, refugee leaders (community, religious, cultural) may have substantial power to affect the well-being and rights of other refugees both because of their authority within the refugee community and because of their role as intermediaries between the refugee community and officials from the host state and aid providers. One example of this power is the role of community elders in refugee dispute resolution systems and in enforcing cultural norms. Refugee leaders may also have a role in the registration of new arrivals, the distribution of food and material aid, the maintenance of security within the camp, the enforcement of camp by-laws and the negotiation of terms of return or integration.

As discussed earlier in this chapter, accountability is necessary to good governance and this is true whether we are discussing the governance of a state or the governance of a refugee community. Ensuring that the refugee community can hold its leaders accountable has the potential to increase the quality of governance and the legitimacy of the governing body within the refugee camp.⁵⁷³ A leader who knows that he may be held accountable for his decisions may take more care in making them and be less likely to exercise his power for his own gain. Conversely, if refugees do not have the ability to hold their own leaders accountable for their actions, how can they be expected to participate effectively in holding aid providers or host state authorities to account?

Box 4. Independence and Accountability

The intersection between justice mechanisms, camp governance and accountability was brought into particular relief during an interview by the author with an aid worker in Mae Sot Thailand. During that interview, it was noted that the situation in Umpiem camp was especially grim compared to that of the other refugee camps. Substantial abuses of power by the camp leadership, the use of arbitrary detention and arbitrariness within the camp system in general were all reported. Unlike other camps, there was a complete lack of accountability and checks and balances on the exercise of power. These shortcomings were largely the result of the position of Chair of the Camp Committee and the position of camp judge being held by the same individual. Without even a semblance of independence within the refugee dispute resolution system, it was impossible for camp residents to hold those in power to account.

Interview, Manager of Legal Assistance Center Project (May 2011), Mae Sot Thailand [on file with author].

⁵⁷³ Malena, Forster & Singh, *supra* note 539 at 5; UNDP, *Programming for Justice*, *supra* note 220 at 27.

C. Legal Empowerment as a Means of Enhancing Accountability

As in the case of the administration of justice, efforts to improve accountability can adopt two approaches: strategies to enhance the capacity of powerful actors to provide accountability and strategies to enhance the capacity of individuals to demand or extract accountability. Traditionally, accountability efforts have focused on enhancing the supply-side of governance, the ability of actors to provide accountability. These initiatives emphasized top-down accountability mechanisms, often internal to the organization or institution in question such as political checks and balances, audits, internal regulations and reporting requirements. While these types of mechanisms have the potential to provide an important level of accountability, particularly in situations where there is already a culture of accountability, they have met with limited success in many countries. With the rise of human rights-based approaches however, attention has increasingly shifted to demand-side accountability mechanisms that seek to strengthen the voice of the public and to increase the capacity of individuals to demand greater accountability and responsiveness from government actors.⁵⁷⁴

It is this second branch of accountability that is of greatest importance to refugee communities. Given that refugees have little or no political power within the host state and are dependent upon the state and humanitarian actors, beneficiary-driven strategies such as judicial or quasi-judicial accountability mechanisms and social accountability mechanisms are especially significant. Recalling that legal empowerment seeks to increase the control that refugees have over their lives and their ability to use the law and legal mechanisms and services, broadly understood, to protect and advance their rights, perhaps the most important contributions that legal empowerment can make to accountability are by helping to define the legitimate claims of refugees and by facilitating the acquisition of knowledge and the development of skills necessary to demand these entitlements through legal and social accountability mechanisms.

1. Education, Information, Awareness: Without Them, No Accountability

As we have seen, legal empowerment includes a strong education and awareness-raising component through which individuals are made aware of their rights, their right to redress and the technical aspects of seeking redress. Just as these components are necessary for access to justice, so too are they necessary to accountability. Through legal awareness-raising, legal

⁵⁷⁴ Malena, Forster & Singh, *supra* note 539 at 1.

empowerment helps refugees to identify their legitimate claims, the standards which power-holders must meet. To hold the state accountable for the provision of adequate food and medical care, the refugee community must first be aware that they are entitled to those rights. It may also seem to go without saying but for accountability mechanisms to function within refugee camps, refugees must actually know what those mechanisms are and how to use them. Workshops and information sessions like those described in the last section that inform refugees about their options for the resolution of disputes can (and often do) provide information about accountability mechanisms as well. For instance, in one anecdote recounted by an LAC programme officer in the Burmese refugee camps in Thailand, a young man got drunk and was arrested by a camp security officer who then beat him. Having attended legal information sessions run by the IRC's Legal Assistance Center, the man did not contest his arrest but went to the LAC office the following day to file a complaint against the security officer.⁵⁷⁵ Without having received some training on his rights and the recourses available, it doubtful that this individual would ever have filed a complaint in which case the security officer would never be held accountable for his actions.

2. Empowerment as a Path to Accountability in Refugee Situations

Again, similar to what was discussed in the section on the administration of justice, knowing of the existence of accountability mechanisms does not necessarily mean that refugees will make use of them or be *able* to make use of them. As Anita Ho and Carol Pavlish found in their study of gender-based violence in a Rwandan refugee camp, “accountability cannot be ensured when people lack the power to make their own choices and demand their rights.”⁵⁷⁶ In other words, accountability and empowerment, or the development of human capabilities, must go hand in hand. The full range of human capabilities cannot be assured without some degree of accountability, but it is equally impossible for accountability to exist without a minimal level of empowerment. Ho and Pavlish go on to assert that the promotion of accountability requires an empowering environment that includes formal processes through which power-holders can be held accountable, as well as mechanisms that enable individuals to claim their rights.⁵⁷⁷ It is this

⁵⁷⁵ Interview of Senior Training Manager International Rescue Committee Legal Assistance Center (May 2011) Mae Sot, Thailand.

⁵⁷⁶ Ho & Pavlish, *supra* note 443 at 89.

⁵⁷⁷ *Ibid* at 88.

enabling environment, this particular opportunity structure, that legal empowerment seeks to create. The process of legal empowerment also helps to foster a sense of self and a sense of entitlement (both legal and moral), and strengthens the capability and moral authority of refugees to resist the improper exercise of power and to challenge the status quo. In other words legal empowerment helps to foster the agency of refugees and their ability to exercise it effectively. Accountability will rarely be given, particularly to a vulnerable group such as refugees. Instead, for accountability to occur, it must be demanded and legal empowerment approaches help to ensure that refugees are able to make these claims.

3. Holding Powerful Actors Accountable through Direct Legal Action

The first and most direct contribution that legal empowerment can make to accountability is by facilitating the use of legal and quasi-legal accountability mechanisms including recourse to adjudication. Given the difficulties that refugees face in making their voices heard and their absence in the political arena of the host state, the justice system may be one of the few formal accountability mechanisms available to them. In this way, the role of legal empowerment in securing accountability is inseparable from its role in the administration of justice. By improving the accessibility and quality of the administration of justice, legal empowerment strategies are also increasing the likelihood that power-holders will be held to account.

To start with, accountability can be achieved through the legal system by means of direct litigation. Many forms of misuse of power are illegal if not outright criminal. When a member of the host state's security forces assaults a refugee or an aid worker withholds assistance while demanding sexual favours, it is not merely a question of an improper use of discretion but of the commission of a crime. Similarly, policies and procedures that are discriminatory will likely run afoul of the state's human rights and equality legislation. Corruption, extortion, embezzlement, etc. by aid workers, refugee authorities or host state authorities are all legitimate issues for prosecution. In these cases legal empowerment contributes to accountability by facilitating access to justice and by enhancing the administration of justice as was discussed in the previous section.

In many ways overt abuses such as those mentioned above are the easy cases. It is far more difficult to ensure accountability for policy decisions made by the state, UNHCR or other aid providers that result in the failure to respect, protect and fulfill the rights of refugees.

Nevertheless, legal empowerment initiatives can provide assistance in these situations as well by facilitating activities such as law and policy reform advocacy and strategic litigation. Most of the organizations mentioned in the discussion of the administration of justice engage in some form of advocacy pushing for the reform of laws and policies that affect the lives of refugees.⁵⁷⁸ Some organizations also take a more litigious approach. For example, the Refugee Law Project intervenes directly in certain individual cases to ensure that refugee rights are respected and to assist in building a body of refugee law jurisprudence within the country.⁵⁷⁹ As another example, Asylum Access has engaged directly in strategic litigation. In 2011-2012, Asylum Access brought a challenge to a new law in Ecuador which required refugees to seek permission to access the asylum process. This organization is also seeking to file a complaint on this matter before the Constitutional Court and has brought several cases concerning sexual and gender-based violence against refugees before the Inter-American Commission on Human Rights.⁵⁸⁰

As the work of Asylum Access shows, recourse to direct legal action need not be confined to the formal legal courts of the state. The legal mechanisms used by legal empowerment strategies include administrative tribunals such as national human rights commissions, regional courts and tribunals such as the European Court of Human Rights or the African Commission on Human and People's Rights, and international forums, for example the UN Human Rights Council Complaints Procedure and where applicable, the complaints mechanisms of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on Elimination of Discrimination against Women, etc.

Achieving accountability through these mechanisms will not be easy. Given their proximity to the refugee situation and their potential influence over the government of the host state, national human rights institutions hold the most promise, while international mechanisms, with their complicated admissibility rules and procedures, long delays and enforcement difficulties, are likely to be substantially less useful. The most problematic aspect of the types of direct legal action employed today, whether before a court or an international body, is the

⁵⁷⁸ See Table 3. Legal Empowerment Initiatives at 165, above.

⁵⁷⁹ Refugee Law Project, *Access to Justice*, *supra* note 530.

⁵⁸⁰ Asylum Access, *Asylum Access: Empowering Refugee Communities Worldwide*, Asylum Access Annual Report Fiscal Year 2011-2012, at 9, online: asylumaccess.org/AsylumAccess/wp-content/uploads/2012/10/AA_AnnualReport_11-12_FINAL_resized.pdf [Asylum Access, *Empowering Communities*].

absence of refugee voices and even when refugees are party to the litigation, the dependence on external actors for assistance and funding.⁵⁸¹ Several of the organizations referred to in the discussion of access to justice will assist refugees in bringing claims before the host state courts but what happens if a refugee wishes to bring a claim against the aid provider itself? Similarly, it is possible that an international aid provider that is present in the country at the pleasure of the host state may end up in a difficult situation if it funds litigation against the state itself. In a comparable case, in 2009 the Sudanese government expelled 13 international NGOs and closed three Sudanese relief organizations after the International Criminal Court issued an arrest warrant for President Omar el-Bashir on war crimes charges. Although in this case these organizations were not necessarily involved in the legal action, this example demonstrates the precarious situation that humanitarian actors can find themselves in.⁵⁸² Moreover, internationally we are seeing increasing efforts on the part of governments to limit the space for civil society. One effective method of doing this is to enact legislation that restricts the activities of international organizations and that limits foreign funding of domestic civil society organizations. Ethiopia, for instance, enacted the 2009 CSO Proclamation which prohibits organizations working on issues including democratic rights, rule of law and the promotion of the rights of children and the disabled from receiving more than 10 percent of their budget from foreign sources, thereby effectively eliminating virtually all NGO activity on these issues.⁵⁸³ One of the objectives of legal empowerment then must be to increase the capacity of refugees and refugee communities to use the existing legal accountability mechanisms independently with minimal assistance from powerful external actors perhaps through the training of refugee paralegals and fostering links between the refugee community and the host state legal community. In that way, refugees become better able to speak for themselves, to gain greater control over their own demands for accountability, and to hold powerful actors accountable through the justice system. However, while the justice system is one important means to ensure accountability, it is not the only one.

⁵⁸¹ See e.g. Farmer, *supra* note 8 at 71.

⁵⁸² “Sudan: NGO expulsion to hit Darfur’s displaced” *IRIN* (9 March 2009), online: www.irinnews.org/report/83370/sudan-ngo-expulsion-to-hit-darfur-s-displaced. In another example, a 2014 report by the NGO Monitor, accuses the Norwegian Refugee Council of waging “lawfare” against Israel through its Information, Counselling and Legal Assistance (ICLA) project and calls on the Israeli government to investigate the NGO and on other governments to freeze their funding of the NRC. NGO Monitor, “Exploiting Justice: How the UK, EU, & Norway Fund NGO Lawfare vs. Israel” (February 2014), online: [ngo-monitor.org/data/images/File/NGO_Monitor-Report_Norwegian_Refugee_Council%20\(1\).pdf](http://ngo-monitor.org/data/images/File/NGO_Monitor-Report_Norwegian_Refugee_Council%20(1).pdf).

⁵⁸³ Tor Hodenfield, “The Hypocrisy of Foreign Funding Laws in Ethiopia”, *Open Global Rights* (25 April 2014), online: www.opendemocracy.net/openglobalrights/tor-hodenfield/hypocrisy-of-foreign-funding-laws-in-ethiopia.

4. Fostering Social Accountability through Legal Empowerment

Legal advocacy and strategic litigation are two specific types of accountability mechanisms that can be subsumed under the broader category of social accountability. Social accountability has been defined as an approach towards enhancing accountability that relies on civic engagement. In other words, members of the public and civil society organizations participate directly in extracting accountability from powerful actors.⁵⁸⁴ In addition to advocacy and strategic litigation, social accountability initiatives employ a broad range of mechanisms including the media, protests and demonstrations, public evaluations, social audits, public monitoring, and community organizing and the building of coalitions. While social accountability mechanisms can be initiated and supported by power-holders as well as by the public, a key feature is that they are generally demand-driven and operate from the bottom up.⁵⁸⁵ Social accountability necessarily involves processes that empower individuals to become involved in political and social action, and offer them the opportunity to do so, which is the mark of true accountability according to Yamin.⁵⁸⁶

In this context, legal empowerment initiatives can enhance the capacity of refugees to participate in social accountability mechanisms and effectively engage with power holders by increasing both their agency and their capacity to exercise that agency. Claims for accountability framed using the language of legal rights and entitlements have potentially far greater weight than claims that are justified by relying on moral norms or personal preferences. Additionally, legal empowerment strategies such as community education, community organizing, training community members as paralegals and training in mediation and negotiation all develop skills and knowledge that can be used equally in social accountability initiatives.

Social accountability mechanisms rely on a range of formal and informal rewards and sanctions, for instance public pressure, to support their claims. When necessary, for example if ‘softer’ methods are unsuccessful, groups can appeal to formal means of sanction or enforcement such as filing a court case, appealing to a public ombudsman or going before a public

⁵⁸⁴ Malena, Forster & Singh, *supra* note 539 at 3; Maru, “Allies Unknown”, *supra* note 477 at 84. Definitions of social accountability generally refer to action by citizens and/or civil society organizations, however social accountability is equally relevant to refugees and other non-citizens given that, as demonstrated in earlier chapters, any individual under the jurisdiction of the State is equally entitled to the respect, protection and fulfillment of their fundamental rights and accountability mechanisms seek to ensure that power is exercised in a way that is consistent with those entitlements.

⁵⁸⁵ Malena, Forster & Singh, *supra* note 539 at 3.

⁵⁸⁶ Yamin, *supra* note 538 at 2.

commission of inquiry, to achieve accountability.⁵⁸⁷ Legal empowerment makes the threat of potential recourse to these mechanisms by refugees much more real and can thus strengthen and increase the effectiveness of social accountability mechanisms.

Box 5. Someone is Watching

Anecdotal evidence collected during interviews of staff and camp-based assistants working with the Legal Assistance Center in Mae La refugee camp in Thailand suggests that there has been a noticeable increase in the quality and consistency of decision-making in the refugee dispute resolution system with hearings being conducted in a manner that was both consistent with camp policies and with the legal training that decision-makers had received. This change was attributed to the monitoring of the informal justice system and the detention facilities by IRC and by trained members of the refugee community.

Additionally, several interviewees noted that the presence of the LAC project also had an impact on the conduct of the Thai authorities as they were aware of being watched.

(Note that these reports of progress must be treated with some caution as it is unclear to what extent the behaviour and practices of presiding officials varies depending upon the presence of a representative from LAC.)

Interviews conducted with staff and camp-based assistants of the International Rescue Committee Legal Assistance Center Project in Tak Province (May 2011) Mae Sot, Thailand [on file with author].

In turn, by strengthening the capability of refugees to interact more effectively with authorities through awareness-raising, advocacy and organizing, and to demand accountability, legal empowerment may also stimulate change among duty-bearers, not least because there is then the risk of being held accountable for their actions either through formal processes such as the courts or public inquiries or through more informal mechanisms such as ‘naming and shaming.’ Decision-makers and other power-holders are more likely to follow the rules if there is someone who knows the rules who is watching.

D. Conclusion

Ultimately, in addition to increasing the capability of refugees to demand accountability, legal empowerment has the potential to change the paradigm in which refugees and aid providers, including host state authorities, interact; it gives refugees access to the language of rights, entitlements and duties and can stimulate a process of social change that will necessarily impact the relationships with aid providers and lead to greater accountability.

⁵⁸⁷ See Malena, Forster & Singh, *supra* note 539 at 4.

IV. Fostering Durable Solutions Through Legal Empowerment

Of all the arguments in favour of adopting a human rights-based capabilities approach to protracted refugee situations that centers on the legal empowerment of refugees, the one which is most likely to sway host states is that legal empowerment has the potential to play an important role in facilitating and preparing refugees for durable solutions. While many of the strategies discussed so far go some way to improving the situation of refugees in exile, the ultimate goal of any approach to protracted refugee situations is to achieve one of the three durable solutions, repatriation, local integration or resettlement, as it is only through those solutions that the human rights of refugees can be fully realized and their dignity respected. In this section, we will examine the role that legal empowerment strategies can play in achieving each of these solutions, acknowledging that their greatest contributions are in situations involving transitional justice and integration or re-integration.

A. Legal Empowerment in Transitional Justice: Facilitating Durable Solutions⁵⁸⁸

Transitional justice has been defined by the UN Secretary General as comprising “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁵⁸⁹ In a slightly modified and perhaps more practical definition, Pablo de Greiff suggests instead that transitional justice refers to the measures implemented “to redress the legacies of massive human rights abuses, where ‘redressing the legacies’ means, primarily, giving force to human rights norms that were systematically violated.”⁵⁹⁰ In both cases, transitional justice initiatives are understood as involving a range of judicial and non-judicial mechanisms including truth commissions, other truth-seeking processes, restitution programs, reparations programs and criminal prosecutions. A broad understanding of transitional justice also encompasses state-building and institutional reform strategies aimed at resolving governance issues. These can include the drafting of a new constitution, legislative reform,

⁵⁸⁸ Portions of this section are adapted from Anna Purkey, “Transitioning to Justice: Legal Empowerment in Protracted Refugee Situations” (Paper delivered at the XV International Association for the Study of Forced Migration Conference, Bogota, Colombia, 17 July 2014) [unpublished].

⁵⁸⁹ Secretary General, *Transitional Justice Report*, *supra* note 453 at 4.

⁵⁹⁰ Pablo de Greiff, “Theorizing Transitional Justice” in Williams, Nagy & Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 31 at 40 [De Greiff, “Theorizing”].

security and justice sector reform, and the development national reconstruction and development plans.

At a conceptual level, transitional justice can be seen as having three overarching, and to some extent overlapping, objectives: providing recognition to victims, fostering civic trust and contributing to reconciliation.⁵⁹¹ To start with, transitional justice measures seek to provide recognition to victims which involves both acknowledging wrongdoing and the harm that was done to them, as well as acknowledging the inherent dignity of the individuals and their standing not merely as victims but as rights-bearers and citizens.⁵⁹² Truth-telling initiatives play an important role in achieving this objective by providing victims with the opportunity to exercise their agency, to give voice to their suffering, and to speak and be heard in a formal setting. These initiatives, along with other forms of redress, can help to reaffirm the human and civil dignity of victims.⁵⁹³ For instance, restitution and reparations programs can provide at least a symbolic acknowledgement that the individual possesses rights that were violated and is thus entitled to redress.

In “Theorizing Transitional Justice”, Pablo de Greiff asserts that “trust develops out of a mutual sense of commitment to shared norms and values.”⁵⁹⁴ The systematic violation of the human rights of individuals by state actors or, alternatively, the failure of the state to protect its citizens from such violations, is perhaps the ultimate breach of civic trust. Neither peace, nor reconciliation is possible until some degree of trust has been re-established. Transitional justice mechanisms can help to foster this trust by reaffirming the importance of the principles and norms that were violated. For example, the criminal prosecution of an individual accused of widespread rape during conflict before a transparent and fair tribunal not only acknowledges the commission of a crime and the resulting harm but also demonstrates a commitment to accountability and the rule of law more generally. Similarly, the fact of implementing a reparations program is a concrete indicator of the extent to which the state now takes the violations of rights seriously.⁵⁹⁵ Civic trust is also fostered when the state takes explicit steps to

⁵⁹¹ See generally Secretary General, *Transitional Justice Report*, *supra* note 453 at 4; Pablo de Greiff, “Justice and Reparations,” in Jon Miller & Rahul Kumar eds, *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007) 153 at 154-167.

⁵⁹² De Greiff, “Theorizing”, *supra* note 590 at 42.

⁵⁹³ Raquel Aldana, “A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities” (2006) 5:1 *Journal of Human Rights* 107 at 108.

⁵⁹⁴ De Greiff, “Theorizing”, *supra* note 590 at 45

⁵⁹⁵ *Ibid* at 43.

acknowledge and to address the concerns of victims, for example the fear of retaliation or a return to violence. By strengthening the rule of law and democracy by providing forums for free expression, reforming state institutions and implementing measures to address division and marginalization within society (for example through property restoration and measures to overcome economic insecurity), transitional justice mechanisms seek to help re-establish the citizen-state relationship.

Lastly, transitional justice initiatives seek to promote reconciliation and social cohesion. Reconciliation is not a concept that is easily defined but at very least it appears to involve repairing relationships and social links and building trust between citizens and between groups of citizens. Reconciliation does not mean forgetting the past and it does not necessarily mean that divisions within society will be entirely eliminated. Instead reconciliation involves achieving a state where citizens are able to live together according to certain basic shared principles and values, confident that the governing institutions of the state also adhere to those norms.⁵⁹⁶ In order to identify and construct these shared norms, it is also necessary that transitional justice mechanisms confront the dominant narratives of the past – an important feature of many truth and reconciliation commissions.⁵⁹⁷ Transitional justice measures will not achieve reconciliation on their own, but reconciliation can emerge out of the process of transition which includes these mechanisms.

1. Hand in Hand: Transitional Justice and the Resolution of Displacement

Historically, refugees and displaced persons generally have had little involvement either in the peace negotiations that preceded transitional justice initiatives or in those initiatives themselves. Similarly, transitional justice has not traditionally engaged in depth with the particular concerns of refugees.⁵⁹⁸ Indeed, the return of displaced populations may long have been recognized as evidence of a successful return to peace, but that has not meant that displaced

⁵⁹⁶ See *ibid* at 45.

⁵⁹⁷ Huma Haider, “Transnational Transitional Justice and Reconciliation: The Participation of Conflict-generated Diasporas in Addressing the Legacies of Mass Violence” (2014) *Journal of Refugee Studies* [Advance Release] at 4.

⁵⁹⁸ See e.g. Bryce Campbell, “Addressing Concerns about Transitional Justice in Displacement Contexts: A Humanitarian Perspective” in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 65 at 67; Susan Harris Rimmer, “Reconceiving Refugees and Internally Displaced Persons as Transitional Justice Actors” (2010) UNHCR New Issues in Refugee Research, Research Paper No. 187, online: www.unhcr.org/4bbb2a589.pdf; Brookings-Bern Project on Internal Displacement, *Transitional Justice and Displacement: Challenges and Recommendations* (June 2012), online: www.refworld.org/publisher.BROOKINGS...506158102.0.html [Brooking-Bern, *Transitional Justice*].

persons have participated in the transitional process in any meaningful way. Evidence of the failure to fully involve refugee communities can be seen in the use of tripartite agreements concluded between UNHCR, the host state and the state of origin, but not the refugee community, to set the framework for refugee protection and voluntary repatriation.⁵⁹⁹

More recently, however, there is a growing acknowledgement of the critical stake that displaced populations have in transitional justice and of the importance of their participation in transitional justice processes.⁶⁰⁰ In the 2004 report by the UN Secretary General on “Rule of Law and Transitional Justice”, for example, it is specifically noted that a comprehensive transitional justice strategy “should also pay special attention to abuses committed against groups most affected by conflict, such as [...] displaced persons and refugees, and must establish particular measures for their protection and redress in judicial and reconciliation processes.”⁶⁰¹ The Report also emphasizes the need to recognize and respect the rights of those most affected by conflict, and to “ensure that proceedings for the redress of grievances include specific measures for their participation and protection.”⁶⁰²

This shift represents an acknowledgement that the resolution of conflict and the resolution of situations of displacement are inseparable.⁶⁰³ As mentioned above, the return of displaced populations has long been seen as a signal that the conflict has ended and yet a conflict cannot truly be considered to be concluded until the issues of displacement are resolved. This greater focus on displacement in transitional justice processes coincides with an increased awareness of the links between human rights violations and displacement.⁶⁰⁴ Displacement is not merely a side-effect of conflict, a result of massive human rights abuses; it is itself a serious violation of human rights.⁶⁰⁵ Consequently, resolution of a conflict or transition to peace requires

⁵⁹⁹ See e.g. *Tripartite Agreement DRC*, *supra* note 34; *Tripartite Agreement Rwanda*, *supra* note 34; UNHCR, *Tripartite Agreement on the Voluntary Repatriation of Congolese Refugees from Tanzania*, 21 August 1997, online: www.refworld.org/cgi-bin/telex/vtx/rwmain?page=search&docid=3ee84d5b4&skip=0&query=tripartite.

⁶⁰⁰ See e.g. Campbell, *supra* note 598; Harris Rimmer, *supra* note 598; Brookings-Bern, *Transitional Justice*, *supra* note 598.

⁶⁰¹ Secretary General, *Transitional Justice Report*, *supra* note 453 at 9.

⁶⁰² *Ibid* at 21.

⁶⁰³ See generally UN Secretary-General’s Policy Committee. *Durable Solutions: Follow up to the Secretary-General’s 2009 report on peacebuilding*, UNSG Dec. 2011/20, (New York: UN, 2011); Deschamp & Lohse, *supra* note 118 at 7-8.

⁶⁰⁴ Brookings-Bern, *Transitional Justice*, *supra* note 598 at 2.

⁶⁰⁵ *Ibid* at 5.

that the human rights abuses related to displacement be specifically addressed.⁶⁰⁶ Similarly, refugee return is not merely a side-effect of the end of conflict in the same way that reopening embassies or borders, or re-establishing trade relations are; refugees are agents that can affect the peace process and the resolution of conflict in both positive and negative ways. If the specific issues of concern to refugees are not resolved in the transitional process, if displaced populations do not feel that they have been heard and if they are not secure in the belief that their fundamental rights and freedom will be guaranteed, the success of peacebuilding, reconciliation and reintegration is unlikely and attempts at repatriation may result in new displacements and new conflicts.⁶⁰⁷ This consideration has been explicitly recognized in the *IASC Framework on Durable Solutions for Internally Displaced Persons*, the principles of which can be largely extended to the case of refugees as well. The Framework states the following:

Securing effective remedies for the violations of international human rights and humanitarian law which caused displacement, or which occurred during displacement, may have a major impact on prospects for durable solutions for IDPs. Failure to secure effective remedies for such violations may cause risks of further displacement, impede reconciliation processes, create a prolonged sense of injustice or prejudice among IDPs, and thereby undermine the achievement of durable solutions. Thus, securing justice for IDPs is an essential component of long-term peace and stability.⁶⁰⁸

Unfortunately, acknowledging that the success of transitional justice strategies may depend upon the effective and meaningful participation of national stakeholders, including displaced persons and refugees, has not in fact resulted in much *actual* refugee participation in any comprehensive way.⁶⁰⁹ With few specific measures targeting displaced populations, the extent of refugee participation has largely depended upon the initiative and resources of the communities themselves. The main exception to this trend is the case of Liberia where the involvement of both refugee and diaspora communities was actively sought with hearings and testimony gathering taking place both in refugee camps in neighbouring countries and in

⁶⁰⁶ Roger Duthie, "Incorporating Transitional Justice into the Response to Displacement" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 10 at 13 [Duthie, "Incorporating Transitional Justice"].

⁶⁰⁷ Andrew Solomon, "Justice, Accountability, and the Protection of Displaced Persons" (Paper prepared for the Annual Course on Forced Migration, Mahanirban Calcutta Research Group, Kolkata, December 1, 2009) [unpublished] at 1; Megan Bradley, "Back to Basics: The Conditions of Just Refugee Return" (2008) 21:3 *Journal of Refugee Studies* 285 [Bradley, "Back to Basics"].

⁶⁰⁸ Brookings-Bern Project on Internal Displacement, *IASC Framework on Durable Solutions for IDPs* (Washington DC: The Brookings Institutions – University of Bern Project on Internal Displacement, 2010) at 43.

⁶⁰⁹ Secretary General, *Transitional Justice Report*, *supra* note 453 at 6, 7, 21.

countries of resettlement, and with refugees recognized as a distinct category of witness.⁶¹⁰ While the Liberian case represents the most comprehensive involvement of the refugee community, other transitional justice mechanisms have also made some efforts in this direction. The Timor-Leste Commission for Reception, Truth and Reconciliation, for instance, was novel in that in addition to truth-seeking and reconciliation, it had a unique “reception” function that focused on the reception of refugees from West Timor.⁶¹¹ Refugee views were also specifically sought by transitional justice mechanisms in Sierra Leone and Guatemala. Nevertheless, these examples remain exceptions with few transitional justice mechanisms taking any substantial steps to actively engage with refugee populations or to address the numerous obstacles that either prevent or discourage the participation of refugee communities. Thus despite its acknowledged importance, refugee involvement in transitional justice has generally remained *ad hoc* at best.

There are many reasons why refugee involvement in transitional justice mechanisms has been very limited. To begin with, the state of origin may either lack the political will to engage with refugees or may deliberately exclude them. For instance, in Brazil, participation in the truth commission was purposefully limited to individuals within the territory of the state, necessarily excluding refugees.⁶¹² This exclusion may also be prevalent in cases where there is a presumption that the population that has fled includes the perpetrators of abuses or the instigators of conflict.⁶¹³ Even if refugees are technically permitted to participate in transitional justice mechanisms, that participation may be impeded by the physical inaccessibility of the institutions (or alternatively of the refugee community) and by the lack of adequate national identity documents to confirm their eligibility and the documentation with which to substantiate potential

⁶¹⁰ Awa Dabo, “In the Presence of Absence: Truth-Telling and Displacement in Liberia” (2012) Paper prepared for ICTJ/Brookings Project on Transitional Justice and Displacement, at 10, online:

www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Liberia-CaseStudy-2012-English.pdf.

Interestingly, although the participation of individuals who had been externally displaced was encouraged, the complete absence of representation from the internally displaced community means that the concerns of the IDP population were left unaddressed by both the peace negotiations and transitional justice process. Moreover, this emphasis was not entirely motivated by the recognition of the particular needs of the displaced populations as victims but rather by an acknowledgement of the role that the diaspora played in perpetuating the conflict and in the hope of securing increased financial support for reparations and development programmes from the diaspora communities.

⁶¹¹ See Timor-Leste Commission for Reception, Truth and Reconciliation, online: www.cavr-timorleste.org/.

⁶¹² Megan Bradley, “Truth-Telling and Displacement: Patterns and Prospects” in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 189 at 204 [Bradley, “Truth-Telling”].

⁶¹³ See e.g. *ibid* at 204; Duthie, “Incorporating Transitional Justice”, *supra* note 606 at 25.

claims.⁶¹⁴ By definition, refugees are outside of their country of origin which can make their participation in transitional justice initiatives difficult, particularly if potential participants reside in refugee camps and are subject to restrictions on their mobility. In some instances, states have adopted strategies to specifically target members of the diaspora community either by holding hearings at embassies, using technology or by sending investigators to refugee camps to gather testimony. The availability of these options, however, is dependent upon the acquiescence of host states and the availability of adequate resources, including the relevant technology.⁶¹⁵

Problems associated with the impoverishment and social marginalization can also present obstacles to effective refugee participation. Refugees may not wish to participate in situations where drawing attention to themselves might jeopardize their status in the host state, or they may be too preoccupied with the immediate concerns of survival to devote the time and energy necessary to participating in transitional justice. Other impediments may include the fear of discrimination and cultural factors (different conceptions of justice, the role of women, etc.). Above all, refugees may be reluctant to trust authorities and unwilling to forego their anonymity in order to testify due to the fear of possible consequences to their security including threats, intimidation and reprisals.⁶¹⁶

Another major barrier to refugee participation is the lack of accurate information in the host state about the situation in the state of origin and specifically about transitional justice institutions. For example in the case of Guatemala, while the participation of many people was limited by fear of reprisals and the remote location of many communities, others were not even aware that a truth commission had been established.⁶¹⁷ If individuals within the country are unaware of these processes, the likelihood of refugees being familiar with them is doubtful. Finally, refugee participation is also impeded by the community's inability in many cases to properly mobilize in order to better represent their interests. Within refugee communities social mobilization is made more difficult by host state government repression, restrictions on the

⁶¹⁴ See e.g. Peter Van der Auweraert, "The Potential for Redress: Reparations and Large-Scale Displacement" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 139 at 161; Duthie, "Incorporating Transitional Justice", *supra* note 606 at 18; Campbell, *supra* note 598 at 67; Maria Suchkova, "The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation" (2011) Essex Transitional Justice Network, Reparations Unit Briefing Paper No 5 at 5; Bradley, "Truth-Telling", *supra* note 612 at 204; Brookings-Bern, *Transitional Justice*, *supra* note 598 at 6.

⁶¹⁵ Bradley, "Truth-Telling", *supra* note 612 at 204.

⁶¹⁶ See e.g. *ibid* at 205; Suchkova, *supra* note 614 at 6; Harris Rimmer, *supra* note 598 at 3.

⁶¹⁷ See e.g. Bradley, "Truth-Telling", *supra* note 612 at 202.

political activities of refugees, and by the lack of human and material resources and capacity.⁶¹⁸ With the most educated and best-resourced refugees often resettled to third countries, the remaining refugees may be lacking in leadership skills, be illiterate, be less politically engaged, etc.⁶¹⁹ Further complicating the situation is the fact that refugees may be spread out and be distrustful of other groups.⁶²⁰ Where refugees are able to organize themselves in exile, for example as in the case of Guatemalan refugees in Mexico who used their time outside of the country to organize themselves and to negotiate with the Guatemalan government, they are then better able to represent their interests and ensure that their voices are heard during the transition process.⁶²¹

2. The Promises and Pitfalls of Refugee Participation in Transitional Justice⁶²²

The importance of effective refugee participation in transitional justice stems from the fact that individuals have a right to be involved in the decision-making processes that affect their lives and most closely-held interests. Thus, even if transitional justice mechanisms claim to address the needs and concerns of displaced populations, they may still undermine the inherent dignity and violate the human rights of refugees so long as the refugees themselves are unable to or prevented from fully engaging in the transitional justice process. In addition to being a right in itself, refugee participation in transitional justice has intrinsic value insofar as it can help to create a sense of ownership over the relevant programmes and to support and promote the dignity of individual participants. Meaningful participation in transitional justice means being treated not just as a victim but as a rights-bearer, which can potentially have a healing effect regardless of the outcome of the process.⁶²³ As Bernadette Iyodu has noted in discussing the inclusion of refugee voices in the Kenyan transitional justice process, the psychological impact of feeling heard cannot be overestimated.⁶²⁴

⁶¹⁸ *Ibid* at 206; Duthie, “Incorporating Transitional Justice”, *supra* note 606 at 18.

⁶¹⁹ See Bradley, “Back to Basics”, *supra* note 607 at 287.

⁶²⁰ Campbell, *supra* note 598 at 68; Duthie, “Incorporating Transitional Justice”, *supra* note 606 at 18.

⁶²¹ Roger Duthie, “Contributing to Durable Solutions: Transitional Justice and the Integration and Reintegration of Displaced Persons” in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 37 at 49.

⁶²² A more complete discussion of the importance of adopting a participatory approach is explored in chapter 5 Participation in Protracted Refugee Situations at 216, below.

⁶²³ Suchkova, *supra* note 614 at 2.

⁶²⁴ Bernadette Iyodu, “Kenyan Refugees Included in Transitional Justice Processes” (2011) 38 *Forced Migration Rev* 52 at 52.

Ensuring the engagement of refugee communities will also likely produce better outcomes that enhance the well-being of participants. Transitional justice mechanisms that emphasize victim engagement will be more effective and able to achieve better results (more comprehensive truth-telling and greater progress in reconciliation) as they will be more informed, more responsive to reality and are likely to be better supported by the community.⁶²⁵ In fact, the absence of participation may render some transitional justice mechanisms entirely ineffective: for instance if witnesses are unable or unwilling to participate in criminal prosecutions. Similarly, restitution and reparations programmes can only be successful if they adequately respond to the needs of victims and that in turn is only possible if those needs are accurately identified. With regards to refugees, without broad and meaningful participation, transitional justice mechanisms are unlikely to address the particular needs and experiences that result from displacement and that differ from the lived experiences of other victims. This failure may then undermine any efforts to promote reintegration and sustainable peace and reconciliation. Refugee participation may be of instrumental value to the home state as well. In addition to contributing to the increased success and effectiveness of transitional justice processes, broad participation may increase the popular (and international) legitimacy of the transitional justice process and, by extension the governance by the state.⁶²⁶

Additionally, refugee participation in transitional justice mechanisms has an important role to play in achieving reconciliation and reconstructing state identity.⁶²⁷ The testimony of refugee victims and the discussions, debates and interactions that take place between different groups in the context of transitional justice provide the opportunity for individuals to reflect critically on their own values and for the development of a new narrative that embodies shared values; in other words, for reconciliation and the development of civic trust. Participation in this dialogue then has the potential to influence the formation and development of the values and principles that will form the core of the new post-conflict society and the basis of the state's

⁶²⁵ See e.g. Lisa Magarrell, "Outreach to and Engagement of Victims on Reparations – Lessons Learned from Truth and Reconciliation Processes" (Paper delivered at the Conference: Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making, The Hague, 1 March 2007) [unpublished]; Alkire, *Valuing Freedoms*, *supra* note 180 at 132, 152.

⁶²⁶ But see David Taylor, "Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?" (2014) Discussion paper prepared for Impunity Watch, at 7, online: www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf; Patricia Lundy & Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up" (2008) 35:2 *JL & Soc'y* 265 at 275.

⁶²⁷ See Alkire, *Valuing Freedoms*, *supra* note 180 at 133.

policy priorities. As victims of violence, conflict and human rights abuses that have suffered the added indignity of displacement and who are contemplating the possibility of repatriation, refugees who have not achieved a durable solution have a particularly critical stake in the re-formation of the state.

Lastly, participation of refugee populations in transitional justice has a very important symbolic value. By specifically reaching out to refugee populations, the home state may be sending a message that these individuals are an important part of the state, not only as an obstacle that needs to be overcome in order to achieve peace, but as active participants in the creation of a new order. Ensuring refugee participation where the refugee population is primarily made up of individuals from groups that have been previously marginalized, excluded, victimized and subject to discrimination or other human rights violations, can be a powerful signal that future community relations and governance will be different, in short a reaffirmation of the “new” state.⁶²⁸

Currently, most refugee participation in transitional justice has been fairly superficial, limited to the receipt of information about the relevant processes and, occasionally, being permitted to submit their testimony. There have been a few examples of participation in implementation as well, for example refugees have on occasion been trained to help take the statements of fellow refugees in the context of a truth and reconciliation commission.⁶²⁹ Even in those few cases where transitional justice mechanisms have actively sought out the opinions of refugees, the extent to which those views have any impact on the outcome is unclear.

While almost any refugee participation is to be valued, the greatest benefit both for the refugees and for transitional justice itself will only be achieved with fuller and more meaningful participation. Insofar as it is possible, refugees need to be involved at all stages of the process, from the conception and design of the transitional justice strategies to their implementation and management.⁶³⁰ This involvement should be sustained as well; for instance a refugee that provides testimony should be kept informed of the progress of that case even after her role is

⁶²⁸ Van der Auweraert, *supra* note 614 at 157.

⁶²⁹ This has occurred both in Buduburam refugee settlement in the context of the Truth and Reconciliation Commission of Liberia and in Guinea in the context of the Sierra Leone Truth and Reconciliation Commission. See Laura A. Young & Rosalyn Park, “Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project” (2009) 3 *Intl J Transitional Justice* 341; *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (Accra: Graphic Packaging Ltd, 2004), online: www.sierraleonetrc.org/index.php/view-the-final-report.

⁶³⁰ Lundy & McGovern, *supra* note 626 at 266; Brookings-Bern, *Transitional Justice*, *supra* note 598 at 10.

completed. In addition to being witnesses and complainants, members of the refugee community should also be given formal roles as commissioners, investigators and decision-makers.⁶³¹

Perhaps of greatest importance is the idea that refugee participation must be meaningful, it must be “a process that carries weight.”⁶³² Meaningful participation is participation that has an identifiable impact whether it is acknowledgement in the report of a truth and reconciliation commission, the outcome of reparations programmes or the development of state policies.⁶³³

Nevertheless, even lesser forms of participation can still make important contributions.⁶³⁴ Only a fairly small percentage of refugees will ever be able to participate directly in transitional justice procedures (for example by providing testimony) and even fewer will be engaged at the highest (decision-making) level. On the other hand, lesser and more indirect forms of participation such as representation by victims groups, individual progress updates, and public information campaigns can reach a much greater number of people which may be essential to achieving social and collective goals of transitional justice including the prevention of future conflict and reconciliation.⁶³⁵ Even a relatively superficial degree of participation can still be important to the individuals involved. In 2004 the Afghan Independent Human Rights Commission undertook national consultations in order to develop a transitional justice strategy that included surveys and focus groups, including of refugee populations in Iran and Pakistan. One noted outcome of the process was the apparent sense of gratitude that those surveyed felt about being consulted at all.⁶³⁶

It is important to note, however, that refugee engagement in transitional justice is not without risk. There are three serious overarching concerns that must be taken into consideration in the design and implementation of refugee participation in transitional justice. The first concern is the risk that the participation of refugees will be instrumentalized by the state. In discussing the process of democratization that transitional justice mechanisms can help to foster, Pablo de Greiff remarks that “[i]n the absence of civil rights such as freedom of speech and even of privacy rights, which create space for the development of individual preferences, political

⁶³¹ Brookings-Bern, *Transitional Justice*, *supra* note 598 at 11.

⁶³² Magarrell, *supra* note 625.

⁶³³ *Ibid.*

⁶³⁴ See e.g. Taylor, *supra* note 626 at 27.

⁶³⁵ See Taylor, *supra* note 626.

⁶³⁶ Afghanistan Independent Human Rights Commission, *A Call for Justice: Conclusion of National Consultation on Transitional Justice in Afghanistan* (Kabul: Afghanistan Independent Human Rights Commission, 2005), online: www.refworld.org/pdfid/47fdfad50.pdf.

participation turns citizens into instruments of those who hold political power.”⁶³⁷ Similarly, if refugee participation is not accompanied by meaningful dialogue, by discussion and debate, by a process of community organizing and empowerment that enables refugees to take an active role in transitional justice, there is a serious risk that refugee participation will end up being no more than a box to be checked off by the state. In such a case, token participation could be used by the state not to achieve reconciliation, truth-seeking or reparations but to create a “veneer of legitimacy”⁶³⁸ for the transitional justice procedures as well as for its own governance and activities. Refugees, and their participation, then risk becoming mere instruments in the state’s consolidation of power.

The second major concern is the potential for co-option of the participatory discourse by powerful actors within the refugee community. Transitional justice is meant to give voice to the victims but not all victims will ever be able to speak. This raises concerns about representativeness and legitimacy. Who are the individuals speaking on behalf of the refugees? How were they chosen? Do they truly represent the views of the community? It is critical to resist the tendency to homogenize victim communities.⁶³⁹ Although all refugees may share certain commonalities, such as persecution and the loss of their homes, their lived experiences of those events may be very different. Participatory initiatives in transitional justice must be designed to reflect the divisions within the refugee community and the different interests associated with these. Without specific regard for these distinctions, participation has the potential to reproduce and entrench patterns of dominance within the refugee community, thereby implicitly legitimizing the existing hierarchies of power.⁶⁴⁰

Third and lastly, if undertaken improperly, there is a possibility that the participation of refugees in transitional justice could cause further injury and re-victimization.⁶⁴¹ Participation itself can be onerous, requiring individuals to revisit traumatic events and even to confront their persecutors. Cross-examination or expressions of doubt concerning the testimony of victims can cause further trauma and psychological harm while the very fact of coming forward and relinquishing anonymity can put witnesses and victims at risk of retaliatory acts. Recognizing

⁶³⁷ De Greiff, “Theorizing”, *supra* note 590 at 57.

⁶³⁸ Taylor, *supra* note 626 at 7.

⁶³⁹ *Ibid* at 23.

⁶⁴⁰ Séverine Deneulin, “Democracy and Political Participation” in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London: Earthscan, 2009) 185 at 190 [Deneulin, “Democracy”]; Lundy & McGovern, *supra* note 626 at 283.

⁶⁴¹ See e.g. Taylor, *supra* note 626 at 18.

certain victims, certain groups and certain types of injury while excluding others may also create tension and divisions within communities.⁶⁴² Finally, victims may feel doubly wronged and further injured if they undertake the difficult process of participation and then see no impact or benefit from their involvement. The three fundamental concerns regarding participation outlined here should not be used to discourage the implementation of participatory approaches to transitional justice but instead to inform the shape that the engagement of refugees should take.

3. Enhancing Refugee Participation in Transitional Justice

Given that meaningful refugee participation in transitional justice is critical to the resolution of situations of displacement and to the success of the transition to peace, and that current *ad hoc* initiatives have not resulted in sufficient engagement, a commitment to refugee participation could clearly benefit from a new approach. In “Democracy and Political Participation”, Séverine Deneulin states that “full political participation entails not only including everyone in a discussion but ensuring that every person included is equipped with an adequate level of political functioning and adequate cognitive and communications skills to advance her claims.”⁶⁴³ Instead of merely trying to ensure that refugees have access to the physical institutions of transitional justice, the focus should be on developing the capacity of refugees so that they are able to take full advantage of the opportunities that transitional justice mechanisms offer and so that they are empowered to advocate for their own rights and interests and thus create their own opportunities for engagement. The proposition advanced here is that by developing relevant knowledge, skills and capabilities, legal empowerment initiatives have the potential to facilitate the effective participation of refugees in judicial and quasi-judicial transitional justice mechanisms.

While most current efforts that seek to improve refugee participation in transitional justice are quite narrow and take place within the specific confines of an existing transitional justice mechanism, the process of legal empowerment of refugees can begin long before transitional justice processes are discussed or initiated so that when the discussion of transitional justice eventually arises, the refugee communities will be better placed to contribute to the design and implementation of relevant mechanisms, to ensure that issues pertaining to

⁶⁴² Taylor, *supra* note 626 at 33.

⁶⁴³ Deneulin, “Democracy”, *supra* note 640 at 202.

displacement are adequately addressed from the beginning, and to participate in all stages of the transitional justice process.

Perhaps the greatest contribution that legal empowerment can make to the transitional justice process is through the development of local capacity, predominantly through the provision of relevant information and the transmission of knowledge. In the words of Barbara McCallin, “[k]nowledge is the beginning of participation, which is then the beginning of ownership.”⁶⁴⁴ Without relevant, accurate information, knowledge and basic understanding, there can be no meaningful participation. At a minimum, refugees cannot participate in transitional justice processes if they don’t know about them. Legal empowerment mechanisms such as community legal education projects can help to raise awareness among refugees about their rights generally and also provide a forum for the transmission of important information about transitional justice.⁶⁴⁵ More than that however, meaningful participation depends not just on knowing *of* the mechanisms but also actually understanding their procedures, processes, terminology and objectives, as well as the consequences of participation or failure to participate.⁶⁴⁶ Whether we are talking about trials, truth commissions, restitution schemes or security-sector reform, virtually all transitional justice mechanisms involve a legal component. Thus, increasing basic legal literacy and skills through legal empowerment can help to ensure that refugees are able to participate more effectively in transitional justice.

The second area in which legal empowerment can have a significant impact is in facilitating the organization and mobilization of refugee civil society. On the one hand, the implementation of transitional justice measures can catalyze civil society organization by providing it with a focal point which in turn can empower the victims involved.⁶⁴⁷ On the other hand, however, there is evidence that the lack of organization or mobilization leads to the

⁶⁴⁴ Barbara McCallin, “Restitution and Legal Pluralism in Contexts of Displacement” (2012) at 19, online: Brookings-LSE Project on Internal Displacement www.brookings.edu/~media/Projects/idp/tj/%20case%20studies/McCallin%20Legal%20Pluralism.pdf.

⁶⁴⁵ The absence of accurate and accessible information has been recognized as one of the major obstacles to effective participation in transitional justice. See Taylor, *supra* note 626 at 35; see the example of Guatemala in Bradley, “Truth-Telling”, *supra* note 612 at 202; Commission for Reception, Truth and Reconciliation in Timor-Leste, *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor* (Dili: CAVR, 2005) Part 1: Introduction at 12, online: www.cavr-timorleste.org/en/cheгаReport.htm.

⁶⁴⁶ Taylor, *supra* note 626 at 35.

⁶⁴⁷ De Greiff, “Theorizing”, *supra* note 590 at 56; Jamie O’Connell, “Empowering the Disadvantaged after Dictatorship and Conflict: Legal Empowerment, Transitions and Transitional Justice,” in Stephen Golub ed, *Legal Empowerment Practitioners’ Perspectives* (Rome: International Development Law Organization, 2010) 113.

interests of certain groups being overlooked.⁶⁴⁸ To ensure that issues of displacement and the interests of displaced persons are adequately addressed, they need to be on the transitional justice agenda from the beginning which means that refugee mobilization may be most effective if it pre-dates the implementation of transitional justice mechanisms. Effective mobilization and organization can be especially important for refugee communities given that they have particular and different needs and interests from other victims and also given the added impediments to participation that they face such as not being physically present in the state of origin where transitional justice institutions are located and being scattered in different countries. By fostering leadership and advocacy skills and facilitating community organization, legal empowerment initiatives can help refugees to coordinate their possible claims and to not simply participate in transitional justice but to actively *use* these mechanisms to ensure that their own rights are respected. By empowering refugees to act on their own behalf and providing them with the knowledge and skills to do so, legal empowerment increases the capacity of refugee to participate in transitional justice which, as discussed above, is central to the success of these mechanisms. The ability to effectively use the law and to engage in legal processes helps to re-establish the refugee as a rights-bearing member of the state of origin.⁶⁴⁹

Legal empowerment initiatives can also help to mitigate some of the risks of improper participation. To begin with, refugees who are legally empowered will be better able to assess the risks and benefits and make informed decisions regarding their engagement with transitional justice mechanisms. Moreover, by not only targeting refugees as a group but also focussing on the empowerment of each refugee as an individual, legal empowerment strategies can help to increase the representativeness of refugee participation and guard against co-option of refugee discourse by ensuring that every person has the capacity and confidence to make their voice heard within the community as well.⁶⁵⁰ Finally, legal empowerment strategies create a space for the development of individual preferences, support mobilization around those preferences, and enable disadvantaged individuals and groups to advance their rights.⁶⁵¹ By enabling refugees to better ensure that their true voices are heard and their concerns publicized both within their

⁶⁴⁸ For example, during the peace process in Liberia, the absence of any substantial representation meant that the resulting peace agreement and transitional justice process failed to address the concerns of internally displaced persons. Brookings-Bern, *Transitional Justice*, *supra* note 598 at 10; Dabo, *supra* note 610 at 7.

⁶⁴⁹ See e.g. Iyodu, *supra* note 624 at 52.

⁶⁵⁰ For instance, many legal empowerment initiatives directly target disadvantaged sub-groups such as minorities, women and children. See e.g. O'Connell, *supra* note 647 at 117.

⁶⁵¹ See e.g. De Greiff, "Theorizing", *supra* note 590 at 57.

community and with regards to their state of origin, and by promoting the development of skills and capacities, legal empowerment facilitates effective participation in transitional justice which in turn helps to guarantee that the state will treat them in a non-instrumental manner that is consistent with their inherent dignity.

4. Beyond Transitional Justice: Facilitating the Three Rs – Repatriation, Reintegration and Restitution

While meaningful refugee participation has the potential to make an important contribution to transitional justice and is fundamental to the resolution of conflict,⁶⁵² transitional justice itself has a contribution to make towards the achievement of durable solutions by facilitating the reintegration of refugee communities.⁶⁵³ Transitional justice mechanisms are often a key feature of the process of “just return” which aims to “put returnees back on an equal footing with their non-displaced co-nationals by restoring a normal relationship of rights and duties between the state and its returning citizens.”⁶⁵⁴ By helping to re-establish a relationship of trust and citizenship between the individual and the state, transitional justice mechanisms can facilitate the social and political reintegration of refugee communities. As part of a “just return” transitional justice mechanisms also often involve initiatives aimed at the return of property, the resolution of disputes and restitution which are increasingly acknowledged as critical elements of both peacebuilding and the reintegration of displaced populations.⁶⁵⁵ Thus, measures aimed at achieving the reintegration of refugees should include strengthening the capacity of the refugee community to engage effectively with transitional justice processes.⁶⁵⁶

So far the focus of this section has been on the importance of legal empowerment in enhancing refugee participation in transitional justice. Nevertheless, despite best efforts to the contrary, refugees are not always able to participate effectively in transitional justice processes and not all situations of return following protracted exile involve transitional justice. Whether or not formal transitional justice structures exist, legal empowerment can still play an important role

⁶⁵² As noted in a World Bank paper: “as long as significant portions of a society’s population are displaced, the conflict has not ended.” S. Holtzman, “Post-conflict reconstruction”, *Environment Department Work in Progress* (Washington DC: The World Bank, 1995) at 15.

⁶⁵³ See Brookings-Bern, *Transitional Justice*, *supra* note 598.

⁶⁵⁴ Bradley, “Back to Basics”, *supra* note 607 at 286.

⁶⁵⁵ See McCallin, *supra* note 644; Brookings-Bern, *Transitional Justice*, *supra* note 598 at 1.

⁶⁵⁶ Brookings-Bern, *Transitional Justice*, *supra* note 598 at 8.

in smoothing the way for successful repatriation and reintegration by helping to ensure that refugees have the capabilities necessary to claim their rights in the country of origin.

If the restitution and return of property is increasingly seen as necessary to peace, it is also necessary to the return and reintegration of displaced populations.⁶⁵⁷ When considering return, refugees, who may have been absent from their homes for years, need to have the resources to be able to address the specific consequences associated with displacement including the loss of housing, land, property, jobs, physical assets and resources. The Norwegian Refugee Council's Information, Counseling and Legal Assistance (ICLA) programme which provides support to Afghan refugees in Pakistan, offers one example of how legal empowerment can help to facilitate return even in the absence of transitional justice mechanisms.⁶⁵⁸ Among other activities, the ICLA programme provides refugees with legal assistance and with information regarding their return to Afghanistan. One particular advantage of the Norwegian Refugee Council's activities is that they are cross-border: the Council also works within Afghanistan assisting returning refugees and internally displaced persons with the repossession of land, housing and property that was confiscated during their time in exile through mediation and legal procedures.⁶⁵⁹ ICLA programmes also operate in Sudan, Uganda, the Democratic Republic of Congo, Burundi, Georgia, Azerbaijan, Sri Lanka and Colombia.⁶⁶⁰

Facilitating restitution and resolution of property disputes is not the only field in which legal empowerment can have an impact. As noted in the UNHCR *Review of the Repatriation and Reintegration Programme in Sierra Leone*, “[it] has, in fact, been repeatedly observed that education, training and capacity building programmes administered in refugee camps can play a crucial role in preparing the ground for successful reintegration and community empowerment after repatriation.”⁶⁶¹ In Sierra Leone, Community Empowerment Projects run by local Project Management Committees (PMCs) had been established to assist in the process of reintegration and repatriation. The evaluation report found that the most successful PMCs were those that

⁶⁵⁷ McCallin, *supra* note 644 at 4; CLEP, *Volume One*, *supra* note 360 at 29.

⁶⁵⁸ Norwegian Refugee Council, *Fact Sheet: NCR's Country Programme in Pakistan* (March 2013), online: www.nrc.no/arch/_img/9186618.pdf.

⁶⁵⁹ UNHCR, *Operational Protection*, *supra* note 465 at A9.

⁶⁶⁰ Inter-Agency, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons. Implementing the 'Pinheiro Principles'* (March 2007) at 71, online: www.refworld.org/docid/4693432c2.html.

⁶⁶¹ Stefan Sperl & Machtelt De Vriese, “From Emergency Evacuation to Community Empowerment: Review of the Repatriation and Reintegration Programme in Sierra Leone”, UN Doc EPAU/2005/01 (Geneva: United Nations High Commissioner for Refugees, February 2005) at 48, online: www.unhcr.org/420b80384.pdf.

were staffed by individuals who had received training or worked with NGOs in refugee camps and were therefore more familiar with the concept of project management.⁶⁶² Although this example and similar recommendations often relate to the literacy, vocational training, economic and employment opportunities provided in refugee camps, the same effect can be expected of legal empowerment initiatives.⁶⁶³ In fact, without wanting to minimize the importance of creating opportunities for employment and the satisfaction of basic needs, it should be recalled that one of the critiques of the current refugee assistance regime presented in an earlier chapter was too great a focus on economic as opposed to human rights. Forced displacement is caused by the violation of human rights and is such a violation itself. It follows then that a true resolution to displacement must address the underlying human rights issues, not only the immediate needs of returnees. Through legal education, awareness-raising and skill development, legal empowerment initiatives in exile can help refugees acquire the capabilities necessary to secure the respect, protection and fulfillment of their fundamental human rights upon repatriation thus ensuring a return that is consistent with international human rights standards and is sustainable.

More broadly, the skills and knowledge acquired by refugees through legal empowerment initiatives in exile can enable refugees to potentially make important contributions to state-building and reform activities upon resettlement and ultimately to help to ensure that justice institutions within the country of origin, including transitional justice institutions, conform to international standards.⁶⁶⁴ This potential was remarked upon in a 2007 report by the Burma Lawyers' Council on the situation of justice in refugee camps in Thailand. In that report, the BLC expressed the belief that if the refugee communities became accustomed to living in a society based upon the rule of law, which could be achieved by strengthening justice institutions and the rule of law within the camps, their return to Burma (after a democratic transition) would help to promote human rights and foster peace and stability in their country of origin.⁶⁶⁵

⁶⁶² *Ibid* at 47.

⁶⁶³ *Ibid* at 48; Brett Ballard, "Reintegration Programmes for Refugees in South-East Asia: Lessons Learned from UNHCR's Experience", UN Doc E/PAU/2002/01 (Geneva, United Nations High Commissioner for Refugees, April 2002) at 69, online: www.unhcr.org/3ccff9134.html.

⁶⁶⁴ See generally UNHCR, *PRS Discussion Paper*, *supra* note 120.

⁶⁶⁵ Burma Lawyers' Council, "Analysis on the Situation of the Refugee Camps From the Rule of Law Aspect" (April 2007) 26 *LawKa Pala: Legal Journal on Burma* 38 at 40, online: Thailand Law Forum www.thailawforum.com/articles/burma-lawyers.html.

A “just return” can only happen if the security and basic human rights of refugees, including accountability for previous violations of human rights, are assured.⁶⁶⁶ Redress mechanisms, whether in the form of formal transitional justice mechanisms or *ad hoc* efforts to obtain restitution, compensation and accountability, “relocate refugees as citizens with fundamental moral and legal prerogatives”⁶⁶⁷ and play a vital role in ensuring that rights-based re-integration is successful.

B. Legal Empowerment as a Path to Local Integration

Recognizing that legal empowerment has the potential to assist in establishing a relationship of rights and duties between the state and the refugee (or the refugee community) is relevant for all durable solutions, not just repatriation, as the existence and strength of that relationship can have a substantial impact on refugee integration (or re-integration) which is a key feature of any solution to a situation of protracted displacement. The section that follows explores the value of legal empowerment in the context of local integration, the most controversial durable solution.

Despite direct reference being made to the concept in the *Refugee Convention*, there is no formal international definition of local integration.⁶⁶⁸ Nevertheless, there is a common understanding among many scholars that local integration is a multi-faceted process which leads to a durable solution for refugees within a host state.⁶⁶⁹ According to this understanding, promoted by Jeff Crisp head of UNHCR’s Policy Development and Evaluation Service, local integration is a legal process whereby refugees are granted an increasingly broad range of rights and entitlements that may eventually lead to permanent residence rights and citizenship. It is an economic process whereby refugees establish sustainable livelihoods and become self-reliant and it is a social process of adaptation and acceptance whereby refugees become able to live

⁶⁶⁶ See generally Bradley, “Back to Basics”, *supra* note 607.

⁶⁶⁷ *Ibid* at 300.

⁶⁶⁸ *Refugee Convention*, *supra* note 72, art 34.

⁶⁶⁹ UNHCR, *The Benefits of Belonging: Local Integration Options and Opportunities for Host Countries, Communities and Refugees* (29 July 2011) at 7, online: www.unhcr.org/4e3276e26.html; Alexandra Fielden, “Local Integration: an Under-reported Solution to Protracted Refugee Situations” (2008) UNHCR New Issues in Refugee Research, Research Paper 158 (Geneva: UNHCR) at 1, online: www.unhcr.org/486cc99f2.html; Jeff Crisp, “The Local Integration and Local Settlement of Refugees: a Conceptual and Historical Analysis” (2004) UNHCR New Issues in Refugee Research, Working Paper 102 (Geneva: UNHCR) at 1, online: www.unhcr.org/407d3b762.html [Crisp, “Local Integration”]; Jacobsen, *supra* note 49 at 1; Rosa da Costa, *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations* (Geneva: UNHCR, June 2006) UN Doc POLAS/2006/02, at 8, online: www.refworld.org/docid/44bb9b684.html [Da Costa, *Rights of Refugees*].

alongside the host population without fear of systemic discrimination or exploitation.⁶⁷⁰ As a durable solution, local integration should ideally result in citizenship for refugees within the host state; however a high level of local integration may be attained, including a broad range of legal rights and entitlements, even without that last step, assuming that refugees have some form of legal protection for their residency rights that permits the other elements of local integration to be securely achieved.

In situations where the permanent settlement of refugees in the host state is not possible (or acceptable), temporary or partial local integration should be considered as an interim harm-reduction strategy to be used in place of warehousing in refugee camps. A few countries have formally employed this type of refugee settlement,⁶⁷¹ though more often the local settlement of refugees currently takes place informally.⁶⁷² Although this second type of local settlement does avoid some of the human rights violations that are associated with life in refugee camps, without any form of legal protection or status, these refugees may be even more vulnerable to abuse, exploitation and forced return. Self-settled refugees are also often unable to access benefits and services or any of the assistance that is provided by the host state to its own citizens and by the aid providers to refugees in camps. As a formal interim strategy, local integration would provide refugee communities with legal recognition and protection, access to certain rights, services and benefits, as well as an opportunity to become both self-sufficient and to contribute in a meaningful way to the host state. Should the refugee crisis end, the host state would then have the option of either permitting permanent local integration by providing refugees with permanent status, or encouraging refugees to return to their country of origin. Either way, the host state would have reaped some benefit and the refugee community would have avoided the human rights desert that is the refugee camp.

Although local integration has not been employed in many situations, there are some examples that provide evidence of the potential that this approach holds. For example, Uganda chose to adopt a policy of refugee settlement as opposed to encampment when it was faced with reduced donor interest in funding protracted refugee situations. It was felt that self-reliant refugees would in the end cost less in terms of food and services, and initiatives that targeted

⁶⁷⁰ Crisp, "Local Integration", *supra* note 669 at 1.

⁶⁷¹ Local settlement has been used perhaps most prominently in Uganda but also in other countries including Tanzania, Sudan and Gabon. The use of local settlement was most prevalent during the 1960s and 1980s. *Ibid* at 2.

⁶⁷² *Ibid* at 6.

both refugees and the local population might elicit more funding and support from development agencies.⁶⁷³ In a similar vein, Kenya managed to address a shortage of doctors and teachers in the 1980s by giving refugees the right to work.⁶⁷⁴

Despite the potential benefits, convincing states to employ local integration, whether as a durable solution (ideally) or as a temporary coping mechanism, is likely to be an uphill battle. There is fear (sometimes valid and sometimes not) among states that temporary integration is merely a pretext for permanent integration and that permanent integration may create conflict and insecurity and will put too great a strain on host state resources. Although these arguments are not insurmountable, the objective of this section is not to convince readers that local integration is to be preferred over other solutions; it is to explain how, if local integration is accepted as a legitimate strategy, legal empowerment can contribute to its success.

To begin with, legal empowerment provides refugees with the knowledge and capabilities necessary to navigate the legal and administrative systems of the host state. Given that local integration requires the recognition of rights and the participation of the refugee community in the economic and social life of the state, its success requires a framework of enforceable laws in place that protects those rights and that participation in practice. Even with such a framework in place, refugees may have far more difficulty in exercising their rights in practice than nationals of the host state due to the lack of awareness among host state actors, including the institutions of the state, of the relevant rights regime, the absence of effective administrative mechanisms, obstacles at the implementation level, bias and discrimination, language barriers, etc.⁶⁷⁵ As noted in previous sections, legal empowerment can help refugees to address and overcome these obstacles.

Even in cases where there is no formal policy of local integration in place, the level of integration in practice can be improved simply by increasing the number and depth of interactions between refugee communities and the official institutions and mechanisms of the host state. For example, in addition to providing training sessions to the courts, government staff and other authorities, the Norwegian Refugee Council's information and legal aid projects have helped Afghan refugees access legal remedies in Pakistan. This assistance has helped to change the perception that Afghans are illegal and thus without any means of redress and, consequently,

⁶⁷³ Fielden, *supra* note 669 at 11.

⁶⁷⁴ M Smith, "Warehousing Refugees", *supra* note 49 at 47.

⁶⁷⁵ Da Costa, *Rights of Refugees*, *supra* note 669 at 140.

to ensure that their rights are respected, and could potentially act as a first step to local integration.⁶⁷⁶ Empowering refugees to be actors in their own interests before host state institutions also provides refugees with formal legal recognition by the host state and begins to establish that relationship of rights and duties that is vital to integration.

If legal empowerment can help refugees integrate into the host state community, it also has potential benefits for the state itself. Research has produced evidence that where refugees live in a dignified manner, where the host state respects their social, economic, cultural and political needs and permits access to education, health facilities and the right to work, refugees are better able to integrate, to achieve self-reliance and to contribute to the local economy or thrive wherever they end up.⁶⁷⁷ Although little empirical research has been done on the topic, it is reasonable to assume that the skills and capacities acquired through legal empowerment would result in a similar outcome. Additionally, when a state adopts a policy of local integration, it opens the door to development and capacity-building projects that target both the refugee and the host state population.⁶⁷⁸ Rights awareness-raising initiatives, community legal education projects and paralegal training programs need not be limited to the refugee population in these cases but can also be used to empower vulnerable groups within the host state to claim their rights. As Rosa da Costa found in her study *Rights of Refugees in the Context of Integration*, providing refugees with better information (and arguably education as well) regarding their rights and obligations and the laws of the host state enables refugees to better adapt to the expectations of the host state and to respect their obligations while still protecting their rights and interests.⁶⁷⁹

In a similar manner, legal empowerment can also facilitate integration in the context of the third durable solution, resettlement. Refugees are generally resettled to third countries that have political and legal systems based upon the rule of law with strong rights regimes. The legal empowerment skills and knowledge acquired, and the capacities developed during asylum can help refugees make the transition into these societies more successfully. Being aware of the rights and obligations and laws of the state of residence enables refugees to better understand

⁶⁷⁶ UNHCR, *Operational Protection*, *supra* note 465 at A10.

⁶⁷⁷ See Wilde, *supra* note 333 at 118; UNHCR, *Transitional Solutions*, *supra* note 48 at 4.

⁶⁷⁸ An argument has been made that a potentially critical measure to overcome government reluctance with regards to creating durable solutions would be additional development assistance supporting integrated initiatives that target displaced persons, returnees and the local population. See Betts, “Development Assistance”, *supra* note 66. See also UNHCR, *Transitional Solutions*, *supra* note 48 at 7.

⁶⁷⁹ Da Costa, *Rights of Refugees*, *supra* note 669 at 180.

how to participate politically within that society and to exercise those rights, in short to be better citizens.

C. Conclusion

One should be under no illusions that adopting a focus on legal empowerment in refugee situations will lead directly to durable solutions. The suggestion here is merely that legal empowerment can contribute to alleviating the various financial and social costs on host states and enhancing the likelihood that durable solutions will succeed once states and aid providers decide to commit themselves to resolving protracted refugee situations. Getting to that point is a separate issue.

V. Conclusion

As we will see in the following chapter, the variety of considerations and entrenched interests that must be navigated in order to increase the focus on legal empowerment in protracted refugee situations in the context of a human rights-based capabilities approach is daunting. It would be far easier to throw our hands up in despair and resign ourselves to the status quo. But the status quo is equally untenable; to accept it would be to endorse a state of affairs that actively undermines the dignity of millions of refugees and that leads to an epidemic of human rights violations. In this case, change and a real shift in perspective is the only way to move forward.

The espousal by the humanitarian community of human rights-based approaches represents progress but has not resulted in the desired sea change at the ground level. What has been shown in this chapter is not that legal empowerment is a cure-all but that it is a strategy, a tool with immense potential. Many aid initiatives have focused on increasing the self-sufficiency of refugees in an economic sense and while this approach contributes to individual dignity it is founded upon a very narrow conception of well-being. Legal empowerment initiatives have the capacity to affect virtually every aspect of the lives of refugees and refugee communities from the economic and political to the legal, social and cultural. Legal empowerment is not just about making refugees self-sufficient, it is about providing them with the tools needed to choose *how* they want to become self-sufficient and to achieve their own objectives. Legal empowerment is

about enabling refugees to reclaim control over their own lives which is a critical component of living with dignity.

Chapter 5 – Participation in Protracted Refugee Situations

Participation and active involvement in the determination of one's own destiny is the essence of human dignity.

Mary Robinson, United Nations High Commissioner for Human Rights (1997-2002)

I. Introduction

It is one thing to extoll the virtues of legal empowerment, and the human rights-based capabilities approach generally, in the abstract; it is quite something else to design and implement such a strategy in practice. Any substantial change to either the manner in which assistance is provided to refugees in protracted situations or to its content requires negotiating a labyrinth of obstacles and issues specific to each particular situation: from the practical problems associated with a lack of human and financial resources, geographical location and language barriers, to the entrenched interests of powerful actors, cultural norms, inter-community relations and local, national and international power politics. These concerns constitute a formidable challenge to the reform of refugee assistance and they may be largely responsible for the fact that many of the elements that make up the human rights-based capabilities approach presented here have either only rarely been discussed or have not yet been implemented successfully. It is neither desirable nor possible to design a one-size-fits-all formula for the implementation of the HRCA; each situation has its own potential and its own problems and must be addressed on its own terms in order to fully respect the dignity and rights of all parties. Consequently, the purpose of this chapter is not to set out a ready-made solution but to examine how the principles underlying the fiduciary theory of state legal authority and the human rights-based capabilities approach will shape the design and implementation of legal empowerment initiatives and, ultimately, any initiatives aimed at fulfilling the promise of the human rights-based capabilities approach.

In the following chapter, the factors identified as being of primary importance in the success of legal empowerment and the HRCA are discussed primarily in the context of a participatory approach. The reasons behind the emphasis on participation will be outlined in

more detail below but simply put, the significance of participation in this context can be traced back to the basic premise that underpins participation, empowerment and the capabilities approach as a whole and which is central to respect for the full dignity of the person, namely that people should be able to be agents in their own lives, specifically regarding those issues that are of fundamental importance to them.⁶⁸⁰ In other words, a dignified life requires that individuals be able to play an active role in decision making and to achieve some degree of control over their own destiny.

The concept of participation is one that has been examined extensively within the field of development.⁶⁸¹ Substantial bodies of scholarship exist concerning participation, participatory approaches, participatory development and democratic development, and a full analysis and critique of these concepts is far beyond the scope of this chapter. Instead, this chapter will develop an understanding of a participatory framework that is inspired by the theory but that is ultimately specifically oriented towards the implementation of legal empowerment and the human rights-based capabilities approach in protracted refugee situations.

II. Justifying a Participatory Approach

The connections between participation, empowerment, human dignity and the capabilities approach can be traced in part back to the concept of agency. In chapter 3, the concept of agency was defined as the ability of individuals or groups to make “purposive choices”, in other words to be able to envisage their options and choose among them or to act on behalf of what they value and have reason to value.⁶⁸² Thus meaningful and effective participation (in other words participation that actually furthers the objective of making individuals active subjects in their

⁶⁸⁰ See generally Denis Goulet, “Participation in Development: New Avenues” (1989) 17:2 World Development 165 [Goulet, “Participation”]. See also Jay Drydyk, “Participation, Empowerment, and Democracy” in Charles K Wilber, Amitava Krishna Dutt & Theodore M Hesburgh, eds, *New Directions in Development Ethics: Essays in Honor of Denis Goulet* (Notre Dame, Ind: University of Notre Dame Press, 2010) 333 at 335 [Drydyk, “Participation”]; David A Crocker, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy* (New York: Cambridge University Press, 2008) at 339.

⁶⁸¹ See e.g. James Blackburn & Jeremy Holland, eds, *Who Changes?: Institutionalizing Participation in Development* (London: Intermediate Technology Publications, 2008); Bill Cooke & Uma Kothari, eds, *Participation: The New Tyranny?* (London: Zed Books, 2001) [Cooke & Kothari, *The New Tyranny*]; Jean Drèze & Amartya Sen, *India: Development and Participation* (Delhi: Oxford University Press, 2002) [Drèze & Sen, *Development and Participation*]; Denis Goulet, *The Cruel Choice: A New Concept in the Theory of Development* (New York: Atheneum, 1971); Goulet, “Participation”, *supra* note 680; Robert Chambers, “Participatory Rural Appraisal (PRA): Analysis of Experience” (1994) 22:9 World Development 1253.

⁶⁸² Chapter 3 II.B. Agency and Opportunity Structure: The Core of Empowerment at 118, above. See generally Alsop, Bertelsen & Holland, *supra* note 365; see also Solava & Alkire, *supra* note 368.

own lives) can be viewed as an exercise of agency.⁶⁸³ In turn, the degree to which agency can be (and is) freely exercised (agency + opportunity structure) is an indication of the degree of empowerment.⁶⁸⁴ From these assertions we can draw the conclusion that meaningful participation in those activities and related issues is a necessary feature of achieving legal empowerment and implementing a human rights-based capabilities approach. If participation is recognized as a way in which people manifest their inherent worth and dignity,⁶⁸⁵ a HRC that did not adopt a participatory framework would be undermining its claim to be human rights-based and would be demonstrating a marked lack of respect for the human dignity of those concerned.

A. The Right to Participate

Another argument in favour of the adoption of a participatory approach is the claim that individuals have a right to participate in decision-making that affects their lives and their rights.⁶⁸⁶ Support for a right to participate in the decision-making that affects one's life can be found in the many references to participation contained in international treaties and declarations as well as in the general comments and general recommendations of treaty bodies.⁶⁸⁷ Although these references generally pertain to ensuring the right of specific vulnerable groups (children, women, disabled persons, minority groups, migrant workers and indigenous peoples) to participate, their number and variety seems to support the existence of an international consensus

⁶⁸³ Sabina Alkire, "Structural Injustice and Democratic Practice: The Trajectory in Sen's Writings" in Séverine Deneulin, Mathias Nebel & Nicholas Sagovsky eds, *Transforming Unjust Structures: The Capability Approach* (Dordrecht: Springer, 2006) 47 at 53.

⁶⁸⁴ See chapter 5 II. B. The Virtues of Participation at 221, below.

⁶⁸⁵ Crocker, *supra* note 680 at 340.

⁶⁸⁶ Noel Calhoun, "UNHCR and Community Development: A weak link in the chain of refugee protection?" (2010) *New Issues in Refugee Research*, Research Paper 191, UNHCR Policy Development and Evaluation Service, at 5, online: www.unhcr.org/4cb47c2f9.html.

⁶⁸⁷ See e.g. *Universal Declaration*, *supra* note 224 arts 21, 27; *ICCPR*, *supra* note 73, art 25; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), arts 7, 8, 14; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 12, 31; *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), arts 3(c), 4.3, 9, 29, 30; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003), arts 41, 42.2; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, UN Doc A/Res/47/1 (2007), arts 5, 18, 19, 41; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (2000); UN Human Rights Committee, *CCPR General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, UN Doc CCPR/C/21/Rev.1/Add.7 (1996).

regarding the importance of participation. This position is also supported by the *Vienna Declaration and Programme of Action*, which contains numerous mentions of the importance and need to ensure the full and free participation of different groups and which affirms in its preamble that “the human person is the central subject of human rights and fundamental freedoms, and consequently [...] should participate actively in the realization of these rights and freedoms.”⁶⁸⁸

The existence of a general right to participate in decision-making that affects oneself above and beyond what is explicitly stated in international legal instruments can also be deduced from our commitment to the inherent dignity and equality of the human person and his/her role as the subject of human rights and fundamental freedoms. From these characteristics necessarily follows an obligation to acknowledge the will, opinions and agency of the individual, and by extension his or her participation, the expression of which is guaranteed by the rights to freedom of opinion, of expression, of assembly and of thought and conscience. The right to participate is not only supported by these freedoms, but is itself a critical component of other human rights such as the right to the highest attainable standard of health and the right to fair treatment before the courts.⁶⁸⁹ Further support for a general right to participate was recently provided by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona. In a 2013 report, the Special Rapporteur recognized the right to participate and exert influence in decision-making processes that affect one’s life as a fundamental right that is “inextricably linked to the most fundamental understanding of being human and the purpose of rights: respect of dignity and the exercise of agency, autonomy and self-determination.”⁶⁹⁰

With regards to the rights of refugees, the right to participate has been expressly referred to by UNHCR in its manual *A Community-based Approach in UNHCR Operations*.⁶⁹¹ In that manual, it is asserted that a rights- and community-based approach necessarily includes the recognition that participation “is a right, and essential for informed decision-making.”⁶⁹² While

⁶⁸⁸ *Vienna Declaration*, *supra* note 10, preamble.

⁶⁸⁹ Helen Potts, *Participation and the Right to the Highest Attainable Standard of Health* (Essex, UK: Human Rights Centre, University of Essex, 2008) online: University of Essex repository.essex.ac.uk/9714/1/participation-right-highest-attainable-standard-health.pdf.

⁶⁹⁰ *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*, UN GAOR, 23rd Sess, UN Doc A/HRC/23/36 (2013) at 6, online: OHCHR daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/117/94/PDF/G1311794.pdf?OpenElement.

⁶⁹¹ UNHCR, *Community-Based Approach*, *supra* note 349 at 5.

⁶⁹² *Ibid* at 18.

this statement is consistent with and reflects the trends noted above, there remains some question regarding the extent to which international law recognizes and supports the right to participate for non-citizens. Many references in international instruments to a right to participate pertain to the right to participate in the political affairs of the state or, more specifically, to the right of the individual to participate in the public affairs of *his or her* state, implying that, for refugees, the right to participate might not extend to the state of refuge.⁶⁹³ Indeed, as General Comment 25 explains, unlike the other rights and freedoms contained in the *ICCPR* which are guaranteed to all individuals within the state, article 25 of the Covenant explicitly restricts the right to take part in the conduct of public affairs, understood broadly to include not only voting but the exercise of legislative, executive and administrative powers, to “every citizen.”⁶⁹⁴

It is important to note, as Noel Calhoun does, that the type of participation that we are talking about in the refugee context is different from that anticipated in article 25 of the *ICCPR*.⁶⁹⁵ We are not necessarily talking about participation in the formal political processes and broad governance of the host state. Rather, participation in the humanitarian context involves refugees contributing as one stakeholder among many to decision-making processes that directly affect their rights and interests and is more analogous to general right of certain groups to participate in decision-making that has been recognized in article 18 of the *Declaration on the Rights of Indigenous Peoples*, article 2(3) of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* and article 42 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.⁶⁹⁶ Nevertheless, even if we accept the existence of a general right to participate in decision-making that affects one’s rights and interests, if we look at how decisions are currently made in the refugee context and at the fact that the extent and impact of refugee participation is entirely subject to the whims of UNHCR and the host state, it seems somewhat misleading to justify the adoption of a participatory approach by reference to a right to participate.⁶⁹⁷

⁶⁹³ See e.g. *Universal Declaration*, *supra* note 224 arts 21, 27; *ICCPR*, *supra* note 73, art 25.

⁶⁹⁴ *CCPR General Comment No. 25*, *supra* note 687.

⁶⁹⁵ Calhoun, *supra* note 686 at 5.

⁶⁹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 687; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, GA Res 47/135 (Annex), UN GAOR, 47th Sess, Supp No 49, UN Doc A/47/49 (1993); *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, *supra* note 687.

⁶⁹⁷ Calhoun, *supra* note 686 at 6.

B. The Virtues of Participation

In addition to the more theoretical or ideological explanations just mentioned, a more practical and perhaps convincing argument for adopting a participatory approach can be made by referring to three main virtues of participation. First, still linked to the concepts of agency and empowerment, as noted by the Asian Development Bank, there is value “in the very process of engagement” even if that engagement fails to achieve the desired results.⁶⁹⁸ Participation is intrinsically valuable because it enhances the agency of the participant and enables her to act as a rights-bearer in a manner that is self-directed.⁶⁹⁹ As Sen and Drèze suggest, there is value in being able to do or achieve something for oneself but also for other members of society.⁷⁰⁰ Participation, either alone or as part of a group, is a means to empowerment; it creates a sense of control and ownership that strengthens the individual’s confidence in her own political and personal capabilities and skills, thereby increasing both her “power from within” and her “power with”.⁷⁰¹

Second, participation is instrumentally valuable insofar as it produces better outcomes that enhance the well-being of participants. There is inherent value in being able to choose and to act upon those choices, but the effects of those choices, in the context of a participatory approach, also have their own value.⁷⁰² Programming that emphasizes participation is likely to be more effective and to achieve better results because it is informed and supported by the community.⁷⁰³ Drawing on local information and knowledge that is more accurate than that which could be supplied by third parties, enables initiatives to be tailored to the specific circumstances in a particular situation. Consequently such an approach may be better able to identify potential barriers and resources, to address or use them, and to lower implementation costs. The sense of ownership mentioned above may also help to stimulate local interest which may in turn encourage further engagement and “buy-in” thereby increasing the sustainability of initiatives after external funding is terminated.⁷⁰⁴

⁶⁹⁸ Golub & McQuay, *supra* note 360 at 52.

⁶⁹⁹ Alkire, *Valuing Freedoms*, *supra* note 180 at 130.

⁷⁰⁰ Drèze & Sen, *Social Opportunity*, *supra* note 154 at 106.

⁷⁰¹ Golub & McQuay, *supra* note 360 at 52; See Drydyk, “Participation”, *supra* note 680 at 348.

⁷⁰² Alkire, *Valuing Freedoms*, *supra* note 180 at 132.

⁷⁰³ See e.g. *ibid* at 132, 152.

⁷⁰⁴ *Ibid* at 152.

Third, participation has constructive value insofar as it influences both value and identity formation. Discussions, debates and interactions that take place between participants within the context of a participatory approach give them the opportunity to learn from each other, to acquire new information and to reflect critically on their own values. By making participants more aware of the impacts that certain choices can have on other members of society and by exposing them to the opinions, beliefs and knowledge of other parties, participation can influence the formation and development of the values around which society is ordered and which may form the basis of the community's policy priorities. Similarly, the choices that individuals make help to construct their identities. Participation means that individuals have an active role in the formation of their own identities and that their identities are influenced by choices that they have made, not that have been made on their behalf by more powerful actors.⁷⁰⁵ Another benefit that is linked to both the notions of value and identity formation is that participation will likely make programs and initiatives more sensitive to local cultural values and mores as people who adhere to those principles will be intimately involved at many, if not all, stages.⁷⁰⁶ Increased cultural sensitivity does not mean that there will not be conflicts between culture and development or refugee assistance but it may help to enhance the effectiveness and increase the acceptance of those projects. Furthermore, the deliberations about values that occur in the context of participation also provide a space for cultures to grow and change from within, on their own terms.⁷⁰⁷

Jay Drydyk also suggests that participation has the potential to make development, or in this case refugee assistance and the decision-making associated with refugee assistance, more democratic. In this context "democratic" does not refer to elections; instead a process or situation is viewed as being more democratic when "political influence on decision-making affecting valuable capabilities is better shared."⁷⁰⁸ This can be achieved among other ways by expanding the range of individuals that have access to decision-making, ensuring that the political activity that individuals can engage in has greater influence over decisions that affect capabilities and increasing the types and instances of political activity in which people can participate. Drawing on Drydyk's work, one can assert that participation per se does not necessarily lead to more democratic functioning, instead the key is whether participation enhances the influence that

⁷⁰⁵ See *ibid* at 133ff.

⁷⁰⁶ *Ibid* at 152.

⁷⁰⁷ See *ibid*; Frédérique Apffel-Marglin & Stephan Marglin, *Dominating Knowledge: Development, Culture, and Resistance* (Oxford: Clarendon Press, 1990) at 16.

⁷⁰⁸ Drydyk, "Participation", *supra* note 680 at 339.

individuals have over decisions that affect capabilities that everyone has reason to value.⁷⁰⁹ Indeed as we will see in the discussion of typologies of participation below, not all participation achieves this end. Too often participatory mechanisms end up being little more than formalities, a box to check on the form entitled “Human Rights-based Approach,” as opposed to a meaningful part of the exercise of political freedom.

C. A Typology of Participation

Different authors define participation more or less broadly. In her discussion of Sen’s capability approach, Sabina Alkire defines participation as “the process of discussion, information gathering, conflict, and eventual decision-making, implementation, and evaluation by the group(s) directly affected by an activity.”⁷¹⁰ To her, participation is directly linked to decision-making; true participation occurs when the individuals who will be affected by a particular decision are those that have the power and authority to make it.⁷¹¹ This interpretation, although consistent with the justifications for participatory approaches set out above, is quite narrow and can potentially be seen as an ideal form of participation. The question we must then address is whether there are other forms or degrees of participation that are meaningful, and if so, what these look like.

Although Alkire’s conception of participation may be the ultimate objective of a participatory approach, many authors have adopted more nuanced understandings of participation that can be understood through an assortment of typologies. For example, Denis Goulet, one of the original proponents of participation in development, identified several ways in which participation can be classified including according to its originating agent (authority or expert, non-expert populace, external third agent) or the moment at which it is introduced (diagnosis of a problem, listing possible solutions, selecting a course of action, preparing for implementation, implementation, evaluation, etc.) in which case he suggests that the earlier the participation is introduced, the better the potential outcome.⁷¹² Two typologies that offer somewhat more insight into the use of participation in the context of refugee assistance are that

⁷⁰⁹ See *ibid.*

⁷¹⁰ Alkire, *Valuing Freedoms*, *supra* note 180 at 129.

⁷¹¹ *Ibid* at 130.

⁷¹² See Goulet, “Participation”, *supra* note 680.

developed by Jules Pretty⁷¹³ and reiterated by Jan Drydyk,⁷¹⁴ and that outlined by David Crocker.⁷¹⁵ Although similar, these two classifications contain some differences and by combining elements of both, we can develop a typology that better captures the full spectrum of participation from nominal participation that is merely a formality and does little to alleviate the power imbalances within a society, to full and meaningful participation that represents a substantial degree of control over one’s own life.⁷¹⁶

Typology	What is involved in each type of participation
1. Passive participation	People participate by being told what is going to happen or has already happened. At the extreme, participants may nominally be members of decision-making groups but may not actually be present in that forum (nominal participation).
2. Consultative participation	People participate by providing information, being consulted and/or having their opinions listened to. No decision-making power is conceded and while decision-makers may listen to participants, they are under no obligation to do so or to take their views into account.
3. Petitionary Participation	People participate by petitioning authorities to make certain decisions and to do certain things (for example to remedy grievances). Participants have a right to be heard and decision-makers have a corresponding obligation to listen and consider their submissions even though the elites retain all decision-making power.
4. Participation for material incentives	People participate by providing resources (including labour) in return for food, money or other material incentives. Participants have little stake in prolonging the activities once the incentives end. Decision-making power is retained by elite actors.
5. Participatory implementation (functional participation)	Major decisions regarding goals and means are made by elite decision-makers. People participate to meet these pre-determined objectives and may have some control over the tactics employed. Involvement may include social organization that is initiated externally but may eventually become self-dependent.
6. Bargaining	On the basis of whatever individual or collective power they have, people participate by bargaining with elites. This form of participation is more adversarial than collaborative. Outcomes depend upon the concessions that elites are willing to make and are highly dependent upon the relative power of the different parties.
7. Deliberative or interactive participation	People participate in joint analysis and deliberations among themselves and with elites to forge agreements on policies that at least a majority can accept. These agreements lead to new action plans and may result in the formation of new local institutions or the strengthening of existing ones. At the “thick” or more robust end of this category, non-elite groups take control over local decisions. Participants have a stake in maintaining structures or practices.
8. Self-mobilization	People participate by taking initiatives independent of external institutions to change systems. This type of mobilization may or may not challenge existing inequitable distributions of wealth and power.

Table 4. Typology of Participation

⁷¹³ Jules N Pretty, “Alternative Systems of Enquiry for Sustainable Agriculture” (1994) 2(25) IDS Bulletin 37 at 41.

⁷¹⁴ Jay Drydyk, “When is Development More Democratic?” (2005) 6:2 Journal of Human Development 247 at 260 [Drydyk, “Development”].

⁷¹⁵ Crocker, *supra* note 680 at 343.

⁷¹⁶ Adapted from: Pretty, *supra* note 713 at 41; Drydyk, “Development”, *supra* note 714 at 259; Crocker, *supra* note 680 at 343.

When talking about meaningful participation in the context of legal empowerment and the human rights-based capabilities approach in protracted refugee situations, we are talking about participation that enables refugees to have a degree of control over their lives and specifically the decisions that affect their valuable capabilities; in other words, participation that enables refugees to play an active role in decision-making. This conception of participation which is integral to the respect for the dignity of refugees and to their full development is embodied to varying degrees in categories 5-8. The importance attributed to these more robust forms of participation does not ignore that lesser forms of participation may still yield some important benefits, but it acknowledges that participation falling under categories 1-4 will have little impact on the agency of refugees, their empowerment, or value and identity formation.⁷¹⁷

So far this discussion has justified the adoption of a participatory framework by examining the potential benefits of participation while acknowledging that not all participation is equal. For a participatory framework to be a rights and dignity-respect instrument, it must involve meaningful participation that includes real influence over decision-making. As Cooke and Kothari note, we must not be naïve about “the authenticity of motivations and behaviour in participatory processes.”⁷¹⁸ While “good” participation is fundamental to the dignity of the individual and has the potential to enhance empowerment and improve outcomes, “bad” participation, or participatory mechanisms that do not fully take into consideration existing power dynamics both within the community and between the community and external actors, has the potential to reproduce and even reinforce power imbalances and entrench marginalized actors within power structures that they are unable to question with “tyrannical” effects.⁷¹⁹ In these cases the voices of marginalized and less powerful actors can be hijacked and their participation instrumentalized by powerful actors who espouse the value of participation for their own purposes (for example to legitimize their own actions). Although deliberative participation and self-mobilization are the ideal, the variety of factors that can impact the quality of participatory approaches may make achieving these objectives difficult. Nevertheless, each project or assistance intervention must at least endeavor to achieve “more” and “better” participation. Real

⁷¹⁷ See Drydyk, “Development”, *supra* note 714 at 260. Nevertheless, as noted in chapter 4 above, marginalized groups may find more value in even the most minimal forms of participation than might be expected. See e.g. Afghanistan Independent Human Rights Commission, *supra* note 636; Taylor, *supra* note 626 at 27.

⁷¹⁸ Bill Cooke & Uma Kothari, “The Case for Participation as Tyranny” in Bill Cooke & Uma Kothari, eds, *Participation: The New Tyranny?* (London: Zed Books, 2001) 1 at 13-14.

⁷¹⁹ See generally the discussion in Cooke & Kothari, *The New Tyranny*, *supra* note 681; and Samuel Hickey & Giles Mohan, eds, *Participation: From Tyranny to Transformation?* (London: Zed Books, 2004).

participation must not be viewed only as an end in itself but as a means to increase agency and well-being.

III. Participation, the Human Rights-based Capabilities Approach and the Fiduciary Theory

As the previous section shows, participation and participatory approaches clearly have value on their own account. More than that, however, meaningful public participation plays a critical role in both the fiduciary theory and in the human rights-based capabilities approach, and thus, by extension, in legal empowerment.

A. Ensuring Non-Instrumentalization and Facilitating Public Deliberation

To start with, meaningful participation helps to ensure that power-holders, including the host state and UNHCR, act according to the principles of non-domination and non-instrumentalization as required by the fiduciary theory of state legal authority. As Denis Goulet stated in 1989, participation “guarantees government’s noninstrumental treatment of powerless people by bringing them dignity as beings of worth, independent of their productivity, utility, or importance to the state’s goals.”⁷²⁰ Without an opportunity to participate effectively in the design and implementation of legal empowerment initiatives or any other HRCA strategies, refugees are vulnerable to domination and instrumentalization by lawyers, aid workers and host state authorities. Historically, this situation has characterized many aid initiatives: outside actors enter protracted refugee situations as the bearers of expertise and with the backing of donors and are able to dominate the discourse, set objectives, determine strategies and methods of implementation with at best token refugee participation.⁷²¹ Similarly, host states, as primary responsibility-bearers under international law and wielders of virtually untrammelled power over refugee communities, are able to set the conditions of asylum with little, if any, input from refugees themselves.

At a minimum, the fiduciary theory requires that the fiduciary, whether it is the state, UNHCR or some other power-holder, ensure that refugees are able to participate actively and

⁷²⁰ Goulet, “Participation”, *supra* note 680 at 175.

⁷²¹ See e.g. Harrell-Bond, “Humanitarian Work”, *supra* note 3; Wilde, *supra* note 333.

meaningfully in discussions that concern their rights and interests, as public deliberation is a manifestation of the state's appropriate solicitude for the legitimate interests of those under its authority.⁷²² This participation must in turn be guided by the principles that govern the state-subject fiduciary relationship: the moral equality of every individual, their entitlement to protection for their freedom, solicitude, integrity and equal security under the law.⁷²³ Although not explicitly stated, from these principles and the human rights requirements of the fiduciary theory, we can infer that the participation that would meet the requirements for non-domination and non-instrumentalization is more, in reality, than bare participation in relevant discussions. Instead, the fiduciary theory requires that refugees play a meaningful role not only in the discussions but in the actual decisions that most affect them, in other words, participation as described in categories 5-8 of the typology above.

B. Enabling the Development and Public Debate of Capabilities

Informed participation also plays a central role in the capabilities approach, and by extension in the human rights-based capabilities approach, in several different ways. To begin, the objective of the capabilities approach is to increase the capabilities of disadvantaged groups and individuals and this can be achieved most effectively when programming is based on accurate information and benefits from the support of the relevant communities, both of which can be achieved through participation. Furthermore, in Sen's capabilities approach, the relevant capabilities are those that are the product of an overlapping consensus and public debate; participatory approaches, especially insofar as they contribute to value and identity formation, provide a forum for these important deliberations. Although the human rights-based capabilities approach asserts that the International Bill of Human Rights is a product of just such a consensus and debate and thus constitutes the list of central capabilities that must be realized in order to fully protect the human dignity of refugees, public reasoning is still required to determine the threshold levels of each capability and how these rights are to be interpreted and realized in practice.⁷²⁴ In particular, the constraints imposed by limited resources and political will mean that the realization of these human rights-based capabilities in practice will often be incremental.

⁷²² See chapter 2 Part IV.D. The Critical Role of Public Deliberation and Debate: Thresholds and Hierarchies at 107, above.

⁷²³ See *ibid.*

⁷²⁴ *Ibid.*

Consequently, refugee participation can help with the difficult task of prioritizing these capabilities: of making those tragic choices that are most likely to yield a future where choices between capabilities are not necessary, in other words, where individuals can all enjoy a threshold level of all capabilities.⁷²⁵ An argument has been made here that legal empowerment and its associated right should be given priority since they provide an enabling framework for the realization of other capabilities. Thereafter, the refugees themselves are in the best position to identify which capabilities are likely to make the greatest impact on their well-being, which should therefore be given priority in form the objectives of future initiatives and how they might best be realized.

In the end, the importance of meaningful participation and its role in both the fiduciary theory and the human rights-based capabilities approach can be linked back to that most basic of concepts: human dignity. If human dignity requires that individuals maintain some degree of control over their own lives and over the decisions that affect the most fundamental dimensions of their well-being, any initiative or programming that seeks to unilaterally affect the lives of refugees, or to do so with only token participation, will be disempowering and will undermine the human rights and human dignity of refugees.

C. Common Criteria of a Participatory Conceptual Framework

Although the specific forms that participation will take necessarily vary from case to case, considering the discussion and typology of participation presented above, it is clear that truly meaningful participation requires the active and equitable involvement of all stakeholders in all dimensions of assistance including the definition of problems, objective-setting, designing solutions, and implementation and evaluation and, moreover, that participants have some degree of control over the eventual outcomes.⁷²⁶ These overarching requirements are then further supplemented and given substance by the principles that underlie both the fiduciary theory and the human rights-based capabilities approach, in particular the respect and consideration due each individual by virtue of their equal and inherent dignity.

⁷²⁵ Nussbaum, *Creating Capabilities*, *supra* note 29 at 37. See chapter 2 IV.C. Conflicting Capabilities: How to Make Tragic Choices at 104, above.

⁷²⁶ UNDP, *Programming for Justice*, *supra* note 220 at 17.

1. Participation is Human Rights-based

To start, a participatory framework must adhere to human rights principles as it would be morally and philosophically inconsistent to employ strategies in the implementation of the human rights-based capabilities approach that violated or undermined the very human rights that form the core of that theory. Moreover, as explained in chapter 2, the exercise of power by the fiduciary, whether it is the host state, UNHCR or another aid provider, is subject to the limitations that arise from the beneficiary's dignity as a person: namely a commitment to non-instrumentalization and non-domination that takes the form of human rights.⁷²⁷ Public deliberations or participation then, as a demonstration of the fiduciary's appropriate solicitude for the interests and dignity of each individual under its authority and as a means of protecting them against domination, must likewise be subject to the constraints imposed by an adherence to human rights principles, specifically the requirements of equality and non-discrimination.

To this end, participation in relevant strategies must be inclusive and representative; women, the elderly, ethnic and religious minorities must all be able to participate freely. More than that, however, their participation must be actively facilitated. As noted above, mere presence in decision-making forums does not equate with meaningful participation. The complexities of power dynamics within the refugee community must be taken into consideration in the design and implementation of participatory systems in order to ensure that participation does not end up merely reproducing or reinforcing existing inequalities and is not co-opted by powerful interests within the community.⁷²⁸ Thus for example in a community where women or minorities do not feel free to voice their opinions in the presence of dominant actors, the objective of equal and meaningful participation may require that women and men or individuals from different religious groups meet separately. Similarly, the design of participatory mechanisms must take care to avoid unconscious bias, for example on the basis of language or education level.⁷²⁹ Something as seemingly neutral as the location or timing of meetings may impose a disproportionate burden on certain groups that ultimately prevents them from participating. For instance, security concerns may prevent women from attending meetings held at night.

⁷²⁷ See chapter 2, *The State-Refugee Fiduciary Relationship: The Legal Obligation to Secure Human Rights-based Capabilities* at 64, above.

⁷²⁸ See e.g. Deneulin, "Democracy", *supra* note 640 at 190.

⁷²⁹ UNHCR, *Operational Protection*, *supra* note 465 at 121.

2. Participation is Inclusive and Direct

In addition to being egalitarian and non-discriminatory, participatory approaches must be inclusive and draw from a broad base.⁷³⁰ These requirements can be traced back to the principle of inherent human dignity that provides the foundation for both the human rights-based capabilities approach and the fiduciary theory. The inherent dignity of each individual entitles them to have their voice heard and to have due regard given to their individual interests. Generally, refugee participation with host state and other authorities does not require the direct involvement of refugees and is instead mediated through refugee leadership committees and organizations.⁷³¹ Where those committees and councils are representative and democratic, they may be a resource-effective way of ensuring refugee participation. Additionally, the involvement of traditional leadership systems is important as they can lend legitimacy to legal empowerment initiatives, act as advocates and facilitate the transfer of information to the refugee community.⁷³² However, it is not always clear to what extent these leadership institutions represent the population or merely reproduce existing inequalities. Relying exclusively or primarily on traditional leadership structures puts these leaders in the position of gatekeepers and may provide external actors with a skewed perception and reinforce power monopolies within refugee camps by allowing refugee leaders to control the flow of information and even resources.⁷³³ Broad community participation, for example through the use of public or open consultations, as opposed to interacting through a single point of contact, can help to ensure that legal empowerment initiatives are based on accurate and representative information and to prevent certain powerful groups from hijacking these initiatives (elite capture). In short, broad participation helps to ensure accountability.

3. Participation is Informed, Responsive and Accountable

For participation to be truly rights-respecting, it must be informed, responsive and transparent. Encouraging individuals to participate in policy or strategy development or

⁷³⁰ See e.g. UNHCR, *Community-Based Approach*, *supra* note 349 at 16ff.

⁷³¹ CASA Consulting, *The Community Services Function in UNHCR: An Independent Evaluation*, UN Doc EPAU/2003/02 (Geneva: UNHCR, 2003) at 47, online: www.unhcr.org/3e2d233ba.html; see also Tania Kaiser, "Participation or Consultation? Reflections on a 'Beneficiary Based' Evaluation of UNHCR's Programme for Sierra Leonean and Liberian Refugees in Guinea, June-July 2000" (2004) 17:2 *Journal of Refugee Studies* 185 at 188.

⁷³² See UNHCR, *Operational Protection*, *supra* note 465 at 121; CASA Consulting, *supra* note 731 at 47.

⁷³³ See CASA Consulting, *supra* note 731 at 47.

implementation without ensuring that they are provided with the resources, particularly the information, necessary to make informed decisions demonstrates a lack of respect for both for the process of participation and for the individuals themselves. As the axiom says, knowledge is power. Withholding relevant information from potential participants is an exercise of power that is inconsistent with a fiduciary duty. Furthermore, one of the overarching objectives of the HRCA is to enable individuals to be effective agents in their own lives and refugees cannot be effective participants in legal empowerment or the development of any other capability if they are not properly informed. Thus, for members of the refugee community to participate actively in objective-setting, program design and implementation, they must be able to access information about the background, available resources, objectives, alternative strategies, requirements and processes involved.

The disclosure of important information is not only a condition precedent to meaningful participation; it is also an integral part of it. One of the common criticisms of refugee “consultation” processes is that they are often one-sided; refugees are asked to discuss issues and provide opinions and information, but rarely receive any response or follow-up from external actors.⁷³⁴

According to the typology presented above, such processes can barely be considered to be forms of participation, for any genuine participation is a two-way process that requires a response.⁷³⁵ In order to constitute meaningful participation, refugees who are involved in consultations, discussions or other participatory activities are entitled at the very least to be kept informed about the outcomes of those activities and the processes through which decisions based

Box 6. Making Complaint Procedures Responsive

The problem of one-sided communication is highlighted by The Border Consortium’s complaints procedure in place in the Burmese refugee camps. Comment or complaint boxes are set up around the camp as a means of ensuring that the voices of refugees are heard. Unfortunately, as most of the complaints are delivered anonymously, it is difficult to provide a response. One solution that TBC came up with was to note the main comments received and explain what was being done to address them in the regular newsletter that was distributed to camp residents.

Interview of Community Outreach Officer, Thai Burma Border Consortium (now The Border Consortium) (May 2011), Mae Sot Thailand [on file with author].

⁷³⁴ *Ibid* at 55; UNHCR, *Operational Protection*, *supra* note 465 at 122.

⁷³⁵ CASA Consulting, *supra* note 731 at 57; UNHCR, *Operational Protection*, *supra* note 465 at 122.

on those outcomes are made, and should preferably be directly involved in every step of the decision-making process.⁷³⁶

The relationship between power-holders and the refugee population delineated by the fiduciary theory is one founded on legal rights and obligations; it is a bilateral relationship of responsibility which demands that the parties be accountable to one another. In the context of protracted refugee situations, this requirement of accountability both with respect to the outcomes of participatory activities and any subsequent actions is an important dimension of the shift from charity-based to rights and responsibility-based refugee assistance. Thus, in addition to the requirements that participatory initiatives be undertaken in an informed and responsive manner, systems of representation or participation must also have clear and transparent processes that are well communicated to the refugee community.⁷³⁷ In this way, the community will be able to judge whether real participation has taken place and be able to form reasonable expectations of the outcome of participation. Likewise, individuals will be able to make informed decisions about whether they wish to participate in the legal empowerment initiatives and if so, what that participation will require. For example, if a proposed method of participation is to have community members complete a survey, those individuals must be informed of the purpose of the survey, whether the information will be confidential, who will have access to it, what the data will be used for and, by extension, how it may affect their lives. Recently, UNHCR and its partners conducted a profiling survey in the Burmese refugee camps in Thailand investigating, among other things, popular support for different durable solutions. However, the strong emphasis on questions regarding life after a return to Burma raised the fear among members of the refugee community that their responses could be used in the future as an indication of voluntary return. Because of these concerns and the lack of communication regarding the purposes to which this information would be put, many members of the refugee community refused to participate in the survey process.⁷³⁸

⁷³⁶ See CASA Consulting, *supra* note 731 at 57; UNHCR, *Operational Protection*, *supra* note 465 at 122.

⁷³⁷ See e.g. UNHCR, *Operational Protection*, *supra* note 465 at 121.

⁷³⁸ Frank Sullivan, "Fearing Repatriation, Mae La Refugees Shun Profiling Survey", *Democratic Voice of Burma* (5 June 2013), online: www.dvb.no/news/fearing-repatriation-mae-la-refugees-shun-profiling-survey/28656; Burma Partnership. "Profiling Survey Stokes Refugee Fears", *Burma Partnership* (24 June 2013), online: www.burmapartnership.org/2013/06/17-23-june-profiling-survey-stokes-refugee-fears/ [Burma Partnership, "Profiling Survey"].

4. Participation is Realistic

Last but not least, meaningful participation requires that refugees play active roles in the actual implementation of initiatives. It follows then that the respect due to each potential participant means that participatory initiatives, and their demands on participants, must also be realistic. On the one hand, as suggested by CASA Consulting as part of their evaluation of the community services function of UNHCR, this requirement infers that when members of the refugee community or their organizations are asked to participate in a particular way or are entrusted with responsibility for some aspect of implementation, care must be taken to ensure that they have the requisite capacity and the means (time, human and material resources) to fulfill these obligations successfully.⁷³⁹ On the other hand, the need for participatory initiatives to be realistic requires a careful re-evaluation of the appropriateness of what is expected of the refugee community, specifically the expectations of volunteerism. Although it is not necessarily unreasonable to assume that refugees will participate in these activities on a volunteer basis given that the objective is to improve their own situation, these expectations can become severely burdensome for the communities. Within camps, refugees are increasingly expected to volunteer substantial amounts of time and labour to their communities for a broad range of activities including serving on committees, participating in food distribution, providing camp security, camp maintenance, labour for infrastructure development (building shelters, schools, etc.), working in health clinics and schools, and so on. These demands become problematic as cuts to funding and changing conditions require refugees to increasingly provide for their own subsistence needs. As the time that refugees have to devote to community service becomes more limited and valuable, onerous volunteer expectations are likely to deter refugee participation.⁷⁴⁰ Consequently, the expectations with regard to refugee time and resources should be reviewed periodically and ways of compensating refugees for their time and service found. However, a careful balance must be struck in order to ensure that legitimate compensation provided to facilitate meaningful participation does not devolve into mere participation for material incentives.

⁷³⁹ CASA Consulting, *supra* note 731 at 57.

⁷⁴⁰ *Ibid* at 57, 46.

D. Obstacles to Meaningful Refugee Participation in Legal Empowerment

The meaningful participation necessary to the human rights-based capabilities approach and the fiduciary theory requires that refugees are not only *able* to participate and have the opportunity to participate, but that they actually *do* participate. Consequently, merely making participatory mechanisms available is necessary but insufficient. The Commission for the Legal Empowerment of the Poor identifies this distinction as the difference between formal social exclusion and substantive social exclusion.⁷⁴¹ Formal social exclusion refers to the complete absence or exclusion of the disadvantaged from the discussion: the lack of participatory mechanisms. Substantive social exclusion refers to the silence of the disadvantaged even within those forums. This difference is perhaps best illustrated by looking at the participation of women. In many cases women are completely absent from decision-making processes. This is formal social exclusion. In other cases, for example where funding is conditional upon gender quotas being met, women may be given seats in decision-making bodies but their effective participation may still be limited by social and cultural conventions that give the voices of women little weight. This is substantive social exclusion in the form of passive participation.

Given these nuances, meaningful refugee participation, and specifically participation in legal empowerment initiatives, can be impeded in many ways. The host state may limit the ability of refugees to organize or engage in legal empowerment activities. The state may also place limits on the activities of non-governmental actors and aid providers or obstruct the ability of those actors to engage fully with the refugee community in a meaningful way (for example by imposing onerous requirements for obtaining camp passes and limiting their presence in refugee camps). Additionally, despite the increased lip service paid to human rights-based and community-based approaches that include refugee participation as a guiding principle, it is unclear to what extent aid actors generally, and UNHCR specifically, are committed to truly meaningful participation of refugees in decision-making in accordance with the requirements set out above, as opposed to the shallow forms of participation represented in categories 1-4 of the typology of participation.⁷⁴²

⁷⁴¹ CLEP, *Volume Two*, *supra* note 360 at 298.

⁷⁴² Passive participation, consultative participation, petitionary participation and participation for material incentives.

Consider as an example the work of UNHCR. In its reference guide to good practices in refugee camps and settlements, UNHCR has stated that a “good” practice is one that incorporates, among other things, a community-based approach including participation by persons of concern.⁷⁴³ This type of process is one that allows refugees to “express their needs and to decide their own future with empowerment, ownership, and sustainability” and that recognizes that “they are active participants in decision-making.”⁷⁴⁴ The importance of participation is further elaborated in UNHCR’s *A Community-Based Approach in UNHCR Operations* where it is explained that meaningful participation “refers to the full and equal involvement of all members of the community in decision-making processes and activities that affect their lives, in both public and private spheres.”⁷⁴⁵ In that manual, UNHCR outlines the many benefits of participation that have been discussed here, from informed decision-making and improved programming to the promotion and protection of self-esteem and the reduction of feelings of powerlessness. An acknowledgement is also made that participation is often narrowly viewed as a means to improve project performance as opposed to a method “of fostering critical consciousness as the basis for active citizenship.”⁷⁴⁶

Nevertheless, a clear understanding of the potential advantages of participation and a commitment to refugee participation at the policy level does not always translate into a substantive change in operations. Tellingly, in an independent evaluation of UNHCR’s community services function, CASA Consulting remarked that refugee leaders often complained that UNHCR engaged in one-sided and largely symbolic consultations which implied no responsibility to act on the part of UNHCR or any substantive role in decision-making for the refugee community.⁷⁴⁷ The evaluation found that meaningful refugee participation was minimal and raised questions about “the actual willingness and ability of UNHCR to promote and encourage a meaningful, rather than a token or symbolic, level of refugee participation.”⁷⁴⁸ Similar concerns have been raised in other evaluations including Tania Kaiser’s 2001 beneficiary-based evaluation of UNHCR’s programme in Guinea where the author made the following statement:

⁷⁴³ UNHCR, *Operational Protection*, *supra* note 465 at 13.

⁷⁴⁴ *Ibid* at 16.

⁷⁴⁵ UNHCR, *Community-Based Approach*, *supra* note 349 at 17.

⁷⁴⁶ *Ibid* at 18-19.

⁷⁴⁷ CASA Consulting, *supra* note 731 at 55.

⁷⁴⁸ *Ibid* at 54, 56.

[A] centralized, top down programme, is unlikely to be prepared to allow beneficiaries to share power and affect decision making in the way true participatory work demands. UNHCR's programmes are predicated on refugees and other beneficiaries functioning as recipients of assistance and not as decision makers and judges of it. Mechanisms rarely exist in such programmes for refugees to become involved in any meaningful way in discussions about the best use of resources, or about effective modes of assistance delivery.⁷⁴⁹

Although UNHCR has developed instruments such as the above-mentioned manual and the *UNHCR Tool for Participatory Assessment in Operations*⁷⁵⁰ since these evaluations were conducted, further research would need to be conducted in order to determine whether and to what extent these policy developments have had any substantial impact on operations. Certainly there remain many situations where meaningful participation is lacking.⁷⁵¹ As noted earlier, UNHCR and its partners recently came under criticism from Burmese refugees in Thai camps for having conducted a profiling survey with little input from refugees. The refugee community felt that the survey reflected a strong preference for repatriation to Burma as the only viable solution and did not allow the participants to freely express their true opinions. As evidence of their frustration, many of the refugee community members who had been chosen to administer the survey refused to participate after having seen the questions in a training session.⁷⁵² Indeed, without a very strong ethical, ideological and political commitment to participation at all levels of UNHCR operations and willingness to set aside sufficient resources to achieve it, the institutional culture and organizational structure (hierarchical, donor-dependent, limited resources) of UNHCR have the potential to inhibit meaningful participation in most instances.

Obstacles to refugee participation in legal empowerment can also be found within the refugee community itself. Even in situations where participatory mechanisms are in place, some refugees may be unable or unwilling to engage with them. A lack of engagement can be the result of various factors. Depending upon the mechanisms used, refugees who are illiterate may not be able to participate or, alternatively, they may avoid participating out of a sense of their

⁷⁴⁹ Tania Kaiser, *A Beneficiary-Based Evaluation of UNHCR's Programme in Guinea, West Africa*, UN Doc EPAU/2001/02 (Geneva: UNHCR, 2001) at 27, online: www.unhcr.org/3b0a2a752.html.

⁷⁵⁰ UNHCR, *The UNHCR Tool for Participatory Assessment in Operations* (Geneva: UNHCR, 2006), online: www.unhcr.org/450e963f2.html.

⁷⁵¹ See e.g. Paul O'Hagan, *An Independent Impact Evaluation of UNHCR's Community Based Reintegration Programme in Southern Sudan* (UNHCR, 2011) at 40, online: www.unhcr.org/4e41237a9.html. See generally Elisabeth Olivius, "(Un)Governable Subjects: The Limits of Refugee Participation in the Promotion of Gender Equality in Humanitarian Aid" (2014) 27:1 *Journal of Refugee Studies* 42.

⁷⁵² Sullivan, *supra* note 738; Burma Partnership, "Profiling Survey", *supra* note 738.

own inferiority to educated members of the community. In other cases, resistance to participation may be based on cultural considerations. For example, in the case of legal empowerment certain aspects such as the empowerment of women or the use of formal justice systems may be viewed by some as being in conflict with the community's cultural background and traditions. The existing power structures within the camp may also prevent broad and meaningful participation. For example, in a camp that has been militarized, the refugee leadership may be unduly influenced by the military groups and thus unable to accurately represent the community. Similarly, community members, particularly those who come from traditionally disadvantaged groups (women, the disabled, religious or ethnic minorities, etc.) may face a variety of obstacles to their participation.

While many of these obstacles are linked either to culture or to power relations within the refugee community, the nature of refugee-hood itself may also deter participation in certain initiatives. For refugees, the need to hold on to the belief that exile is merely a temporary situation may make individuals less willing to devote time and effort to programs like legal empowerment initiatives that are necessarily longer-term, as to do so would be to acknowledge that repatriation is not feasible in the short-term. Finally, some communities may have a culture of learned helplessness, a “resigned attitude and lack of expectations among those who feel that traditional power relations will invariably leave them powerless to assert their rights or to participate in local public decision making or other governance processes.”⁷⁵³ This may be of particular relevance in protracted refugee situations where communities have seen aid projects and assistance initiatives come and go for years, if not generations, with little sustained impact on the refugees' lives and where participation has historically meant being “consulted” repeatedly by authorities without their concerns and interests being reflected in subsequent decisions.

Although the factors described in this section constitute potential barriers to refugee participation, the use of real and effective participatory mechanisms can help to overcome, or at least minimize, these obstacles. Power structures within a refugee camp that impede the participation of certain groups, can themselves be modified by disadvantaged groups benefiting from the empowering effects of participation thus changing the balance of power within a camp.

⁷⁵³ Golub & McQuay, *supra* note 360 at 41.

IV. Implementing Legal Empowerment within a Participatory Framework⁷⁵⁴

Thus far we have ascertained that the adoption of the fiduciary theory and the human rights-based capabilities approach supports and even demands the use of a participatory framework in implementing the legal empowerment of refugees. According to the fiduciary theory, the fiduciary must demonstrate appropriate solicitude for the interests and rights of those under its authority in order to avoid their domination and instrumentalization. Public deliberations or the guarantee of meaningful participation are important manifestations of this responsibility. Likewise, the human rights-based capabilities approach has as its objective the development of the most valuable capabilities of each individual; capabilities that can only be identified and secured with the full and active participation of the individuals involved. Underpinning both theories is a focus on the inherent dignity of the individual and the agency that that dignity implies.

As legal empowerment initiatives seek to enable refugees and refugee populations to use the law and legal mechanisms to protect and advance their rights and to acquire greater control over their lives, adopting a participatory framework for the legal empowerment of refugees means identifying objectives, designing and implementing strategies, evaluating outcomes and making decisions in such a manner as to ensure that refugees play the greatest role and have the highest degree of control possible in each stage of legal empowerment. However, given the different characteristics and complexities of each refugee situation, it is not feasible to design a universal path to legal empowerment applicable in all protracted situations. The IRC's Legal Assistance Center program may work very well in Thailand where there is a functioning (if imperfect) national justice system and where the host state is relatively stable, but what about refugee camps in Sudan, Chad and the Democratic Republic of Congo, countries that have suffered from substantial conflict and rank at the top of the Failed States Index?⁷⁵⁵ Yet while it may be impossible to come up with a one size fits all solution to the legal empowerment of refugees, we can provide some insight into the basic criteria or strategies that are likely to produce successful results by drawing both on existing and past practical examples and on the theoretical scholarship. The following sections of this chapter identify and explore some of these

⁷⁵⁴ Although the emphasis here is on the legal empowerment of refugees, much of this discussion would be equally applicable to the realization of other human rights-based capabilities.

⁷⁵⁵ The Fund for Peace, *The Failed States Index 2013* (2013), online: ffp.statesindex.org/rankings-2013-sortable.

elements and how they can contribute to successful legal empowerment within a participatory framework, with particular attention being paid to strategies for addressing the important power imbalances that are characteristic of refugee situations.

A. Legal Empowerment is Context-Specific

To start with, a participatory approach to legal empowerment requires that legal empowerment be context-specific.⁷⁵⁶ Legal empowerment must be grounded in the political, social, economic, legal and cultural realities of a particular situation and this has important implications for project design and implementation. A participatory approach requires that the starting point for legal empowerment be the needs and interests of the refugees as they themselves perceive them, which means that there is no single entry point that can be employed in all cases.⁷⁵⁷ As each situation will be characterized by different problems, needs, interests and opportunities depending upon its specific circumstances, legal empowerment initiatives must also be case-specific and tailor-made to the particular refugee context.⁷⁵⁸ Consequently, greater attention must be paid to the role of local actors, to local ideas and initiatives, and to learning from good practices in other similar contexts rather than the transplantation of existing, and generally Western, models which are unlikely to take root.⁷⁵⁹ Successful legal empowerment initiatives will respond to the needs and desires of the refugees and be designed to maximize the capacities of different parties and to accommodate their interests.

It follows then that successful context-specific legal empowerment initiatives, and especially external interventions, will be preceded by and based on an in-depth contextual analysis that is the product of active and meaningful participation of the refugee population.⁷⁶⁰ This type of analysis includes identifying and evaluating among other things the problems, the

⁷⁵⁶ Context-specificity is one of the most commonly discussed characteristics of legal empowerment: see e.g. UNDP, *Envisioning Empowerment*, *supra* note 446 at ix; CLEP, *Volume Two*, *supra* note 360; Van de Meene & van Rooij, *supra* note 447 at 22; Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 16.

⁷⁵⁷ See e.g. Johanna Cunningham, R Sudarshan & Ewa Wojkowska, *Making Everyone Work for Legal Empowerment of the Poor* (Report of the Regional Dialogue on Legal Empowerment of the Poor, Bangkok, 3-5 March 2009); CLEP, *Volume Two*, *supra* note 360; Golub, “Rule of Law Orthodoxy”, *supra* note 406; De Langen & Barendrecht, *supra* note 536.

⁷⁵⁸ See e.g. UNDP, *Envisioning Empowerment*, *supra* note 446 at xi; Van de Meene & van Rooij, *supra* note 447 at 14.

⁷⁵⁹ See e.g. Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 26; Van de Meene & van Rooij, *supra* note 447 at 14.

⁷⁶⁰ CLEP, *Volume Two*, *supra* note 360 at 296; Asian Development Bank, *supra* note 360; Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 16.

potential risks and challenges, the nature, structure, capacities and interests of different actors, the socio-economic, political and cultural environment, the structural causes of human rights failures, etc. Without a deep and comprehensive understanding of the context that can often only be provided by the refugee community itself, external intervention risks potentially exacerbating tensions and conflicts, undermining existing structures and initiatives and even compromising the security and dignity of refugees.

B. Legal Empowerment is Bottom-up, Top-down, Outside-in and Inside-out

The difficulty of overcoming the power imbalances that are characteristic of refugee situations is by far the most significant obstacle to legal empowerment in protracted situations. Historically most legal initiatives have been top-down, with much of the emphasis focused on the reform of legislation and legal institutions as opposed to the grass-roots empowerment of vulnerable groups. This traditional approach demonstrates an adherence to the rule of law orthodoxy⁷⁶¹ but may also be partly a function of the challenges posed by existing power structures and entrenched interests. It is far easier to convince a state to participate in an initiative that has a direct and immediate benefit for the upper echelons of society which may eventually trickle down to the rest of the population than to convince a state to facilitate empowerment initiatives that are likely to challenge its exercise of its authority. Nevertheless, if the objective is to enable refugees to gain control over at least some dimensions of their own lives, the strategies employed to achieve this end must themselves be empowering. Research has shown that empowerment does not happen from the top-down alone.⁷⁶² To give full weight to the interests, capabilities and resources of the refugee community, host state authorities and other external interveners need to encourage meaningful participation of refugees and to respect and accept them as partners working towards the same objective, finding solutions to protracted refugee situations, rather than as clients or burdens.⁷⁶³ The legal empowerment of refugees can likely

⁷⁶¹ See chapter 3, Part III.B. Contrasting Legal Empowerment and the Rule of Law Orthodoxy at 130, above.

⁷⁶² See e.g. Banik, “Legal Empowerment”, *supra* note 363 at 129. See also the discussion of the role of agency in empowerment in Alsop, Bertelsen & Holland, *supra* note 365 at 11.

⁷⁶³ In the evaluation of the community services function of UNHCR it was found that UNHCR lacked an ethic of participation “that demonstrates UNHCR’s commitment to participatory processes and partnership building in relation to both refugees and NGO partners.” Consequently, it was recommended that UNHCR adopt a set of ‘ethics of participation’. [CASA Consulting, *supra* note 731 at 57.] This set of ethics can be found in UNHCR, *Operational Protection*, *supra* note 465 at 121.

only be achieved through a delicate balance that takes into consideration the relative power, the interests and concerns of all relevant stakeholders: the refugees, the host state population, the host state authorities and humanitarian actors.

1. Bottom-Up

The emphasis on participation, context-specificity and empowerment leads logically to the most widely recognized and fundamental characteristic of legal empowerment approaches: that they must be primarily bottom-up with priority given to the role of civil society.⁷⁶⁴ Both past development experience and the theoretical framework proposed here suggest that legal empowerment is much more likely to be the result of grass-roots initiatives than top-down reforms.⁷⁶⁵ Beneficiaries have the capacity to disrupt legal empowerment if they are not in agreement with it but they also are best placed to promote it, particularly where the host state is unable or unwilling to participate. In fact, in situations where the host state is firmly opposed to the legal empowerment of refugees, or where the state system is particularly weak, oppressive or dysfunctional, refugee community-led initiatives may be the only feasible option for achieving legal empowerment.⁷⁶⁶

The need for a bottom-up approach also reveals the importance of civil society. Studies suggest that legal empowerment flourishes best in situations where there is a vibrant civil society, particularly where the government is responsive to it.⁷⁶⁷ Civil society organizations tend to be more diverse, flexible and innovative than state institutions.⁷⁶⁸ Civil society may be able to identify potential partners among host state authorities (individuals or agencies) and to cultivate relationships and work with them to further legal empowerment.⁷⁶⁹ Consequently, one way to support and promote legal empowerment of refugees is by investing in and strengthening the capacities and skills of civil society within the camps, as well as supportive host state civil society organizations.⁷⁷⁰ Not all civil society organizations are created equal though, and so to ensure that legal empowerment is achieved within the framework of the human rights-based

⁷⁶⁴ See e.g. CLEP, *Volume One*, *supra* note 360 at 77; Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 12; UNDP, *Envisioning Empowerment*, *supra* note 446 at ix; Banik, “Legal Empowerment”, *supra* note 363 at 129; Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 3.

⁷⁶⁵ Banik, “Legal Empowerment”, *supra* note 363 at 129.

⁷⁶⁶ CLEP, *Volume Two*, *supra* note 360 at 301.

⁷⁶⁷ Golub & McQuay, *supra* note 360 at 86; Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 40-41.

⁷⁶⁸ Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 28.

⁷⁶⁹ *Ibid* at 28; Asian Development Bank, *supra* note 360 at 52.

⁷⁷⁰ Golub, “One Big Step”, *supra* note 427 at 113; Maru, “Access to Justice”, *supra* note 410 at 18.

capabilities approach and that it is not co-opted by powerful elements within the refugee community, it is important that those civil society organizations that take the lead in promoting legal empowerment espouse a truly participatory approach with all that that entails (human rights-based, representative...).

By not relying on external experts or the host state to initiate change, bottom-up and civil society-led legal empowerment initiatives also play an important role in mitigating the power imbalances that exist between actors and in circumventing some of the power structures that can impede the development of refugee capabilities. Ideally, a participatory approach to legal empowerment would see refugees not only participate in grassroots initiatives but actually be the drivers behind them, thereby avoiding domination and instrumentalization by aid providers or state authorities and increasing the control that refugees have over their own objectives and well-being. This independence, though recognized in theory, is difficult for some actors to adhere to in practice. For example, while the CLEP admits the importance of adopting bottom-up strategies, the roadmaps for implementing legal empowerment that it sets out are highly state-centric, adopt a relatively shallow conception of beneficiary participation⁷⁷¹ and, in the words of Stephen Golub, focus primarily on persuading “national leaders to adopt a legal empowerment agenda for the benefit of the poor, rather than pointing to ways in which the poor and their allies can formulate their own agendas, get relevant reforms adopted, and, most crucially, get good laws implemented to their benefit.”⁷⁷² Nevertheless, the adoption of a truly participatory framework for legal empowerment, one that supports and enhances the capacities of beneficiaries, may help refugees (and aid providers) to overcome the discrepancy between theory and practice.

The priority given to bottom-up and civil society initiatives should not belie the fact that the host state government still has an important role to play. In theory, in a situation where social mobilization is strong, grassroots legal empowerment initiatives could strengthen and grow to such an extent and exert such pressure that they would eventually trigger government action and reform. In this way democratic change occurs as a result of the “voice of the people”.

⁷⁷¹ See generally Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (New York: Commission on Legal Empowerment of the Poor, 2008). Although beneficiaries are included in many, if not most, of the stages of legal empowerment according to CLEP, the language of the report gives the reader the strong impression that the state is still conceived of as the primary driver.

⁷⁷² Golub, “One Big Step”, *supra* note 427 at 110.

Unfortunately, this model is largely inconsistent with protracted refugee situations. Community-based initiatives can grow within refugee camps but there is a substantial risk that if they extend their reach too far, instead of eliciting positive changes, they will trigger retaliation by either the host state or the local communities. Equally likely, refugee calls for change may simply be ignored as states often see little to gain in heeding them and little to lose in ignoring them (despite the fact that this is a violation of the state's fiduciary duty to the refugee community, not to mention its international human rights obligations). Thus, although top-down initiatives will never achieve true legal empowerment on their own, they are still vital to legal empowerment.

Box 7. The Bolivia National Access to Justice Program: Mixed Outcomes

Founded in 2004 as a collaboration between the Bolivian Ministry of Justice and the U.S. Agency for International Development (USAID), the Bolivia National Access to Justice Program (BNAJP) led to the creation of a network of community justice centers in poor rural and urban communities around the country. Although these centers have proven highly effective in engaging local communities and providing legal services, they also represent a cautionary tale. The involvement of the Ministry in this project meant that the centers were not allowed to bring cases against the government for denial of rights nor were they permitted to engage in advocacy on behalf of the communities on many policy issues. Eventually, in 2009, the government took full control of the centers and replaced all staff members by less qualified personnel widely considered to be more government-aligned.

Tiernan Mennen, "The Mystery of Legal Empowerment: Livelihoods and Community Justice in Bolivia" in Stephen Golub ed, *Legal Empowerment: Practitioners' Perspectives* (Rome: International Development Law Organization, 2010) 63; Haki Network, "The Legal Empowerment Approach to International Development: White Paper" (September 2011), online: LEPNet www.lepnet.org/group/access-justice/file/haki-legal-empowerment-white-papers.

2. Top-Down

Even though facilitating and promoting bottom-up initiatives is the highest priority within a participatory framework, many writers have acknowledged that legal empowerment will be difficult, if not impossible, to achieve and sustain without some degree of involvement by the state and other authorities as well.⁷⁷³ Indeed, as the discussion of the fiduciary theory established, there are certain discretionary powers that affect the rights and interests of refugees that can only be exercised by the state and its delegates, including aid providers such as UNHCR. One such

⁷⁷³ See e.g. Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (New York: Commission on Legal Empowerment of the Poor, 2008); Van de Meene & van Rooij, *supra* note 447; Asian Development Bank, *supra* note 360 at 51.

example would be the registration or status determination of refugee claimants. Thus, while focusing only on top-down state-led initiatives may merely end up benefiting the elite segments of society, it would be irresponsible and counterproductive to ignore that the state and other authorities exercise significant power and influence over the lives, not to mention the legal empowerment, of refugees.⁷⁷⁴ Refugee participation and legal empowerment initiatives can either be supported by the state and other authorities or they can be impeded by them, but without at least a minimal degree of buy-in by the state, it is unlikely that the legal empowerment of vulnerable groups will be sustainable.

More than that, however, as we have seen in the last chapter, legal empowerment is about access to justice, the administration of justice, accountability and good governance, issues that are intimately linked to state institutions. Can access to justice really be achieved without state involvement? Although legislative reform may not be the most effective starting point for legal empowerment, it is hard to envision it not playing an important role at some point in the process. A substantial reason for adopting a legal empowerment approach is that disadvantaged groups are excluded from state institutions. Thus the ultimate objective is not to establish a separate independent set of institutions and procedures but to facilitate the inclusion of those groups by enhancing their capabilities *and* by reforming the deficient institutions.

To best achieve both refugee participation and legal empowerment, the role of the state should be viewed as complementary to that of civil society.⁷⁷⁵ Government support and collaboration, whether expressed in words, resources or actions, can help to encourage and sustain change. For instance, in some cases central authorities may be able to facilitate bottom-up initiatives where local interests have put up barriers. In other cases, local authorities may be able and willing to act as change-agents and policy-champions within institutions to which disadvantaged groups do not have access.⁷⁷⁶ Even in those instances where the state and its delegates alone have the authority to act, under the fiduciary theory their actions are subordinate to the interests of those subject to their power.

Nevertheless, this support is not necessarily easy to come by and many states do not abide by their fiduciary obligations. The greatest obstacles to legal empowerment and the realization of other human rights-based capabilities are unequal power relations, the structures

⁷⁷⁴ Van de Meene & van Rooij, *supra* note 447 at 19-20.

⁷⁷⁵ See e.g. Asian Development Bank, *supra* note 360 at 73; UNHCR, *Operational Protection*, *supra* note 465 at 16.

⁷⁷⁶ CLEP, *Volume Two*, *supra* note 360 at 288.

that support these power dynamics and the entrenched interests of power-holders.⁷⁷⁷ The host state and other powerful actors (including host state officials, aid providers and even refugee authorities) may present important opposition because they perceive legal empowerment to be a zero-sum game that threatens their position within society, their traditional power advantages or their benefits and privileges.⁷⁷⁸ According to this conception, any gain for refugees corresponds automatically to a loss of power for the state and other authorities. So long as this perception persists, the legal empowerment of refugees is unlikely to benefit from the support of the elite.

The obstacle to legal empowerment presented by the resistance of authorities is compounded by the presence of discrimination, bias and institutional inertia which may be linked to power dynamics but which may also exist separately. Refugees often face legal and institutional discrimination; for example they may not be entitled to access legal aid or may be subject to unequal treatment under the law. Refugees also face discrimination and bias in the context of everyday interactions with both authorities and the host state population. Even where the law is not explicitly discriminatory, negative social attitudes and beliefs about refugees held by the host state population and authorities may impede legal empowerment and the development of refugee capabilities and threaten the security of refugees trying to better their situation.⁷⁷⁹ Given that refugees are frequently viewed as a burden on the host state or as usurpers when it comes to the distribution of resources and benefits, the idea of devoting time and energy to empowering them to use the law in a country that is not their own and for the purpose of claiming more rights in that country may have little traction and garner little support within the host state. Furthermore, even in situations where there is less ideological resistance to refugee empowerment, bureaucratic or institutional inertia may present an important challenge. Governments, ministries and large aid organizations are big bureaucracies made up of hundreds of individual officials; getting those institutions to change their approaches, strategies or objectives can be a herculean task that involves negotiating institutional culture, power tensions within the institution, funding and finances, structural weaknesses, capacity development, etc.

⁷⁷⁷ See e.g. Van de Meene & van Rooij, *supra* note 447 at 15.

⁷⁷⁸ See e.g. Cunningham, Sudarshan & Wojkowska, *supra* note 757 at 2; Asian Development Bank, *supra* note 360 at 30.

⁷⁷⁹ See e.g. Harrell-Bond, "Humanitarian Work", *supra* note 3; UNHCR, *Operational Protection*, *supra* note 465; UNDP, *Programming for Justice*, *supra* note 220 at 168-169; Da Costa, *Administration of Justice*, *supra* note 8 at 31-32.

Even in situations where policy leaders have the will to make changes, individual officials throughout the hierarchy have the potential to impede any meaningful reform.

The challenge then is to secure at least the acquiescence of power-holders to the legal empowerment of refugees and ideally their active support. To achieve this, power-holders must be convinced that legal empowerment is not necessarily a zero-sum game. Generally speaking, major reforms in policy or practice do result in there being “winners” and “losers”; a police officer that uses his authority to extract bribes from refugees will likely be a “loser” if refugees are empowered to take legal action against this type of abuse. However, with regards to the majority of stakeholders, it may be possible to transform what is perceived as being a zero-sum game into a positive-sum game where the legal empowerment of marginalized groups can ultimately benefit even the elite. A key element of this transformation is to look at legal empowerment more comprehensively within a broader context as opposed to evaluating the gains and losses associated with each initiative separately. According to Arjun Sengupta, two ways to evaluate the shift from zero-sum to positive-sum are, first, to examine whether the negative effects in the short term will be compensated for by the positive effects of legal empowerment in the long term, and second, whether there are opportunities to reorganize the system and reallocate resources such that the “losers” benefit as much as the “winners”.⁷⁸⁰ Take for instance the situation of a factory owner. The legal empowerment of his marginalized workforce may mean that he is forced to increase wages in the short term, but in the longer term legal empowerment and its consequences may result in a more organized and productive workforce and access to new markets (as wages increase...). Similarly, access to justice reforms that change the availability of legal services and the accessibility of justice institutions may require significant resources at the initial stages but may ultimately result in a more effective and cost-efficient justice system that benefits not only the poorest members of society but others as well. When marginalized groups are able to engage in economic activities under the protection of the law, society at large may reap the rewards in terms of more secure transactions, a larger market, etc.⁷⁸¹ Finally, awareness of human rights and the ability to seek justice when one’s

⁷⁸⁰ Sengupta, *supra* note 366 at 39.

⁷⁸¹ A simple example of how a refugee assistance initiative can turn into a positive-sum game for an entire country is the carpet industry in Nepal. In the 1960s, with a large influx of Tibetan refugees into Nepal, a Swiss organization launched a carpet weaving program as a livelihood initiative for the refugees. At that time, the marketing of Nepalese carpets was restricted to the domestic market. Over the subsequent years the Swiss organization facilitated access to the international market and what began as a small handicraft project for refugees became the basis for

rights are violated may act as a deterrent to abuses of rights and reduce the level of conflict within a society, for example the incidence of domestic violence, thereby increasing the well-being of the community at large.

Other authors suggest that the support of power-holders for legal empowerment can also be enhanced through strategies aimed at increasing understanding and incentives.⁷⁸² For legal empowerment initiatives to be successful, powerful actors, particularly those who have the capacity to directly impede legal empowerment or, conversely to facilitate it, must understand and accept the implications of legal empowerment.⁷⁸³ Thus it is up to legal empowerment advocates from NGOs, civil society and the international community to convince power-holders of the advantages of legal empowerment, which may include benefits for elites such as the expansion of economic opportunities,⁷⁸⁴ improved reputation,⁷⁸⁵ or something else.⁷⁸⁶ Where rational persuasion is not effective and the benefits that flow naturally from legal empowerment are insufficient, it may be necessary to find ways of making it in the self-interest of government personnel and other authorities to support legal empowerment, specifically by designing empowerment initiatives to include incentives for key actors at different levels to support empowerment.⁷⁸⁷ Incentives can take different forms. At the policy-making level, incentives for the government to support legal empowerment could include additional funding from international organizations for state infrastructure and institutions (court houses, legislative reforms, etc.). At the level of implementation, incentives could include additional resources to facilitate the jobs of officials or special training that could open the door to future promotions.

There are at least two specific arguments that can be made to help secure host state support for legal empowerment in the context of protracted refugee situations. First, one can emphasize the economic potential of refugee populations that legal empowerment may unlock. Refugees bring skills, knowledge and connections with them when they flee their countries of

what was for a time the most important export industry in Nepal. *History of Carpet in Nepal*, online: Central Carpet Industries Association nepalcarpet.org/index.php?page=history; Tsering Dolker Gurung, "The Rise and Fall of the Tibetan Carpet Industry" *Nepali Times* (10 June 2011), online: nepalitimes.com/news.php?id=18273#.UoO3lBrUC-U.

⁷⁸² See e.g. Golub, "One Big Step", *supra* note 427 at 116; Cunningham, Sudarshan & Wojkowska, *supra* note 757 at 2, 10; UNDP, *Envisioning Empowerment*, *supra* note 446 at vii.

⁷⁸³ Banik, "Legal Empowerment", *supra* note 363 at 130.

⁷⁸⁴ CLEP, *Volume Two*, *supra* note 360 at 310.

⁷⁸⁵ See e.g. Asian Development Bank, *supra* note 360 at 30.

⁷⁸⁶ See e.g. Cunningham, Sudarshan & Wojkowska, *supra* note 757 at 2.

⁷⁸⁷ Golub, "One Big Step", *supra* note 427 at 116.

origin. Refugees may also have economic assets and benefit from remittances sent from abroad. All of these resources could be channeled to help in the development of under-developed regions of the host state (where refugee camps are most often found), they could be used to fill a local shortcoming, as was the case in the 1980s when Kenya addressed a shortage of doctors and teachers by granting refugees the right to work,⁷⁸⁸ or, more generally, they can simply bring in additional income to the country.⁷⁸⁹ Refugees in camps also represent a large market to which local producers and manufacturers do not necessarily have access. The legal empowerment of refugees helps to ensure that their rights are respected and that they can participate in the economic, social and cultural life of the host state; if given the legal protection and opportunity, refugees can make important contributions to the economy of the host state. In addition to the economic potential of refugees, legal empowerment strategies themselves also have the potential to make an economic impact by bringing in additional funding from aid agencies.

Another possible incentive for the host state to support legal empowerment was discussed in the previous chapter, namely the connection between legal empowerment and repatriation. If the objective of the host state is to rid itself of the refugee population, then it has an incentive to invest in initiatives that will ensure that repatriation is successful. Legal empowerment is one of these strategies. Even before the stage of repatriation, legal empowerment can help increase the self-sufficiency of refugee populations by giving them access to opportunities and protecting them from the burden of exploitation. To secure the support and engagement of host state officials and other power-holders, legal empowerment could be presented not as a threat to their authority but as a means of expanding economic opportunities and of ultimately reducing the burden on the host state.

3. Outside-In

Attempting to achieve legal empowerment within a participatory framework requires a careful examination and delineation of the roles that external actors including donors, foreign legal experts and aid workers can and should play. Few efforts at legal empowerment will occur without the involvement of at least some outside actors and refugee situations are no different. External actors have the potential to make substantial contributions to legal empowerment by providing resources and expertise, mediating the relationship between vulnerable groups and

⁷⁸⁸ M Smith, "Warehousing Refugees", *supra* note 49 at 47.

⁷⁸⁹ See the discussion of the Nepalese carpet *supra* note 781.

powerful actors, acting as advocates, putting pressure on governments to support reforms, etc. Unfortunately, as mentioned previously, too often aid providers and external experts enter a refugee situation with laudable objectives and then end up taking over, marginalizing refugee organizations and initiatives. Most traditional justice-based approaches fail to ensure an adequate level of meaningful participation: lawyers and other “experts” end up dominating refugees and adopting a paternalistic attitude towards beneficiaries that undermines their agency, as opposed to supporting and partnering with them.⁷⁹⁰

In order to respect and strengthen the dignity of refugees and to guard against domination, the human rights-based capabilities approach and the fiduciary theory both require that the actions of external actors exercising power over the refugee communities be guided by human rights and participatory principles. The assistance provided by external actors is not charity; it is a recognition of the rights and entitlements that all individuals possess by virtue of their common humanity. The role of external actors within this framework then is to facilitate legal empowerment, to create an enabling environment⁷⁹¹ and to support and collaborate with refugees as partners in legal empowerment. To establish and maintain such a partnership requires a careful balance. The extent to which external actors should engage directly with civil society, non-governmental organizations and the state is a matter of debate with some authors calling for only indirect engagement with NGOs and others calling for direct engagement with civil society but no engagement with the state.⁷⁹² At very least external actors must ensure that their interventions support civil society and do not compromise the independence and authority of the organizations and communities with which they work by intervening too much, undermining their support, creating obstacles (for example excessive micro-management of funds) or staying too long, in essence creating a situation of domination that undermines the development of refugee capabilities.⁷⁹³ In an ideal situation the success of a truly participatory approach to legal empowerment would see key decisions being made and implemented by the refugee communities and the host state with little to no direct external intervention. It is difficult to envision this outcome in the context of protracted refugee situations given the existence of severe power imbalances and the particular vulnerability of the refugee population; in these cases the

⁷⁹⁰ Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 6.

⁷⁹¹ Mick Moore, “Empowerment at Last?” (2001) 13 J Intl Dev 321 at 325.

⁷⁹² Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 325.

⁷⁹³ See e.g. CLEP, *Volume Two*, *supra* note 360 at 333; Crocker, *supra* note 680 at 341.

support and intervention of external and international actors may be necessary to overcome these inequalities.⁷⁹⁴ Nevertheless, the existence of the fiduciary relationship between the host state and the refugee community argues in favour of a situation where the empowerment of refugees leads to a diminishing role for external actors.

Partnership, whether between two lovers or aid providers and refugee communities, requires a foundation of understanding and trust. External actors seeking to provide assistance need to understand the context as well as possible but must also recognize that perfect understanding is impossible, particularly for an outsider. There will always be hidden power dynamics and interests within the community that are beyond the reach of outsiders and an acknowledgement of this may help to instill a degree of humility into the work of external actors. In addition to the concealed dimensions of the refugee community, external actors also need to be conscious of their own motivations and how these can impact their work. Take for example an organization that has a short funding cycle and, consequently, requires quick results in order to maintain its funding. This type of organization may be able to provide some assistance in the legal empowerment of refugee communities but may be ill-suited to be a primary partner given the long-term nature of empowerment initiatives. Likewise, the intervention of external actors and the interaction between these actors and the community in participatory approaches has an important impact on the development and spread of norms and values within the refugee community.⁷⁹⁵ Ignoring this role or assuming its beneficence in all cases rings of neo-colonialism and the traditional approaches to refugee situations from which the human rights-based capabilities approach is attempting to move away.

As difficult as it may be for external actors to gain a comprehensive understanding of a refugee situation and of their role within it, building a foundation of trust is even more challenging. Trust goes both ways. On the one hand refugee communities must be able to trust that external actors will act in a responsible and ethical way. Trust, like love or participation, requires open and constant communication: explaining how funding is allocated, providing accurate assessments, informing partners about their objectives, their limits, delays encountered, potential for success... Actors must account and be perceived as accounting for what they do. Above all, however, trust requires that external actors fulfill their commitments and do what they

⁷⁹⁴ See McConnachie, *supra* note 6 at 123.

⁷⁹⁵ Glyn Williams, "Evaluating Participatory Development: Tyranny, Power and (Re)politicisation" (2004) 25:3 Third World Quarterly 557 at 564.

say they are going to do such that false expectations are not created and so that refugee communities can depend on them.

On the other hand, external actors functioning within a participatory framework also need to trust the refugee community. This means trusting that members of the community are able and best placed to identify important interests and objectives; that, perhaps with some external guidance and information, refugees know what is best for themselves. For instance, an aid provider may not like the leadership of a refugee community but if that leadership has been democratically chosen, then it is entitled to respect. Trust also means being willing to depend on the practical abilities, skills and knowledge that the refugee community possesses as opposed to requiring that representatives of the external actors are present to lead, supervise and monitor every intervention. Nevertheless, a foundation of trust does not imply a *carte-blanche*, nor does it require external actors to adopt a relativist perspective. Responsibilities exist on both sides of a trust relationship. External actors must be willing to trust refugee communities but those communities must also be trustworthy. Refugee leaders who misuse funds or fail to respect reasonable conditions and obligations imposed by aid providers cannot expect deference to be shown them by external actors, nor continued support. Trust is an attitude that can only truly exist when parties accept one another as equal in rights and dignity. The absence of this understanding creates a situation of inequality that undermines the possibility for real participation and cooperation.

A simple example of the importance of trust and understanding in interventions by external actors can be seen in an account given to the author regarding a small school for migrant and refugee children on the Thai-Burmese border.⁷⁹⁶ This home-based school, funded largely by a Western aid organization, was run by a husband and wife and catered primarily to the poor Burmese-Muslim community. A small portion of the funding that the school received was used by the wife to buy food so that she could cook a halal lunch for all of the students each day. Eventually the organization became concerned regarding what it considered to be a lack of appropriate accounting or record keeping with regards to the lunches. As a consequence, the organization made the unilateral decision to cut direct funding to the school for those lunches and instead to pay a third party to make the food and bring it in every day. From the donor's perspective, this decision solved the problem: they now knew exactly how much money was

⁷⁹⁶ This case was both recounted to and observed directly by the author in Mae Sot, Thailand (summer 2008).

being used for food and the children were still receiving their lunches. Furthermore, this decision could also be justified as an income-generating project for the Burmese people hired to prepare school lunches for the schools that the organization supported. Yet this decision ultimately represented a breakdown in the partnership between school and funder and an instance of domination and paternalism that is incompatible with a participatory approach, with the development of capabilities and with respect for the dignity and equality of others. Taking control over the money for lunches away from the school sent a clear and condescending message that the funders did not trust the school to use the money in an appropriate manner or to judge how it could best be spent. This decision also exposed a lack of understanding of the context on the part of the funders. To start, there were no receipts for the lunches because all of the ingredients were purchased at the local market where receipts were unheard of. Furthermore, to expect detailed Western-style bookkeeping in a situation where the headmaster is accountant, fundraiser, teacher, administrator and groundskeeper, running an overcrowded school out of his house, where much of the staff and student body are illegal and security is lacking is unrealistic. Having the lunches made externally by the same people who made the lunches for the other primarily Buddhist and Christian schools also meant that the school was unable to ensure that the meals were halal, a very important factor in keeping the trust of its Muslim students' parents. Finally, in making the decision to outsource the lunches, the funding organization also overlooked the intangible value that the headmaster's wife placed on being able to prepare the lunches for the students herself. This was her role, her way of taking care of the students, of contributing to their well-being. By taking away that role unilaterally, the organization undermined the sense of self-worth that was intimately linked to her dignity as an individual.

The example presented here is of a discrete situation that has nothing to do with legal empowerment but the principles that it illustrates are universal to aid work. The assistance of external actors in legal empowerment or in the realization of any human rights-based capabilities in refugee situations is often essential to the success of these initiatives. External actors can smooth the path with host state authorities, stimulate change, provide funding, expertise and other much-needed resources, help to mobilize refugee communities and respond to their expressed needs, but all this must be achieved without dominating or unilaterally imposing their views and approaches on the communities they are trying to assist. To comply with the requirements of a truly participatory approach to legal empowerment and the development of

refugee capabilities, the role of external actors must ultimately be no more than complementary and supportive.

4. Inside-Out

In the end, what must be remembered is that the objective of all of these strategies is the expansion of the capabilities of refugees, specifically their legal empowerment, and this particular capability, as in the case of all empowerment, comes primarily from within. The host state, aid providers and other external actors can create an environment, an opportunity structure, that is conducive to empowerment (or not). They can inform and advise the community, they can advocate for change, and even impose programs and reforms in the short run, but ultimately whether or not the community becomes truly empowered and whether or not legal empowerment is sustainable, depends upon the commitment and collaboration of the refugee community itself. Empowerment is a form of social transformation that enables disadvantaged individuals and communities to take action to effect change on their own behalf.⁷⁹⁷

C. Securing Empowerment and Participation for the Individual and the Collective

One of the failings that participatory approaches are accused of is that they idealize both participation and the participating “community”, ignoring the divisions and hierarchies that exist within it, and thus may end up reproducing those harmful power structures and favouring the dominant discourse to the exclusion of all others or being co-opted by powerful actors.⁷⁹⁸ While certain participatory initiatives may fall into this trap, it can be avoided if appropriate consideration is given to the composition and nature of the community and to ensuring that participatory mechanisms are inclusive and representative.

Like participation, legal empowerment occurs at different levels and has both a communal and an individual dimension. On the one hand, the precariousness engendered by protracted refugee situations affects all members of the refugee community. Legal empowerment seeks to redress this lack of power by facilitating organization and mobilization to enable the refugee community to use the law and legal institutions to gain control over important outcomes that affect the entire community such as the conditions of just return or the right to work in the

⁷⁹⁷ CLEP, *Volume Two*, *supra* note 360 at 281.

⁷⁹⁸ Williams, *supra* note 795 at 561.

host state. On the other hand, the degree of disempowerment varies within the refugee community as well. Certain groups, especially women, children, disabled persons and minorities, face a double burden of oppression that must be acknowledged and addressed in the design and implementation of participatory legal empowerment initiatives. Legal empowerment can only be successful if individuals are empowered to exercise control over their lives both *within* their communities and also with regard to external actors when their interests do not coincide with those of the majority of the refugee community.

Box 8. WEAVE

One example of this type of activity is undertaken in the Burmese refugee camps in Thailand by WEAVE (Women's Education for Advancement and Empowerment). WEAVE offers refugee women the opportunity to engage in income generating activities, acquire vocational training and develop important knowledge and skills. By educating women about microcredit, business development, financial management and organizational management and providing them with safe employment, WEAVE seeks to empower women to provide a better life for their families, to be better able to deal with issues such as domestic violence and to take on leadership roles in the community.

Women's Education for Advancement and Empowerment, online: www.weave-women.org/economic-empowerment-and-development/.

The guiding principles for legal empowerment interventions are based on our understanding of power, capability, human rights and law. Vulnerable individuals are best able to assert their rights and interests when they do so collectively, when they exercise “power with”.⁷⁹⁹ The opportunity to share knowledge, skills and resources, to build common understandings of rights and wrongs and to support and protect one another invariably strengthens both the ability of refugees to make claims and the claims themselves. However, in adopting the human rights-based capabilities approach, we are

espousing the principles of human rights, including the equal dignity of every individual. Accordingly, the legal empowerment of the collective must not come at the cost of the rights of the individual. One of the most common and troubling examples of a situation in which the interests of the collective are given precedence over individual human rights is with respect to the treatment of rape by traditional dispute resolution systems. In far too many traditions rape is confounded with adultery and is considered to be a violation of the honour of the victim and her family. In these cases it is felt that both honour and community harmony can be restored by requiring the perpetrator to marry the survivor, often without her consent.⁸⁰⁰ Thus, while the decision of a refugee community to implement a system of traditional dispute resolution may

⁷⁹⁹ Golub & McQuay, *supra* note 360 at 77. See also chapter 3, Part II.C.2. A Typology of Power at 123, above.

⁸⁰⁰ See e.g. Griek, *supra* note 8 at 3-4; Da Costa, *Administration of Justice*, *supra* note 8 at 43.

represent an assumption of control over their own community, the subordination of women's rights or the rights of victims of sexual assault within that system is inconsistent with a human rights-based capabilities approach to legal empowerment.

D. Enhancing the Capacity to Achieve Legal Empowerment

Economic, social, political and, arguably, legal inequalities have a tendency to reinforce one another creating a strong association between social privilege and political power.⁸⁰¹ As a function of the fiduciary theory and the human rights-based capabilities approach, legal empowerment strategies seek to overcome this monopoly by enhancing the political power of the underprivileged specifically manifested in their ability to participate freely and equally in decision-making and public, and democratic, deliberation in the political community and to exercise control over their lives. This participation, and by extension the control that refugees exercise over their valuable interests, as well as its sustainability, is largely dependent upon the capacity of individual refugees and the refugee community. Thus empowerment initiatives must be primarily concerned with capacity- building which in turn will facilitate the development of other capabilities. Critical thinking, literacy, education, legal awareness, self-confidence, political knowledge, and communications skills are faculties that contribute to legal empowerment by increasing the capacity of individuals to make legal claims, to demand justice and to organize in order to realize their goals.⁸⁰² Accordingly, these skills and attributes contribute to an expansion of the individual's capacity to make and influence important decisions about his or her own life.⁸⁰³ The host state can reform justice institutions and enact legislation but real legal empowerment only occurs when refugees are able and willing to participate actively in the legal system.

A good example of the importance of capacity-building pertains to access to information. One of the mechanisms through which refugees and other marginalized groups are excluded from the legal system and from access to justice is through control over information about the law and the legal process.⁸⁰⁴ The distribution of information may be restricted at the point of

⁸⁰¹ Drèze & Sen, *Development and Participation*, *supra* note 681 at 10.

⁸⁰² See generally UNDP, *Programming for Justice*, *supra* note 220 at 135.

⁸⁰³ See Drydyk, "Participation", *supra* note 680 at 336.

⁸⁰⁴ As noted in the discussion on the characteristics of meaningful participation, the dissemination (or lack thereof) of information is a key determinant in the quality of participation and the success or failure of participatory initiatives.

origin, for example when laws are unpublished or are published in a language that the community does not speak. Alternatively, access to information may be restricted at a lower level, for example by government functionaries or even refugee authorities. The latter situation occurs when there is a lack of transparency in the legal institutions, when there is difficulty in obtaining even the most basic legal information and where access to legal

Box 9. Ignorance of the Law

The inability of the public to access legal information is a particular problem in certain countries. In Pakistan, legislation tends to be drafted in English which a large percentage of the population does not speak. Moreover, there has been little effort to make legislation accessible to the general population by simplifying the language or disseminating information about the laws and there is no system through which the public can easily access or receive information about legislative amendments or judicial decisions. The lack of accessible legal information means that many individuals are unaware of their rights and creates a system where claimants are wholly dependent on legal counsel to advance their interests.

Golub & McQuay, *supra* note 360 at 32.

counsel is limited.⁸⁰⁵ In such cases, individuals who possess legal information become powerful gatekeepers with the ability to permit entry into the law or to restrict access. Developing the capacities of refugees that enable them to access information directly (literacy, legal literacy, the ability to organize...) and to share that knowledge is a method of redistributing power away from the gatekeepers and making access to justice more egalitarian.

The importance of capacity-building is not limited, however, to the refugee community. Although legal empowerment strategies primarily emphasize bottom-up approaches, the demands by refugees for change must be balanced against the capacity of the duty-bearers (the host state, traditional justice authorities and other powerful actors) to accommodate change.⁸⁰⁶ Any meaningful reform at the “top” requires both a degree of political will and capacity. A host state may be willing to extend full legal rights and access to the justice system to refugees; however, without adequate human, material and financial capacity, the likelihood of any substantial change is small. Conversely, the mere existence of accessible justice mechanisms is no guarantee of access to real justice. Whether it is educating host state officials about refugee law, helping to develop a system of legal aid or providing human rights training to traditional justice actors within the refugee community, improving the capacity of duty-bearers to provide effective remedies is an integral part of a successful legal empowerment initiative.⁸⁰⁷

⁸⁰⁵ See e.g. De Langen & Barendrecht, *supra* note 536 at 257.

⁸⁰⁶ CLEP, *Volume Two*, *supra* note 360 at 282.

⁸⁰⁷ See e.g. Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 3; UNHCR, *Operational Protection*, *supra* note 465 at 28; UNDP, *Programming for Justice*, *supra* note 220 at 59.

E. Adopting a Broad, Multi-Faceted Approach⁸⁰⁸

Unlike many traditional rule of law initiatives which, to a large extent, measure success by looking at the institutions of justice themselves, the purpose of legal empowerment is to enable individuals and groups to use the law to gain control over various aspects of their lives that may not have a clear legal dimension (ex: education, access to clean water, to markets, to services, improved relations with the host state).⁸⁰⁹ Legal empowerment also seeks to enable individuals to protect and gain access to their rights, and to expand their capabilities, all of which is necessary to achieve their full potential as human beings endowed with dignity. This broad, less formally legal objective illustrates the degree to which legal empowerment is complex and multi-faceted and calls for an equally broad response. In contrast to the restrictive definitions of traditional justice approaches, what is considered “law” and “legal” for the purposes of legal empowerment includes not only legislation and the courts but also actors and processes that are not part of a narrowly defined justice sector. Examples of these include regulation, policy reform, administrative processes, local governance, counselling, mediation, negotiation, paralegals, legal literacy and traditional justice mechanisms.⁸¹⁰ Indeed the importance of adopting a broad, multi-dimensional approach to legal empowerment is particularly evident in protracted refugee situations where quasi-legal structures and non-traditional justice actors (for example, UNHCR) govern many of the issues critical to the lives and well-being of refugees.

In addition to elements mentioned above, there is a wide range of related activities that, although not inherently law-oriented, complement and support the legal system and access to justice and, as such, can be included in a broad understanding of legal empowerment. These activities, some of which have been discussed in the previous chapter, include political mobilization, community organizing, development of civil society groups, the use of media and other activities that facilitate the ability of refugees to use the law and the legal system by supporting their agency and capacity (such as general education, health services, livelihood initiatives, etc.).⁸¹¹

⁸⁰⁸ This section is adapted from the author’s article “A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations”, *supra* note 348.

⁸⁰⁹ Golub & McQuay, *supra* note 360 at 26.

⁸¹⁰ Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 26; Golub, “An Introduction”, *supra* note 360 at 13.

⁸¹¹ Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 26.

Another way to understand the breadth of legal empowerment is to note its focus on issues, specifically human rights, rather than on institutions. Thus where a traditional justice intervention might focus on the judiciary or the institution of legal aid, a legal empowerment intervention would focus on ensuring that refugees are able to work and secure their livelihood. These rights involve issues of legislation/regulation, enforcement, legal literacy, freedom of movement, access to transportation, labour legislation, the prohibition of exploitation, the freedom to organize, basic literacy, and even questions of gender equality, and concern not only the members of the refugee community and the formal justice system but also the host state community, other host state authorities (police, legislators) and aid providers. Clearly a single legal empowerment initiative cannot address all of these facets at once; to do so would be either to spread limited resources too thinly or to overwhelm the host state and likely provoke a backlash. A multi-faceted approach requires a delicate balance between the breadth and depth of interventions achieved by combining unambiguously legal strategies such as providing legal education and legal counsel with other quasi- or non-legal strategies (ADR, advocacy, media campaigns, community organizing), by engaging a range of different actors and by implementing these strategies at different levels.⁸¹²

Box 10. Legal Empowerment and Literacy

In discussing attendance at their legal information and training sessions, several members of the IRC's Legal Assistance Center team in Mae Sot Thailand noted that despite their efforts to use interactive activities (skits, games, role play, songs, etc.) in the trainings, they still face substantial challenges due to high levels of illiteracy in the camps. LAC staff found that refugees who were illiterate were less likely to attend training sessions or to feel that the training was successful. Some participants would attend the training sessions but become frustrated because they could not read what was being written on the blackboard and leave partway through.

Illiteracy also means that a significant portion of the population cannot read the codes of conduct posted around the camp or make use of the comment boxes that organizations use to provide some measure of accountability. These impacts weigh particularly heavily on the older generation of refugees as they are more likely to be illiterate.

Thus, the provision of basic education, on its face an issue quite independent from the justice or legal system, turns out to be a necessary component of meaningful participation in legal empowerment.

Interviews conducted with staff and camp-based assistants of the Legal Assistance Center Project in Tak Province (May 2011) Mae Sot, Thailand [on file with author].

⁸¹² For example having one organization provide legal information and advice to refugees, while another provides human rights training to provincial justice officials and yet another lobbies the host state for legislative reforms to its legal aid system. See Maru, "Allies Unknown", *supra* note 477 at 85.

F. Mainstreaming Legal Empowerment

Taking the idea of a broad approach to legal empowerment one step further is the strategy of “mainstreaming” legal empowerment into other socio-economic assistance initiatives (micro-credit, family planning, public health, refugee governance, etc.) in order to increase its effectiveness and reach.⁸¹³ Mainstreaming legal empowerment into other activities acknowledges the interrelatedness between many legal and non-legal issues and the enabling role that legal empowerment plays in the realization of other central capabilities. Mainstreaming supports the overarching goals of legal empowerment by addressing the way in which law is experienced by refugees on a day to day basis with regards to those matters that are of concern to them.

Mainstreaming legal empowerment can also help to increase the engagement and participation of stakeholders and give appropriate consideration to the interests and preferences of the refugee population while still furthering the objectives of legal empowerment. Not only does the participatory approach require that legal empowerment initiatives be centered on the needs and interests most relevant to the refugee community, research has found that efforts to mobilize refugees have met with greatest success when linked to community priorities.⁸¹⁴ While these priorities are not necessarily explicitly legal, engagement with them may open the door to subsequent legal education and empowerment. Moreover, whereas the reform of adjudicative bodies may directly affect only a limited portion of the refugee population, socio-economic initiatives like those mentioned above will have a much broader impact and solicit the involvement of a much larger segment of the population. Consequently, legal empowerment has been found to be most effective when it is integrated with other aspects of development, or in this case refugee assistance.⁸¹⁵

Additionally, mainstreaming can facilitate the implementation of legal empowerment in situations where there is little official political support or where there is active resistance either by members of the refugee community itself or by host state actors by providing a less threatening entry point and thereby circumventing certain entrenched interests. For example, in a traditional patriarchal society it may be culturally unacceptable to talk about women’s rights; however a women’s group focused on health or on child care can provide women with an

⁸¹³ Golub, “Rule of Law Orthodoxy”, *supra* note 406 at 40; Golub, “One Big Step”, *supra* note 427 at 105; Van de Meene & van Rooij, *supra* note 447 at 14; Golub & McQuay, *supra* note 360 at 62.

⁸¹⁴ CASA Consulting, *supra* note 731 at 45.

⁸¹⁵ See e.g. Golub & McQuay, *supra* note 360 at 61.

opportunity to organize around their interests which is itself an important step in legal empowerment. Similarly, while some host states might resist efforts to facilitate refugee organization, legal education and legal advocacy, few would raise objections to public health or income-generating initiatives. Activities such as legal awareness-raising, legal training and even advocacy can then be slowly integrated into these more neutral forums.⁸¹⁶

Despite its potential benefits, mainstreaming legal empowerment also carries with it the risk that by not maintaining a focal point and by spreading responsibility too broadly among too many actors, the essence and intent of legal empowerment might vanish as no one in particular would be responsible for monitoring and ensuring its progress. Thus in mainstreaming as in all things, moderation and balance are key.

G. Recognition of Identity and Status as a Precondition to Legal Empowerment

As the purpose of legal empowerment initiatives is to create conditions which enable refugees to use the law and legal mechanisms to gain control over their lives, it is vital to address the main obstacles that impede the exercise of that capability. Several impediments, in particular entrenched interests and power dynamics, have been discussed above but one of the most significant has not yet been mentioned, namely the lack of legal identity and status.⁸¹⁷ The Commission on Legal Empowerment of the Poor and other authors have highlighted the importance of identity as a critical requirement for access to justice and legal empowerment.⁸¹⁸ Legal identity, including both birth and civic registration (registration of other events such as marriage and death) is the formal, legal recognition by the state that a person exists, without which individuals may be unable to claim entitlements or access services and may be particularly vulnerable to mistreatment. For refugees, proper civic registration and proof of identity can be determinative when it comes to the possibility of resettlement or repatriation or later to the

⁸¹⁶ See for example the Refugee Women's Empowerment Group organized by Asylum Access Tanzania. Asylum Access, *Empowering Communities*, *supra* note 580 at 7; Lisa D'Annunzio, "Celebrating Women, Empowering Refugees", *Realizing Rights* (22 March 2012), online: realizingrights.wordpress.com/2012/03/22/celebrating-women-empowering-refugees/.

⁸¹⁷ Portions of this section are adapted from the author's article "A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations", *supra* note 348.

⁸¹⁸ CLEP, *Volume Two*, *supra* note 360 at 4; Cunningham, Sudarshan & Wojkowska, *supra* note 757 at 13; UNDP, *Envisioning Empowerment*, *supra* note 446 at v; Secretary-General, *Eradication of Poverty Report*, *supra* note 360 at 4.

possibility of sponsoring family members for resettlement.⁸¹⁹ Registration and proof of identity may also be required for access to education, food and health care, for the right to marry, for inheritance claims, for property claims and restitution or compensation upon repatriation and for the preservation of family unity.⁸²⁰

Registration, or the lack thereof, can also have an important impact on the ability of individuals to participate in the political processes where the public deliberation required by the fiduciary theory and the capabilities approach occurs. For example, in several of the Burmese refugee camps in Thailand, only UNHCR-registered refugees have the right to become candidates and to vote in the elections that determine camp governance even though unregistered refugees make up between one-third and half of the population of the camps.⁸²¹ Given that governing committees exercise substantial power within the camps and are the main (and often only) representatives of the refugee population in negotiations with the host state and aid providers, discrimination based on registration and status can have a significant negative impact on the ability of some refugees to realize their human rights-based capabilities.

There are three primary causes for the lack of legal identity.⁸²² First, individuals may lack legal identity because the state does not have an effective and accessible (in terms of cost, distance...) system of registration. Second, certain groups may be deliberately denied legal identity in order to exclude them from full participation in the social, economic and political life of the state or community. Third and last, some individuals may choose not to take the steps necessary to ensure their legal identity is registered, because of the fear of state authorities, a desire to avoid taxation or conscription, or for some other reason. Refugees are especially vulnerable to all of these conditions. They may be the target of discriminatory laws denying them legal identity and status both by the host state and by their state of origin. For example, a state may pass a law that denies citizenship and thus legal recognition to individuals who have left the country illegally, as well as to children born abroad. Similarly, refugees may have difficulty

⁸¹⁹ Viviane Tan, "In Thailand, birth registration gives refugee babies a good start in life", *UNHCR News Stories* (24 September 2012), online: www.unhcr.ca/news/2012-09-24.htm.

⁸²⁰ UNHCR, *Handbook for Registration: Procedures and Standards for Registration, Population Data Management and Documentation*, Provisional Release (September 2003) (UNHCR, 2003) at 6, online: www.unhcr.org/3f8e93e9a.pdf [UNHCR, *Handbook for Registration*].

⁸²¹ E.T. Jackson and Associates Ltd., *Adaptation, Resilience and Transition: Report of the Formative Evaluation of Camp Management in the Burmese Refugee Camps in Thailand*, prepared for the Canadian International Development Agency, Australian Agency for International Development & Act for Peace (Ottawa: 2012) at 52, online: Local Governance etjackson.com/publications/.

⁸²² CLEP, *Volume Two*, *supra* note 360 at 5; Cunningham, Sudarshan & Wojkowska, *supra* note 757 at 14.

Box 11. Birth Registration of Syrian Children Born in Lebanon

Now in its fourth year, one concern raised by the Syrian refugee crisis is the increasing number of children who are born outside of Syria and whose births are not officially registered. It is estimated that 10,000 Syrian children born in Lebanon alone required birth certificates in 2013. Without a birth certificate or at least a notification from either an authorized midwife or a hospital, these children will find it difficult to register with UNHCR. In turn, UNHCR registration is necessary in order to receive rights-protecting assistance in Lebanon including food, access to public schools and primary healthcare and offers some protection against the infrequent instances of deportation. Finally, without an official birth certificate, Syrian children born in Lebanon may face difficulties in obtaining Syrian IDs and thus be unable to cross the border back into Syria.

Assessment Capacities Project (ACAPS), *Legal Status of Individuals Fleeing Syria* (June 2013) online: acaps.org/resourcescats/downloader/legal_status_of_individuals_fleeing_syria/174.

accessing registration mechanisms because of documentation requirements, restrictions on their freedom of movement and the failure of host states to provide for the registration of children born in refugee camps. For a child born in a refugee camp to be registered, her parents may be required to take her back to the country of origin, a costly and dangerous proposition. Finally, distrust between authorities and the refugee community and a lack of information about the registration process and its importance may result in many refugees not being registered even when such mechanisms are available.

As important as legal identity is for refugees, recognition (and proof thereof) of refugee status may be even more so. Refugees are not citizens of the host state and cannot benefit from the rights and protections that citizenship affords. They do, however, benefit from another set of rights and protections, those associated with refugee status. Proof of refugee status may permit refugees to claim and exercise those rights in a legal setting, helps to protect individuals against refoulement and arbitrary arrest and detention, as well as facilitates their access to basic rights, services and assistance, including potentially the possibility of a durable solution.⁸²³

In short, recognition of an individual's legal identity in all its dimensions (woman, mother, wife, asset-holder, worker, and refugee) is a right⁸²⁴ and gives that person a place in the legal world from which to exercise her rights. Consequently, one of the first steps towards legal empowerment must be to develop or strengthen systems of registration and status determination.

⁸²³ UNHCR, *Handbook for Registration*, *supra* note 820 at 6.

⁸²⁴ Article 6 of the *Universal Declaration of Human Rights* "Everyone has the right to recognition everywhere as a person before the law." *Universal Declaration*, *supra* note 224.

H. Participatory Legal Empowerment Engages with Plural Legal Orders

Another impact of adopting a participatory approach to legal empowerment is the need to engage with alternative legal orders. Long-term refugee camps are legally pluralistic systems; in other words, they are systems “where different sources of authority (traditional, religious, or statutory) considered legitimate by social actors coexist, and regulate and solve disputes on similar matters.”⁸²⁵ Refugees are subject to multiple overlapping normative systems, each of which has its own rules and its own processes through which rules are made, applied, interpreted and enforced. Within a camp, this plurality includes the formal legal systems of the host state, systems of alternative dispute resolution, the informal or customary systems of the host state, the camp-based administration and the informal or customary justice systems of the refugee community and is most concretely manifested in the existence of multiple grievance and dispute resolution mechanisms.

Historically, engagement with customary legal systems has not been a feature of many refugee protection initiatives. Indeed, given the frequent failure of customary justice systems to adhere to the principles of the rule of law and to conform to international human rights standards, concerns regarding the potential role of these systems in justice reform have long been a preoccupation of justice-based interventions in development.⁸²⁶ Nonetheless, customary justice systems are unavoidable. Research has found that the lives of marginalized individuals, including the poor and refugees, are overwhelmingly regulated by customary or informal normative systems due to limited access to and distrust of formal justice systems combined with the perceived positive attributes of informal justice mechanisms (cost, efficiency, familiarity). Even when formal systems are accessible, many vulnerable groups and individuals will still give priority to the customary justice system.⁸²⁷ Thus, there is a growing recognition among scholars and activists that legal empowerment and access to justice cannot be achieved without fully taking into consideration the existence and operation of informal and customary justice

⁸²⁵ McCallin, *supra* note 644 at 8.

⁸²⁶ See e.g. Janine Ubink & Benjamin van Rooij, “Towards Customary Legal Empowerment: An Introduction” in Janine Ubink & Thomas McInerney, eds, *Customary Justice: Perspectives on Legal Empowerment* (Rome: International Development Law Organization, 2011) 7 at 7; Ewa Wojkowska & Johanna Cunningham, “Justice Reform’s New Frontier: Engaging with Customary Systems to Legally Empower the Poor” in Stephen Golub ed, *Legal Empowerment: Practitioners’ Perspectives* (Rome: International Development Law Organization, 2010) 93; see generally Da Costa, *Administration of Justice*, *supra* note 8.

⁸²⁷ See e.g. Da Costa, *Administration of Justice*, *supra* note 8 at 50.

systems⁸²⁸ and, moreover, that informal justice mechanisms are an essential component of a functioning justice system.⁸²⁹ As already noted, participatory strategies will be most successful when they are “rooted in the particular social and legal context in which they are introduced.”⁸³⁰ In protracted refugee situations, this regard for the local context includes acknowledging the justice preferences of refugees and the reality that refugees most often experience law and legal normativity through customary and informal systems. Thus, while these systems certainly have their shortcomings and can be forums for the improper exercise of power over the refugee community, to ignore them in the design and implementation of legal empowerment would itself be a form of domination.

In addition to being essential as part of a truly participatory approach, legal empowerment strategies that work with or through customary justice systems (or incorporate some elements of the informal mechanisms) may actually benefit from the social legitimacy which customary systems enjoy and consequently have a greater impact on the ability of individuals to use the law.⁸³¹ Additionally, engagement with the informal justice systems may be one of the only ways to expand the respect for human rights and rule of law principles in dispute resolution in situations where the host state is unable or unwilling to extend its jurisdiction to the refugee community or to take the steps necessary to ensure that the formal justice system is accessible.⁸³²

Given the legitimate concerns regarding customary justice systems, it is essential to understand that engagement with these systems does not equate to deference to them. The fact that refugees may be able to access an informal system more easily does not necessarily mean that they are obtaining justice; access to justice involves more than simply accessing a justice institution.⁸³³ Legal empowerment requires the expansion of both the capacity of individuals to demand justice and the capacity of systems to provide justice. In other words, legal empowerment within the customary legal system requires that the functioning of the system itself be enhanced as well as the ability of individuals to make use of it to secure and protect their

⁸²⁸ See e.g. UNDP, *Envisioning Empowerment*, *supra* note 446 at 6; Ubink & van Rooij, *supra* note 827 at 8.

⁸²⁹ See Van de Meene & van Rooij, *supra* note 447 at 16.

⁸³⁰ UNDP, *Envisioning Empowerment*, *supra* note 446 at 7.

⁸³¹ McCallin, *supra* note 644 at 15.

⁸³² See e.g. Joel Harding & Sheila Varadan, “New Approaches to Refugee Protection in a Protracted Refugee Situation” (Paper delivered at the Oxford Refugee Studies Centre Conference *Protecting People in Conflict & Crisis*, 22-24 September 2009) [unpublished] at 6.

⁸³³ Van de Meene & van Rooij, *supra* note 447 at 17.

Box 12. Gender and Land Rights

Although less relevant in refugee situations, the lack of effective land rights can be linked in many countries to poverty, inadequate health and nutrition and lower levels of education and often disproportionately affects women. In both Mozambique and Tanzania, explicit statutory and constitutional provisions exist that establish gender equality and prohibit discrimination across a range of activities, including property ownership. Nevertheless, despite the existence of these legal provisions and even despite knowledge of them, community courts and clan councils continue to apply customary law and tradition-based norms that hinder the ability of women to own and inherit land in their own right. Formal legal reform on its own has not proven to be sufficient. Research suggests that compliance with women's land rights in these countries is dependent upon NGOs having a strong presence and engaging in legal dissemination, education and assistance, and the existence of paralegal offices that are able to assist women in claiming their rights before formal courts or coercing compliance from relevant parties.

Amrita Kapur, "Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems" in Erica Harper, ed, *Working with Customary Justice Systems: Post Conflict and Fragile States* (Rome: International Development Law Organization, 2011),

rights.⁸³⁴ Consequently, engagement with the informal justice system must include efforts to improve its operation by making it more inclusive, more consistent with human rights and due process principles and more accessible, and by developing the capacities of customary justice actors, regularizing the interface between customary and formal justice systems, etc.⁸³⁵

One of the effects of legal pluralism noted by the UNDP is that rights that are recognized at one level may be denied to individuals because of norms operating at another.⁸³⁶ So while gender equality and women's rights may exist in the formal laws of the state, practices such as child marriage and domestic violence may persist because

they are permitted according to the cultural and traditional norms of the community. As a consequence, legal empowerment efforts that are only aimed at the formal legal system will be unsuccessful in responding to the realities on the ground.

Ultimately, as noted by Vivek Maru, legal empowerment initiatives must in most cases engage and respect both modern and customary legal regimes and build bridges between them because both are both integral parts of a comprehensive, accessible system of justice.⁸³⁷ For example, informal justice systems provide critical capacity for less serious cases in situations where the formal system is under-funded or under-staffed, while the "shadow" of the state legal system helps to ensure that informal systems are fair and just.⁸³⁸ Informal justice systems may also constitute important alternatives to the formal justice system when the latter are biased,

⁸³⁴ Ubink & van Rooij, *supra* note 827 at 17.

⁸³⁵ CLEP, *Volume Two*, *supra* note 360 at 42; see e.g. UNDP, *Envisioning Empowerment*, *supra* note 446 at viii; Wojkowska & Cunningham, *supra* note 826 at 104.

⁸³⁶ UNDP, *Programming for Justice*, *supra* note 220 at 21.

⁸³⁷ Maru, "Allies Unknown", *supra* note 477 at 85; Van de Meene & van Rooij, *supra* note 447 at 17.

⁸³⁸ CLEP, *Volume Two*, *supra* note 360 at 15; Van de Meene & van Rooij, *supra* note 447 at 17; De Langen & Barendrecht, *supra* note 536 at 263.

dysfunctional or corrupt. As the Commission on the Legal Empowerment of the Poor remarked, by engaging with both formal and informal systems and giving people choice in terms of multiple points of access we are increasing the likelihood that individuals will be able to access an intervention that fits their specific problem and thus, to access justice.⁸³⁹

I. The Integration and Shared Benefits of Legal Empowerment

Refugee communities and refugee camps in particular are often dealt with as though they are self-contained entities that are separate and easily distinguishable from the host state. This distinction is reinforced by the host states' propensity to abdicate responsibility for refugee communities to UNHCR or other aid providers, and often results in the creation of parallel structures and institutions: one to address the needs of the citizens of the host state, the other to address the needs of the refugee population. There are three major problems with this approach. First, it is inaccurate; although on the surface there may be a clear separation, often in the form of a fence, between a refugee camp and the local community, in reality the well-being of both communities is intertwined. The social, economic, political and even environmental impact of the presence of refugee communities has serious implications (both positive and negative) for local communities. Moreover, while refugee communities have certain unique needs that result from displacement, the majority of their needs, rights and interests are strikingly similar to those of other marginalized populations within the host state. Second, this distinction is highly inefficient. Creating two separate systems, one for refugees and one for local citizens, is a waste of human, material and financial resources and encourages competition rather than cooperation. Third, at a symbolic level creating two separate systems completely undermines the idea of refugees as "equal" rights-holders which is at the foundation of the concept of inherent human dignity.⁸⁴⁰

⁸³⁹ CLEP, *Volume Two*, *supra* note 360 at 17.

⁸⁴⁰ The exception to this rule being the two rights specifically reserved for citizens: the right to enter one's own country and the right to participate in the conduct of public affairs, including the right to vote and enter the public service (*ICCPR*, *supra* note 73, arts 12, 25).

By focusing on the exercise of power by authorities and the effects of that exercise, the fiduciary theory of state legal responsibility emphasizes the shared nature of marginalized groups, their common interests and the common legal obligations owed to them as opposed to the issue of citizenship which separates them. From this starting point, the objective of the human rights-based capabilities approach and its associated initiatives can be understood as being in part to address interests and vulnerabilities common to both the refugee and host state communities and to produce benefits that are integrated and can be shared by both groups, as opposed to trying to combine the disparate needs of two unique groups. The idea of attempting to integrate refugee assistance and the development of local communities is not new. In fact, this approach has been at the heart of UNHCR policy off and on for over three decades. However,

Box 13. Shared Fruits

A 2010 report evaluating the socio-economic and environmental impacts of the Dadaab refugee camps on host communities found that there were substantially more positive than negative impacts on host communities. In particular, the presence of the refugee camps and international aid providers had made access to water easier and more secure, increased the availability of local transportation (buses, pick-ups and taxis) and increased the consumer market for local products as well as overall economic activity in the region. Host communities also benefit from educational opportunities and scholarships offered by aid agencies in Dadaab and are able to use the private medical clinics in the refugee camps and free agency-equipped hospitals both in the camps and in Dadaab. Although some organizations target only the refugee or host populations, other initiatives are designed to benefit both communities, for example UNHCR and GTZ organized a programme whereby firewood for the refugee camps is purchased directly from the local population. Within the context of Dadaab, the Danish Refugee Council also provides a good example of shared benefits, ensuring that 50% of students completing vocational training and households completing dry land farming and receiving grants come from the refugee camps and 50% come from the host community. Similarly, both host communities and camp blocks were chosen to receive public health packages and training.

Martin Enghoff, et al, *In Search of Protection and Livelihoods: Socio-economic and Environmental Impacts of Dadaab Refugee Camps on Host Communities* (2010) report for the Royal Danish Embassy, the Republic of Kenya & the Norwegian Embassy, online: ALNAP www.alnap.org/resource/6334.

previous initiatives have met with limited success due, among other reasons, to the competing interests of the different parties, the lack of political will and a fear of local integration on the part of host states, a failure of the international community to adequately support these projects and to commit to additional funding, and certain institutional shortcomings such as the division of jurisdiction between UNHCR and UNDP.⁸⁴¹ Moreover, I would argue that while previous initiatives involved a consideration of the interests of both host state populations and refugee communities, they dealt with them individually and did not recognize the *shared* or *integrated*

⁸⁴¹ See e.g. Betts, “International Cooperation”, *supra* note 130; Betts, “Development Assistance”, *supra* note 66; Crisp, “Mind the Gap”, *supra* note 122.

interests of these two communities. Focusing on commonalities as opposed to the differences between refugees and the local communities may help to achieve success where it has previously been elusive.

Emphasizing shared vulnerabilities, interests and needs can also help to overcome the impediments posed by entrenched interests and power relations that view empowerment and assistance as a zero-sum game. Recalling the concept of “power with” from the typology of power explained in chapter 3, there is power in numbers and organization. Approaches that provide benefits to both refugee and local populations will likely ensure the participation of the broader community which in turn can help to mobilize local resources and support more successfully, and transform legal empowerment into a positive-sum game. As Drydyk noted in her exegesis on democracy, empowerment and participation, “[p]olitical life functions more democratically when political influence on decision-making affecting valuable capabilities is better shared.”⁸⁴² Thus, building alliances across stakeholder groups and attempting to create a sense of solidarity between the refugees and the local population, including powerful actors, whether or not powerlessness and vulnerability are shared, is a method for making refugee assistance more democratic.

While the provision of health services and the development or improvement of local infrastructure such as roads and police stations is fairly common, in many situations, refugee assistance initiatives provide “mutual” benefits as opposed to shared or integrated benefits. For example, in the Burmese refugee camps in Thailand, aid providers have realized that relations with the local community can be much improved by providing them with some assistance and funding as well. The Border Consortium has thus at times provided local communities with warm clothing or blankets during the cold season or with rice that is meant as compensation for villagers impacted by the presence of the refugee camp.⁸⁴³ Both the local community and the refugee community are receiving benefits but they are not integrated. Examples of legal empowerment strategies that produce integrated benefits would include supporting civil society organizations that work both with refugees and with the local population, promoting legislative reforms that increase the accessibility of the justice system, and implementing community legal education and training programmes that are delivered to both refugees and the host state

⁸⁴² See Drydyk, “Participation”, *supra* note 680 at 339.

⁸⁴³ Interview of Community Outreach Officer, Thai Burma Border Consortium (now The Border Consortium) (May 2011), Mae Sot Thailand [on file with author]; E.T. Jackson and Associates Ltd., *supra* note 821 at 81 (annex 9).

population. In the end, both mutual and shared benefits have merit but the closer and more direct the ties between the refugees and the local community are, the more likely it is that legal empowerment strategies will be accepted and supported by the host state and that they might over time lead to some degree of local integration of the refugee community.

V. Conclusion

The road to legal empowerment in protracted refugee situations is clearly a long and winding one, studded with innumerable logistical, political and ethical challenges. Nevertheless, these obstacles can largely be overcome by ensuring the meaningful participation of refugees in their own legal empowerment. The participatory nature of legal empowerment flows naturally from the underlying premises of the human rights-based capabilities approach and the fiduciary theory of state legal authority, specifically the requirements that human rights-based capabilities be the product of public consensus, and be identified, delineated and prioritized through a process of public debate and deliberation, and that individuals be free from domination and instrumentalization by those wielding exclusive power over them. By recognizing this participatory dimension of legal empowerment, we can ensure that empowerment strategies are tailored to the specific requirements of each situation and are conducted in a manner that is both rights-respecting and rights-supporting in accordance with the principles set out in this chapter.

If the criteria outlined in this chapter seem to some readers vague and unsatisfactory, it is perhaps because this analysis is not intended to provide a detailed roadmap to implementing legal empowerment in protracted refugee situations. Other reports and studies may provide a clearer set of directions; for example emphasizing the need to plan for long-term initiatives⁸⁴⁴ but to implement small, short-term pilot activities, to build on initial successes and seek incremental improvements,⁸⁴⁵ and to monitor and evaluate outcomes and impacts in order to gather evidence in support of further interventions.⁸⁴⁶ Instead, the principles presented here represent the broad framework of a participatory approach within which legal empowerment may take many different forms influenced by the specific circumstances and context in question. For it must be

⁸⁴⁴ Asian Development Bank, *supra* note 360 at ix.

⁸⁴⁵ Cunningham, Sudarshan & Wojkowska, *supra* note 757 at 21; Maru, “Allies Unknown”, *supra* note 477 at 85ff; CLEP, *Volume Two*, *supra* note 360 at 275ff.

⁸⁴⁶ Cunningham, Sudarshan & Wojkowska, *supra* note 757 at 26; Asian Development Bank, *supra* note 360 at 28; Van de Meene & van Rooij, *supra* note 447 at 22.

remembered that empowerment is not a specific project or programme; it is social transformation, “a more expansive sharing of power that enables disadvantaged people to begin bringing about significant change through their own actions.”⁸⁴⁷

⁸⁴⁷ CLEP, *Volume Two*, *supra* note 360 at 281.

Conclusion

Einstein is often quoted as having said that the definition of insanity is to do the same thing over and over again and to expect a different result. For over sixty years, despite massive changes in the international legal and political landscape, intervention in specific refugee situations has remained surprisingly unvaried. Numerous programs featuring different and evolving priorities have been developed, implemented and have fallen by the wayside. Care and maintenance has given way to an emphasis on self-sufficiency. “Essential needs” have been replaced in assistance rhetoric by “rights”. The zonal approach to refugee assistance was replaced by the Refugee Aid and Development Strategy which was then replaced by Targeted Development Assistance and Convention Plus. But on the ground, huge numbers of refugees continue to be trapped for years, if not decades, in situations of exile that fail to meet the basic standards necessary for a full and dignified life. Despite the lip-service paid to refugee rights at the policy level, most initiatives have been unable to move beyond the predominantly charity-based paradigm of refugee assistance. If the lives of refugees are truly to be improved in exile and if a long-term solution to refugee situations is to be found, it will be through challenging the traditional power dynamics and patterns of dominance and marginalization that have long characterized protracted refugee situations and the relationship between refugees, host states and aid providers. By proposing a capabilities and empowerment-based understanding of human rights, the realization of which is anchored in the fiduciary relationship between refugees, host states and aid providers, this dissertation has sought to contest the exclusion of refugees from the realm of legality and to reconceive them as rights-holders, active participants in their own lives and partners in the search for durable solutions.

In common parlance, refugees around the world have been reduced to “the refugee”, a being that is both to be pitied (as “child”, “victim”, “helpless”) and to be feared (as “criminal”, “illegal”, “burden”, “demanding”).⁸⁴⁸ By marginalizing the individual identities, experiences and capacities of refugees, this reductionist discourse denies the most basic premise of human rights: that all individuals possess equal rights and inherent human dignity. A person does not become

⁸⁴⁸ See e.g. Prem Kumar Rajaram, “Humanitarianism and Representations of the Refugee” (2002) 15 *Journal of Refugee Studies* 247; Liisa H Malkki, “Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization” (August, 1996) 11:3 *Cultural Anthropology* 377; Harrell-Bond, “Humanitarian Work”, *supra* note 3.

less human or less entitled to respect merely because she has fled across an international border. By definition, the very purpose of the international refugee regime is not only to protect the physical person of the refugee but also to protect her dignity and rights.⁸⁴⁹ Instead of top-down humanitarian interventions dominated by state- and aid-provider-determined priorities (for instance prioritizing economic self-reliance over the protection of labour rights), this dissertation proposes that a truly rights-respecting approach to protracted refugee situations is one that accepts individuals as rights-bearing agents and that fully respects and protects their human dignity. At a practical level, this means acknowledging that refugees are not only able to participate in the determination of their own destinies, but that they have the right to participate. Moreover, it means creating an enabling environment in which refugees can exercise their agency and helping to foster the capabilities necessary to that exercise. In other words, a truly rights-respecting approach requires a fundamental reconsideration of both the objectives of refugee assistance and the distribution and exercise of power within protracted refugee situations.

The human rights-based capabilities approach developed in chapter 2 is one strategy for implementing a truly dignity-centered approach to refugee intervention. Building upon the work of Amartya Sen and Martha Nussbaum discussed in the first chapter, the human rights-based capabilities approach constitutes a minimal or partial theory of justice that establishes the human rights-based capabilities of individuals as the central area of concern. By conceiving of rights in terms of human capabilities, the HRCA concretizes rights and anchors them in the lived experience of individuals, as opposed to the instruments of high-level international politics. In the refugee context, thinking about rights in terms of capabilities focuses our attention on what refugees are actually able to be and to do, rather than on their theoretical entitlements, and thus challenges the traditional narratives of charity and humanitarianism that, despite the best of intentions, are often characteristic of refugee assistance strategies. The difference between human rights as traditionally conceived and human rights as capabilities may seem negligible in the abstract but it is the very fact that our commitment to human rights cannot exist merely in the abstract that makes this shift in focus so important. Every time the human rights of refugees are reaffirmed at the international level by a state or an international actor without there being any substantive change in the lives of refugees or the conditions of exile on the ground, the

⁸⁴⁹ See *Refugee Convention*, *supra* note 72, arts 2-33.

international human rights regime and the stated commitment to the inherent dignity of refugees is undermined.

If the human rights-based capabilities approach changes what we envision the objectives of refugee assistance to be, it is the fiduciary theory of state legal authority that ultimately transforms our understanding of the legal framework within which those objectives are to be achieved. Consistent with the stated principles of human rights-based approaches, applying Evan Fox-Decent's fiduciary theory of state legal authority to refugee situations requires that we fundamentally rethink the legal obligations and entitlements of refugees, host states and aid providers. As explained in detail in chapter 2, instead of being viewed merely in terms of the obligations imposed by international treaties and domestic law, the relationship between refugees and aid providers (both host state and otherwise) can be understood as being a fiduciary relationship that arises as a result of the aid provider's ability to exercise power unilaterally over the rights and interests of refugees combined with the particular vulnerability of refugees to this exercise of power. The claim advanced in this thesis is that, in turn, this relationship automatically imposes upon the host state, as the dominant fiduciary, the legal obligation to ensure a threshold level of human rights-based capabilities as legal recognition of the equal and inherent human dignity of the individual and as a means of securing the individual against either instrumentalization or domination by the state or other powerful actors.

Predicated as it is upon the ability of the host state to exercise power unilaterally, it may seem strange to assert that this combined theory challenges the traditional power dynamics of refugee situations. And yet it does. Humanitarian intervention in refugee situations is traditionally viewed as being based upon a combination of top-down, externally imposed international legal principles, domestic legal obligations and political benevolence with the refugee community itself being viewed as an entity to be acted upon. In contrast, in the integrated approach proposed in this thesis the human rights entitlements of refugees and the correlative obligations of powerful actors can be seen as arising organically as a result of the characteristics that are inherent in refugee situations. These rights and duties do not exist as external constructs but are intrinsic to a relationship of negotiated power between refugees and aid providers. Aid providers may have overt power over refugees but that power is not unrestricted. By virtue of their status as beneficiaries, refugees have the legal, and arguably moral, right to constrain that exercise of power. This give and take results in a relationship that

acknowledges the power imbalance between refugees and aid providers, yet is still more egalitarian than humanitarian approaches.

Thus far, I have outlined two central claims: the contention that any meaningful progress in addressing protracted refugee situations will only come from adopting a more refugee- and dignity-centered approach, and the assertion that together the human rights-based capabilities approach and the fiduciary theory of state legal authority offer a way to reconceive the roles and correlative rights and duties of different actors. The third claim, made in chapter 3 and developed in later chapters, is that the empowerment of refugees, and specifically the legal empowerment of refugees, is necessary in order to meet the normative requirements of the human rights-based capabilities approach and to ensure conditions of exile that are consistent with the inherent dignity of refugees. No intervention in protracted refugee situations, however well-intentioned, will be able to secure the human rights-based capabilities of refugees, nor will refugees be able to exercise the constraining power that is implicit in the fiduciary theory, so long as they are so completely excluded from the legal and political processes that impact their lives and interests. Thus the empowerment of refugees to access and to use the law and legal mechanisms and services to protect and advance their rights and increase their control over their lives is a critical element of any response that fully respects the dignity of refugees. Legal empowerment is at once a capability in itself and a crucial enabling factor in the realization of other important capabilities. It is both a mechanism through which refugees can exercise power and it is a means of constraining the exercise of power. More than simply being a useful strategy however, this analysis has shown that refugees have an actual entitlement to legal empowerment and that the correlative duty to facilitate this empowerment flows directly from those very relationships of power that we seek to modify.

It is not ignorance of its flaws and failings that lead me to rely so heavily on the Law, but faith in its potential. Law, whether formal or informal, state- or community-based, may be weak, corrupted or unjust. It may be used to oppress, or it may be ignored altogether. Yet law is also one of the most enduring and universal forces within society; it is one of the most socially acceptable sources of power and constraints on power. Understood pluralistically, law permeates virtually every aspect of our lives, and orders and defines our relationships and interactions with others. At a practical level, law is also inseparable from human rights. Claiming that refugees have equal rights while functionally denying them access to the law is like giving them the deed

to a house but not the key to the front door; nice on paper, but offering little protection from the elements. For better or for worse, law is a potent instrument and, as noted previously, if individuals are unable to make the law work for them, it will likely be working against them.

Legal empowerment may seem to be a fairly esoteric focus for a discussion on refugee assistance when in many cases refugees lack sufficient access to food, clean water, medical assistance and physical security. Yet, as explored in chapters 4 and 5, empowering refugees to use the law is not only relevant to their direct interactions with the formal legal system, but can fundamentally impact the structure and functioning of society as a whole. Legal empowerment is no panacea, but it is a critical means of bringing individuals into the decision-making process by giving them a voice within the process and some control over the process itself, by making them active participants in their own lives rather than objects to be acted upon. When refugees use the law to secure the accountability of powerful actors, to ensure conditions of just return, or even simply to resolve disputes within their own communities, they are exercising their agency and asserting their status as self-determining rights-bearers. In short, they are reaffirming their inherent human dignity.

I am under no illusion that the ideas outlined in these pages will find much favour among host states, or even among powerful non-state actors. Perhaps understandably, given the large-scale refugee movements that we have seen over the past few decades, host states guard their sovereignty jealously and are thus generally reluctant to make any move that would suggest that they owe any legal responsibility to refugees arriving within their borders beyond the bare minimum required by the *Refugee Convention* and their own domestic law. Assistance, even generous and long-term assistance, may be offered but it is couched in the language of humanitarianism and charity; it is a privilege to be bestowed at the discretion of the state. To suggest then, as I do, that even those very actions meant to keep refugees at arm's length, such as long-term encampment or the delegation of authority to UNHCR, are sufficient to establish binding fiduciary obligations is to challenge the accepted order that has been established and maintained by states. Similarly, one cannot be so naïve as to believe that the absence of justice initiatives for refugees is simply an oversight that, once identified, will be remedied by states and aid providers. Refugees have always been entitled to equal benefit of and access to the law: if these rights have not been given substance it is because specific decisions were made either to exclude refugees from the law or to prioritize other interests.

And so we come to the crux of the matter: power, the ability to make decisions and realize desired outcomes and the need to challenge the power structures that have become entrenched in the politics and practice of refugee assistance. Power is a dynamic, shifting force that governs the relationships that make up a society. Law, and the ability to use the law, can enable us to navigate a world of inequalities and to better participate in the process of negotiating power. So long as states and aid providers view refugee assistance as a zero-sum game, the human rights-based capabilities approach and the legal empowerment of refugee populations can only be interpreted as threats both to their power and to their entrenched interests: legal empowerment then will likely remain no more than an aspiration. Yet power takes many forms; it is not just the ability to make other people conform to our will, it is also the ability to determine the course of our own lives. If aid providers and host states have the power to maintain the status quo, refugees and civil society have the power to change it.

I have set out a framework in these pages; a way to reconceive refugee situations and a proposal for how to transform an admittedly dysfunctional system. Although I have presented examples drawn from refugee situations around the world and have compiled and explored a range of guiding principles, I have not set out a concrete plan of action or outlined steps for the implementation of my approach; the challenge of translating this theory into practice lies far beyond the scope of this analysis. The form that legal empowerment initiatives take, the specific role of each actor, the strategies for fostering state interest and political will, the means to best ensure refugee participation and the targeted outcomes will depend upon a detailed contextual analysis of each situation. Likewise, long-term empirical research is likely necessary in order to overcome the bureaucratic inertia of current refugee assistance and to convince power-holders that refugee assistance need not be a zero-sum game and that legal empowerment can have a positive impact on the host states while improving the lives of refugees. Specifically, it will be important to further investigate the actual impact that legal empowerment can have on the prospects for durable solutions for refugees. At a theoretical level, many of the principles used in this analysis require further refinement or, being new to the discourse of refugee assistance, further development. I have only begun to unravel this web of interrelated concepts, and many questions remain to be the subject of further study: how does applying the fiduciary theory of state legal authority to refugee situations affect the relationships between refugees and citizens or the treaty obligations of host states? What can refugee assistance learn from how the capabilities

approach has transformed development assistance? How do we measure effective participation? Consider this dissertation then not as a solution but as new lens through which to see an old problem.

As I write today, more than 160,000 Syrians have fled over the border into Turkey in the last three weeks adding to what has been called the biggest humanitarian emergency of our era.⁸⁵⁰ The fate that awaits them hangs very much in the balance. In five or ten years, will we look back on this moment as the beginning of yet another situation of protracted exile? Despite over sixty years of experience in refugee assistance, we are facing failure: more people are trapped in situations of protracted exile today than ever before. We can no longer afford to maintain the status quo but to produce real change requires a fundamental paradigm shift; we must be willing to challenge the norms and structures that give the current system shape. In this dissertation, I have attempted to show how my instruments of choice, law and legal empowerment, can be used to disrupt and redistribute power within refugee situations and to protect and secure the rights and dignity of individuals. Aspiring to a new conception of refugee assistance is not being overly idealistic or unscholarly; it is an effort to escape Einstein's definition of insanity. In the words of Robert Browning, "a man's reach should exceed his grasp, or what's a heaven for?"⁸⁵¹

Migration has been called an exercise in dignity-seeking and nowhere is this truer than in the case of refugees fleeing violence and human rights abuses.⁸⁵² Leaving everything you know in order to search out security and a better life is not an act of desperation; it is an act of courage, an unambiguous expression of individual agency and a manifestation of the resilience of the human spirit. To then deny this essential truth is to betray our commitment to the equal and inherent human rights and dignity of individuals.

⁸⁵⁰ "Kobane: IS 'may soon take Syria-Turkey border town'" *BBC News* (6 October 2014), online: www.bbc.com/news/world-middle-east-29509828; "Number of Syrian refugees tops 3 million as insecurity grows – UN agency", *UN News Centre* (29 August, 2014), online: www.un.org/apps/news/story.asp?NewsID=48589#.VDLu-ldViQ;

⁸⁵¹ Robert Browning, "Andrea del Sarto (called 'The Faultless Painter')" in *The Norton Anthology of English Literature: The Major Authors*, 6th ed (New York: W. W. Norton & Company, 1996) 2011.

⁸⁵² Crépeau & Samaddar, *supra* note 15 at 6.

Bibliography

INTERNATIONAL TREATIES, DECLARATIONS AND LEGISLATION

1967 Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, online:
www.unhcr.org/refworld/docid/3ae6b36ec.html.

Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”), 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, GA Res 47/135 (Annex), UN GAOR, 47th Sess, Supp No 49, UN Doc A/47/49 (1993).

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

Universal Declaration of Human Rights, GA Res 217(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, UN Doc A/Res/47/1 (2007).

Vienna Declaration and Programme of Action, GA Res 48/121, UNGAOR, 1993, UN Doc A/CONF.157/23.

DOMESTIC LEGISLATION

Argentina: Acta resolutive No. 465 de 1998, Comité de elegibilidad para los refugiados (24 February 1998).

Brazil, Law No. 9474/97, establishing arrangements for the implementation of the 1951 Status of Refugees and related provisions (23 July 1997).

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1981 (U.K.), 1982, c 11.

Honduras, Decreto No. 208-2003, Ley de Migración y Extranjería [Honduras] (3 March 2004).

Peru: Ley No. 27.891 de 2002 – Ley del refugiado [Peru] (20 December 2002).

JURISPRUDENCE

Frame v Smith, [1987] 2 SCR 99.

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), [1970] ICJ Rep 3

UNITED NATIONS DOCUMENTS

Ballard, Brett. “Reintegration Programmes for Refugees in South-East Asia: Lessons Learned from UNHCR’s Experience”, UN Doc EPAU/2002/01 (Geneva, United Nations High Commissioner for Refugees, April 2002), online: www.unhcr.org/3ccff9134.html.

CASA Consulting, *The Community Services Function in UNHCR: An Independent Evaluation*, UN Doc EPAU/2003/02 (Geneva: UNHCR, 2003), online: www.unhcr.org/3e2d233ba.html.

Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (2000).

Da Costa, Rosa. *The Administration of Justice in Refugee Camps: A Study of Practice* (Geneva: UNHCR, 2006), online: www.unhcr.org/refworld/docid/4417f9a24.html.

_____. *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations* (Geneva: UNHCR, June 2006) UN Doc POLAS/2006/02, online: www.refworld.org/docid/44bb9b684.html.

Deschamp, Bryan & Sebastian Lohse. *Still Minding the Gap? A Review of Efforts to Link Relief and Development in Situations of Human Displacement, 2001-2012*, UNHCR Policy Development and Evaluation Service, UN Doc PDES/2013/01 (February 2013), online: www.unhcr.org/512cdef09.html.

Kaiser, Tania. *A Beneficiary-Based Evaluation of UNHCR's Programme in Guinea, West Africa*, UN Doc EPAU/2001/02 (Geneva: UNHCR, 2001), online: www.unhcr.org/3b0a2a752.html.

KRC Research & Consulting Inc. (1991) "A Communications Strategy for the Office of the United Nations High Commissioner for Refugees: Executive Summary", report prepared by Mark Malloch-Brown for the UNHCR.

Legal Empowerment of the Poor and Eradication of Poverty, Report of the Secretary-General, UNGAOR, 64th Sess, UN Doc A/64/133 (2009).

O'Hagan, Paul. *An Independent Impact Evaluation of UNHCR's Community Based Reintegration Programme in Southern Sudan* (UNHCR, 2011), online: www.unhcr.org/4e41237a9.html.

Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, UN GAOR, 23rd Sess, UN Doc A/HRC/23/36 (2013), online: OHCHR daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/117/94/PDF/G1311794.pdf?OpenElement.

The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, UNSCOR, UN Doc S/2004/616 (2004).

Sperl, Stefan & Machtelt De Vriese. "From Emergency Evacuation to Community Empowerment: Review of the Repatriation and Reintegration Programme in Sierra Leone", UN Doc EPAU/2005/01 (Geneva: United Nations High Commissioner for Refugees, February 2005), online: www.unhcr.org/420b80384.pdf.

Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428(V), UNGAOR, 5th Sess, Supp No 20, UN Doc A/1775 (1950).

UNDP. *Access to Justice: Practice Note* (2004), online: www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf.

- _____. *Envisioning Empowerment: A Portfolio of Initiatives for Achieving Inclusion and Development* (UNDP, 2009), online: www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/envisioning-empowerment/Envisioning%20Empowerment_full.pdf.
- _____. *Human Development Report 1990: Concept and Measurement of Human Development*, (Geneva: 1990), online: hdr.undp.org/en/reports/global/hdr1990/.
- _____. *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000).
- _____. *Human Development Report 2011 – Sustainability and Equity: A Better Future for All* (New York: Palgrave Macmillan, 2011).
- _____. *Programming for Justice: Access for All – A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice*, Asia-Pacific Rights and Justice Initiative (Bangkok: UNDP, 2005).
- UNGAOR. *International Conference on Assistance to Refugees in Africa*, 73rd Plen Mtg, GA Res. 42, A/RES/35/42 (1980).
- UNHCR. “2014 UNHCR Country Operations Profile – Kenya”, online: www.unhcr.org/pages/49e483a16.html.
- _____. *A Community-Based Approach in UNHCR Operations* (Geneva: UNHCR, 2008), online: www.refworld.org/pdfid/47da54722.pdf.
- _____. *Agenda for Protection*, 3rd edition (October 2003), online: www.unhcr.org/3e637b194.html.
- _____. *Analysis of Gaps in Refugee Protection Capacity – Thailand* (November 2006), online: www.refworld.org/docid/472897020.html.
- _____. *The Benefits of Belonging: Local Integration Options and Opportunities for Host Countries, Communities and Refugees* (29 July 2011), online: www.unhcr.org/4e3276e26.html.
- _____. *Concept Note – Transitional Solutions Initiative UNDP and UNHCR in Collaboration with the World Bank* (October 2010), online: www.unhcr.org/4e27e2f06.html.
- _____. *Conclusion on Children at Risk*, No 107 (LVIII)-2007, 5 October 2007, online: www.unhcr.org/4717625c2.html.
- _____. *Conclusion on Civil Registration*, No 111 (LXIV)-2013, 17 October 2013, online: www.unhcr.org/525fdfef9.html.

- _____. *Conclusion on Safety of UNHCR Staff and Other Humanitarian Personnel*, No 83 (XLVIII)-1997, 17 October 1997, online: www.unhcr.org/3ae68c4338.html.
- _____. *Conclusion on Protracted Refugee Situations*, No. 109 (LXI)-2009, 22 December 2009, online: www.unhcr.org/4b332bca9.html.
- _____. *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, No 103 (LVI)-2005, 7 October 2005, online: www.unhcr.org/43576e292.html.
- _____. *Conclusion on Women and Girls at Risk*, No 105 (LVII)-2006, 6 October 2006, online: www.unhcr.org/45339d922.html.
- _____. *Convention Plus*, online: www.unhcr.org/pages/4a2792106.html.
- _____. *Displacement: The New 21st Century Challenge*, UNHCR Global Trends 2012 (2013), online: www.unhcr.org/51bacb0f9.html.
- _____. *Framework for Durable Solutions for Refugees and Persons of Concern* (May 2003) online: www.refworld.org/docid/4124b6a04.html.
- _____. *General Conclusion on International Protection*, No 108 (LIX) -2008, 10 October 2008, online: www.unhcr.org/49086bfd2.html.
- _____. *Handbook for Planning and Implementing Development Assistance for Refugees (DAR) Programmes* (January 2005), online: www.unhcr.org/refworld/docid/428076704.html.
- _____. *Handbook for Registration: Procedures and Standards for Registration, Population Data Management and Documentation*, Provisional Release (September 2003) (UNHCR, 2003), online: www.unhcr.org/3f8e93e9a.pdf.
- _____. *Handbook Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996).
- _____. *Operational Protection in Camps and Settlements: A Reference Guide of Good Practices in the Protection of Refugees and Other Persons of Concern* (Geneva: UNHCR, 2006).
- _____. *Protection of the Refugee's Family*, No 88(L)-1999, 8 October 1999, online: www.unhcr.org/3ae68c4340.html.
- _____. *Protracted Refugee Situations*, UNHCR ExCom Standing Committee, 30th Mtg, UN Doc EC/54/SC/CRP.14 (2004).
- _____. *Protracted Refugee Situations: A discussion paper prepared for the High Commissioner's Dialogue on Protection Challenges*, UN Doc UNHCR/DPC/2008/Doc.2 (20 November 2008), online: www.unhcr.org/492ad3782.html.

- _____. *Quick Impact Projects (QiPs) – A Provisional Guide* (May 2004), online: www.unhcr.org/refworld/docid/416bd5a44.html.
- _____. *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* (May 2003), online: www.unhcr.org/3f696bcc4.html
- _____. *The State of the World's Refugees 2006: Human Displacement in the New Millennium* (Oxford: Oxford University Press, 2006).
- _____. *The State of the World's Refugees: In Search of Solidarity – A Synthesis* (2012) online: www.unhcr.org/4fc5ceca9.html.
- _____. *Tripartite Agreement on the Voluntary Repatriation of Burundian Refugees in Rwanda*, 18 August 2005, online: www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=44ae612dc6&skip=0&query=tripartite.
- _____. *Tripartite Agreement on the Voluntary Repatriation of Congolese Refugees from Tanzania*, 21 August 1997, online: www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ee84d5b4&skip=0&query=tripartite.
- _____. *Tripartite Agreement Sudan-DRC-UNHCR for the Voluntary Repatriation of the Refugees From the Republic of Sudan Living in the Democratic Republic of Congo*, January 2006, online: www.refworld.org/docid/44044c224.html.
- _____. *UNHCR Handbook for the Protection of Women and Girls: Glossary* (1 January 2008), online: www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=47cfad9e2&query=glossary.
- _____. *UNHCR Statistical Yearbook 2010: Trends in Displacement, Protection and Solutions*, 27 December 2011, online: www.unhcr.org/4ef9cc9c9.html.
- _____. *UNHCR Statistical Yearbook 2012*, 12th ed (UNHCR, 2013), online: www.unhcr.org/52a7213b9.html.
- _____. *The UNHCR Tool for Participatory Assessment in Operations* (Geneva: UNHCR, 2006), online: www.unhcr.org/450e963f2.html.
- UNHCR ExCom. *Protracted Refugee Situations: Revisiting the Problem*, 42nd Mtg, UN Doc EC/59/SC/CRP.13 (2 June 2008) online: www.unhcr.org/484514c12.html
- UN Human Rights Committee. *CCPR General Comment No. 15: The Position of Aliens under the Covenant*, UN Human Rights Committee, 27th Sess. UN Doc HRI/GEN/1/Rev.9 (Vol 1) (11 April 1986) 18.

_____. *CCPR General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, UN Doc CCPR/C/21/Rev.1/Add.7 (1996).

UNOHCHR, “World Conference on Human Rights. (14-25 June 1993) Vienna, Austria,” online: United Nations Human Rights www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx.

UN Secretary-General’s Policy Committee. *Durable Solutions: Follow up to the Secretary-General’s 2009 report on peacebuilding*, UNSG Dec. 2011/20, (New York: UN, 2011).

OTHER GOVERNMENTAL AND INTERGOVERNMENTAL ORGANIZATIONS

Afghanistan Independent Human Rights Commission. *A Call for Justice: Conclusion of National Consultation on Transitional Justice in Afghanistan* (Kabul: Afghanistan Independent Human Rights Commission, 2005), online: www.refworld.org/pdfid/47fdfad50.pdf.

Asian Development Bank. *Legal Empowerment for Women and Disadvantaged Groups*, Final Report (Manila: Asian Development Bank, 2009).

Bruce, John W., et al. *Legal Empowerment of the Poor: From Concepts to Assessment* (Washington, DC: USAID, 2007).

Central Intelligence Agency (CIA), “Colombia” in *The World Factbook*, online: www.cia.gov/library/publications/the-world-factbook/geos/co.html.

Christensen, Asger & Niels Harild. “Forced Displacement: The Development Challenge”, Conflict, Crime & Violence Issue Note (New York: Social Development Department: The World Bank, 2009), online: siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1164107274725/3182370-1164201144397/Forced_Displacement.pdf.

Commission for Reception, Truth and Reconciliation in Timor-Leste, *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor* (Dili: CAVR, 2005) online: www.cavr-timorleste.org/en/cheгаReport.htm.

Department for International Development, *Safety, Security and Accessible Justice: Putting Policy into Practice* (UK: 2002).

Enghoff, Martin, et al. *In Search of Protection and Livelihoods: Socio-economic and Environmental Impacts of Dadaab Refugee Camps on Host Communities* (2010) report for the Royal Danish Embassy, the Republic of Kenya & the Norwegian Embassy, online: ALNAP www.alnap.org/resource/6334.

E.T. Jackson and Associates Ltd., *Adaptation, Resilience and Transition: Report of the Formative Evaluation of Camp Management in the Burmese Refugee Camps in Thailand*,

prepared for the Canadian International Development Agency, Australian Agency for International Development & Act for Peace (Ottawa: 2012), online: LocalGovernance.etjackson.com/publications/.

European Foundation, *Public Welfare Services and Social Exclusion: The Development of Consumer Oriented Initiatives in the European Union* (Dublin: The European Foundation, 1995).

Golub, Stephen and Kim McQuay. "Legal Empowerment: Advancing Good Governance and Poverty Reduction" in *Law and Policy Reform at the Asian Development Bank* (Manila: Asian Development Bank, 2001).

Holtzman, S. "Post-conflict reconstruction", *Environment Department Work in Progress* (Washington DC: The World Bank, 1995).

Inter-Agency, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons. Implementing the 'Pinheiro Principles'* (March 2007), online: www.refworld.org/docid/4693432c2.html.

Narayan, Deepa ed. *Empowerment and Poverty Reduction: A Sourcebook* (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2002).

Pradhan, Rima Das & Pauline Tweedie. *Legal Empowerment and Access of Women to Justice Assessment: February-March 2008* (Washington DC: USAID, 2008).

Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission (Accra: Graphic Packaging Ltd, 2004), online: www.sierraleonetrc.org/index.php/view-the-final-report.

World Health Organisation. *Mental Health of Refugees, Internally Displaced Persons and Other Populations Affected by Conflict*, online: www.who.int/disasters/repo/7406.doc.

CIVIL SOCIETY ORGANIZATIONS

Asiimwe, Allen Sophia. "NRC Sri Lanka: Promoting the Rights of Displaced Persons Through Legal Aid", (March 2008), Norwegian Refugee Council Evaluation Report, online: www.norad.no/no/resultater/publikasjoner/gjennomganger-fra-organisasjoner/publikasjon?key=134689.

Assessment Capacities Project (ACAPS). *Legal Status of Individuals Fleeing Syria* (June 2013), online: acaps.org/resourcescats/downloader/legal_status_of_individuals_fleeing_syria/174.

Asylum Access. *Asylum Access: Empowering Refugee Communities Worldwide*, Asylum Access Annual Report Fiscal Year 2011-2012, online: asylumaccess.org/AsylumAccess/wp-content/uploads/2012/10/AA_AnnualReport_11-12_FINAL_resized.pdf.

- The Border Consortium (TBC). *TBC Programme Report: July-December 2013* (December 2013), online: reliefweb.int/report/myanmar/border-consortium-programme-report-july-december-2013.
- Brookings-Bern Project on Internal Displacement. *IASC Framework on Durable Solutions for IDPs* (Washington DC: The Brookings Institutions – University of Bern Project on Internal Displacement, 2010).
- _____. *Transitional Justice and Displacement: Challenges and Recommendations* (June 2012), online: www.refworld.org/publisher/BROOKINGS...506158102_0.html.
- Burma Partnership. *Nothing About Us Without Us*, video (Burma Partnership: 2012), online: www.burmapartnership.org/nauwu/.
- Burmese Border Consortium Relief Programme. *Programme Report for the Period January to June 2001* (August 2001), online: www.theborderconsortium.org/media/10028/2001-6-mth-rpt-jan-jun-1-.pdf.
- The Camp Management Toolkit* (Oslo: Norwegian Refugee Council/The Camp Management Project, 2008).
- Commission on Legal Empowerment of the Poor. *Making the Law Work for Everyone – Volume One* (New York: Commission on Legal Empowerment of the Poor, 2008).
- Commission on Legal Empowerment of the Poor. *Making the Law Work for Everyone – Volume Two* (New York: Commission on Legal Empowerment of the Poor, 2008).
- The Fund for Peace. *The Failed States Index 2013* (2013), online: ffp.statesindex.org/rankings-2013-sortable.
- Haki Network. “The Legal Empowerment Approach to International Development: White Paper” (September 2011), online: LEPNet www.lepnet.org/group/access-justice/file/haki-legal-empowerment-white-papers.
- Human Rights Watch. *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers* (New York: Human Rights Watch, 2012), online: www.hrw.org/reports/2012/09/12/ad-hoc-and-inadequate.
- _____. *Trapped by Inequality: Bhutanese Refugee Women in Nepal* (New York: Human Rights Watch, 2003).
- _____. “Welcome to Kenya” *Police Abuse of Somali Refugees* (New York: Human Rights Watch, 2010), online: www.hrw.org/sites/default/files/reports/kenya0610webwcover.pdf.

Humanitarian Accountability Partnership. *The 2010 HAP Standard in Accountability and Quality Management* (Geneva: HAP International, 2010), online: www.hapinternational.org/pool/files/2010-hap-standard-in-accountability.pdf.

_____. *2013 Humanitarian Accountability Report* (2013), online: www.hapinternational.org/pool/files/2013-har.pdf.

International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Geneva: ICHRP, 2009).

Norwegian Refugee Council. *Fact Sheet: NRC's Country Programme in Pakistan* (March 2013), online: www.nrc.no/arch/_img/9186618.pdf.

Refugee Consortium of Kenya. *RCK Annual Report 2012*, online: www.rckkenya.org/index.php/resources/resources2.

Refugee Law Project. "Mobile Court Launched in Nakivale Refugee Settlement" (2013) online: www.refugeelawproject.org/others/13_05_02_mobile_courts.pdf.

The Sphere Project: Humanitarian Charter and Minimum Standards in Humanitarian Response, 2011 ed (Bourton on Dunsmore, Rugby, UK: The Sphere Project, 2011), online: www.ifrc.org/docs/idrl/I1027EN.pdf.

United for Sight, *Module 2: Mental Health in Refugee Camps and Settlements*, Refugee Health Online Course, online: www.uniteforsight.org/refugee-health/module2.

SECONDARY MATERIAL: MONOGRAPHS

Abregú, Martin. "Barricades or Obstacles: The Challenges of Access to Justice" in Rudolf V. Van Puymbroeck, ed, *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2001) 53.

Alkire, Sabina. "Structural Injustice and Democratic Practice: The Trajectory in Sen's Writings" in Séverine Deneulin, Mathias Nebel & Nicholas Sagovsky eds, *Transforming Unjust Structures: The Capability Approach* (Dordrecht: Springer, 2006) 47.

_____. *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (New York: Oxford University Press, 2002).

Alkire, Sabina & Séverine Deneulin. "The Human Development and Capability Approach" in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London UK: Earthscan and International Development Research Center, 2009) 22.

- Alsop, Ruth, Mette Frost Bertelsen & Jeremy Holland. *Empowerment in Practice: From Analysis to Implementation* (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2006), online: siteresources.worldbank.org/INTEMPowerment/Resources/Empowerment_in_Practice.pdf.
- Apffel-Marglin, Frédérique & Stephan Marglin. *Dominating Knowledge: Development, Culture, and Resistance* (Oxford: Clarendon Press, 1990).
- Arendt, Hannah. *The Origins of Totalitarianism* (Orlando: Harcourt Books, 1968).
- Ball, Olivia & Paul Gready. *The No-Nonsense Guide to Human Rights* (Toronto: New Internationalist Publications, 2006).
- Banik, Dan. “Rights, Legal Empowerment and Poverty: An Overview of the Issues” in Dan Banik ed, *Rights and Legal Empowerment in Eradicating Poverty* (Surrey: Ashgate Publishing Ltd, 2008) 11.
- Blackburn, James & Jeremy Holland, eds. *Who Changes?: Institutionalizing Participation in Development* (London: Intermediate Technology Publications, 2008).
- Bradley, Megan. “Truth-Telling and Displacement: Patterns and Prospects” in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 189.
- Browning, Robert. “Andrea del Sarto (called ‘The Faultless Painter’)” in *The Norton Anthology of English Literature: The Major Authors*, 6th ed (New York: W. W. Norton & Company, 1996) 2011.
- Campbell, Bryce. “Addressing Concerns about Transitional Justice in Displacement Contexts: A Humanitarian Perspective” in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 65.
- Cooke, Bill & Uma Kothari, eds. *Participation: The New Tyranny?* (London: Zed Books, 2001).
- _____. “The Case for Participation as Tyranny” in Bill Cooke & Uma Kothari, eds, *Participation: The New Tyranny?* (London: Zed Books, 2001) 1.
- Crépeau, François and Ranabir Samaddar. “Recognizing the Dignity of Migrants” in *Dignity: A Special Focus on Vulnerable Groups*, Frédéric Mégret & Florian Hoffman, eds (Agenda for Human Rights: A Swiss Initiative, Geneva Academy of International Humanitarian Law and Human Rights, 2009) 6.
- Crocker, David A. *Ethics of Global Development: Agency, Capability, and Deliberative Democracy* (New York: Cambridge University Press, 2008).

- Csaszar, Fruzsina. "Understanding the Concept of Power" in Ruth Alsop, ed, *Power, Rights, and Poverty: Concepts and Connections* (Washington DC: The International Bank for Reconstruction and Development/The World Bank and the Department of International Development, 2004) 137.
- Deneulin, Séverine. "Democracy and Political Participation" in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London: Earthscan, 2009) 185.
- _____. "Ideas Related to Human Development" in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London UK: Earthscan and International Development Research Center, 2009) 49.
- Deneulin, Séverine & Lila Shahani, eds. *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London: Earthscan, 2009).
- Donnelly, Jack. "The Virtues of Legalization" in Saladin Meckled-Garcia & Başak Çali, eds, *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (New York: Routledge, 2006) 67.
- Drèze, Jean & Amartya Sen. *India: Development and Participation* (Delhi: Oxford University Press, 2002).
- _____. *India, Economic Development and Social Opportunity* (Delhi: Oxford University Press, 1995).
- Drydyk, Jay. "Participation, Empowerment, and Democracy" in Charles K Wilber, Amitava Krishna Dutt & Theodore M Hesburgh, eds, *New Directions in Development Ethics: Essays in Honor of Denis Goulet* (Notre Dame, Ind: University of Notre Dame Press, 2010) 333.
- Duthie, Roger. "Contributing to Durable Solutions: Transitional Justice and the Integration and Reintegration of Displaced Persons" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 37.
- _____. "Incorporating Transitional Justice into the Response to Displacement" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 10.
- Edwards, Alice. "Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the International Protection of Refugees" in Roberta Arnold & Noëlle Quéniwet, eds, *International Humanitarian Law and Human Rights Law* (Leiden, The Netherlands: Brill Academic Publishers, 2008) 421.
- Eyben, Rosalind. "Linking Power and Poverty Reduction" in Ruth Alsop, ed, *Power, Rights, and Poverty: Concepts and Connections* (Washington DC: The International Bank for

- Reconstruction and Development/The World Bank and the Department of International Development, 2004) 15.
- Foucault, Michel. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Colin Gordon ed (New York: Pantheon Books, 1980).
- Fox-Decent, Evan. *Sovereignty's Promise: The State as Fiduciary* (Oxford, UK: Oxford University Press, 2011).
- Fox-Decent, Evan & Evan Criddle, *International Law and the Fiduciary Constitution of Sovereignty*, New York: Oxford University Press [forthcoming in 2015].
- Golub, Stephen. "What is Legal Empowerment? An Introduction" in Stephen Golub ed, *Legal Empowerment Practitioners' Perspectives* (Rome: International Development Law Organization, 2010) 9.
- Goulet, Denis. *The Cruel Choice: A New Concept in the Theory of Development* (New York: Atheneum, 1971).
- De Greiff, Pablo. "Justice and Reparations," in Jon Miller & Rahul Kumar eds, *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007) 153.
- _____. "Theorizing Transitional Justice" in Williams, Nagy & Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 31.
- Griffiths, Anne. "Legal Pluralism" in Reza Banakar & Max Travers, eds, *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) 289.
- Hagen, Toni. *Building bridges to the Third World: memories of Nepal 1950-1992*, (Delhi: Pilgrims Book House, 1994).
- Helton, Arthur C. *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (New York: Oxford University Press, 2002).
- Hickey, Samuel & Giles Mohan, eds, *Participation: From Tyranny to Transformation?* (London: Zed Books, 2004).
- Kant, Immanuel. *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996).
- Kapur, Amrita. "Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems" in Erica Harper, ed, *Working with Customary Justice Systems: Post Conflict and Fragile States* (Rome: International Development Law Organization, 2011), 73.
- De Langen, Maaïke & Maurits Barendrecht, "Legal Empowerment of the Poor: Innovating Access to Justice" in Jorrit de Jong & Gowher Rizvi, eds, *The State of Access: Success and*

Failure of Democracies to Create Equal Opportunities (Washington DC: Brookings Institution Press, 2008) 250.

Loescher, Gil & James Milner. "Understanding the Problem of Protracted Refugee Situations" in Gil Loescher et al, eds, *Protracted Refugee Situations: Political, Human Rights and Security Implications* (Tokyo: United Nations University Press, 2008) 20.

Lukes, Steven. *Power: a Radical View* (London, UK: Macmillan, 1974).

McConnachie, Kirsten. *Governing Refugees: Justice, Order and Legal Pluralism* (New York: Routledge, 2014).

Mégret, Frédéric & Florian Hoffman, eds. *Dignity: A Special Focus on Vulnerable Groups* (Agenda for Human Rights: A Swiss Initiative, Geneva Academy of International Humanitarian Law and Human Rights, 2009).

Mennen, Tiernan. "The Mystery of Legal Empowerment: Livelihoods and Community Justice in Bolivia" in Stephen Golub ed., *Legal Empowerment: Practitioners' Perspectives* (Rome: International Development Law Organization, 2010) 63.

Nussbaum, Martha. "Capabilities as Fundamental Entitlements: Sen and Social Justice" in Alexander Kaufman, ed, *Capabilities Equality: Basic Issues and Problems* (New York: Routledge, 2006) 44.

_____. *Creating Capabilities: The Human Development Approach*, (Cambridge, Mass: The Belknap Press of Harvard University Press, 2011).

_____. *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass: Belknap Press, Harvard University Press, 2007).

_____. *Women and Human Development* (Cambridge, UK: Cambridge University Press, 2000).

O'Connell, Jamie. "Empowering the Disadvantaged after Dictatorship and Conflict: Legal Empowerment, Transitions and Transitional Justice," in Stephen Golub ed, *Legal Empowerment Practitioners' Perspectives* (Rome: International Development Law Organization, 2010) 113.

Petes, Patti, Catalina Smulovitz & Michael Walton. "Evaluating Empowerment: A Framework with Cases from Latin America" in Deepa Narayan, ed, *Measuring Empowerment: Cross Disciplinary Perspectives* (Herndon, VA: World Bank Publications, 2005) 39.

Rawls, John. *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 1996).

- Robeyns, Ingrid. "Equality and Justice" in Séverine Deneulin & Lila Shahani, eds, *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London UK: Earthscan and International Development Research Center, 2009) 101.
- _____. "Sen's Capability Approach and Feminist Concerns" in S Alkire, M Qizilbash & F Comim, eds, *The Capability Approach: Concepts, Measures and Applications* (Cambridge: Cambridge University Press, 2008) 82.
- Sadan, Elisheva. *Empowerment and Community Planning: Theory and Practice of People-Focused Social Solutions* (Tel Aviv: Hakibbutz Hameuchad Publishers, 1997).
- Sen, Amartya. *Development as Freedom* (New York: Anchor Books, 2000).
- _____. *Inequality Reexamined* (Cambridge, Mass: Harvard University Press, 1992).
- Sengupta, Arjun. "The Political Economy of Legal Empowerment of the Poor" in Dan Banik ed, *Rights and Legal Empowerment in Eradicating Poverty* (Surrey: Ashgate Publishing Ltd, 2008) 31.
- Smith, Adam & Edwin Cannan (ed). *The Wealth of Nations* (New York: Bantam Classic, 2003).
- Türk, Volker & Rebecca Dowd. "Protection Gaps" in Fiddian-Qasmiyeh, et al, eds, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) 278.
- Ubink, Janine & Benjamin van Rooij. "Towards Customary Legal Empowerment: An Introduction" in Janine Ubink & Thomas McInerney, eds, *Customary Justice: Perspectives on Legal Empowerment* (Rome: International Development Law Organization, 2011) 7.
- Van de Meene, Ineke & Benjamin van Rooij. *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Cooperation* (Amsterdam: Leiden University Press, 2008).
- Van der Auweraert, Peter. "The Potential for Redress: Reparations and Large-Scale Displacement" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) 139.
- Voltaire, "La Bégueule" in *Contes et poésies diverses de M. de Voltaire* (Paris: Valade, 1780).
- Wojkowska, Ewa & Johanna Cunningham. "Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Poor" in Stephen Golub ed, *Legal Empowerment: Practitioners' Perspectives* (Rome: International Development Law Organization, 2010) 93.

SECONDARY MATERIAL: ARTICLES, REPORTS AND WORKING PAPERS

- Aldana, Raquel. "A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities" (2006) 5:1 *Journal of Human Rights* 107.
- Alkire, Sabina. "Why the Capability Approach?" (2005) 6:1 *J Human Development* 115.
- Aukot, Ekuru. "It Is Better to Be a Refugee Than a Turkana in Kakuma: Revisiting the Relationship between Hosts and Refugees in Kenya" (2003) 21:3 *Refuge: Canada's Periodical on Refugees* 73.
- Banik, Dan. "Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication" (2009) 1 *Hague Journal on the Rule of Law* 117.
- Beran, Harry. "In Defense of the Consent Theory of Political Obligation and Authority" (1977) 87 *Ethics* 260.
- Betts, Alexander. "Development Assistance and Refugees: Towards a North-South Grand Bargain?" (2009) *Refugee Studies Centre, Oxford University, Forced Migration Policy Briefing* 2.
- _____. "International Cooperation and the Targeting of Development Assistance for Refugee Solutions: Lessons from the 1980s" (2004) *UNHCR New Issues in Refugee Research Working Paper No 107*, online: www.unhcr.org/415d0d982.pdf.
- Bradley, Megan. "Back to Basics: The Conditions of Just Refugee Return" (2008) 21:3 *Journal of Refugee Studies* 285.
- Burma Lawyers' Council, "Analysis on the Situation of the Refugee Camps From the Rule of Law Aspect" (April 2007) 26 *LawKa Pala: Legal Journal on Burma* 38, online: Thailand Law Forum www.thailawforum.com/articles/burma-lawyers.html.
- Calhoun, Noel. "UNHCR and Community Development: A weak link in the chain of refugee protection?" (2010) *New Issues in Refugee Research, Research Paper 191*, UNHCR Policy Development and Evaluation Service, online: www.unhcr.org/4cb47c2f9.html.
- Chambers, Robert. "Participatory Rural Appraisal (PRA): Analysis of Experience" (1994) 22:9 *World Development* 1253.
- Cheng, Christine & Johannes Chudoba, "Moving Beyond Long-term Refugee Situations: the Case of Guatemala" (2003) *UNHCR New Issues in Refugee Research Working Paper No 86*, online: www.unhcr.org/3ea55d704.html.
- Crisp, Jeff. "The Local Integration and Local Settlement of Refugees: a Conceptual and Historical Analysis" (2004) *UNHCR New Issues in Refugee Research, Working Paper 102* (Geneva: UNHCR), online: www.unhcr.org/407d3b762.html.

- _____. “Mind the Gap! UNHCR, Humanitarian Assistance and the Development Process” (2001) UNHCR New Issues in Refugee Research Working Paper No 43, online: www.unhcr.org/3b309dd07.pdf.
- Cunningham, Johanna, R Sudarshan & Ewa Wojkowska. *Making Everyone Work for Legal Empowerment of the Poor* (Report of the Regional Dialogue on Legal Empowerment of the Poor, Bangkok, 3-5 March 2009).
- Dabo, Awa. “In the Presence of Absence: Truth-Telling and Displacement in Liberia” (2012) Paper prepared for ICTJ/Brookings Project on Transitional Justice and Displacement, online: www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Liberia-CaseStudy-2012-English.pdf.
- Dauvergne, Catherine. “The Dilemma of Rights Discourses for Refugees” (2000) 23 UNSWLJ 26.
- Donnelly, Jack. “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982) 76:2 *American Political Science Rev* 303.
- Drydyk, Jay. “When is Development More Democratic?” (2005) 6:2 *Journal of Human Development* 247.
- Dupret, Baudoin. “Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-Specification” (2007) 1 *Eur J Leg Stud*.
- Edwards, Alice. “Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders” (2008-2009) 30 *Mich J Intl L* 763.
- Farmer, Alice. “Refugee Responses, State-like Behavior, and Accountability for Human Rights Violations: A Case Study of Sexual Violence in Guinea’s Refugee Camps” (2006) 9 *Yale Human Rts & Dev LJ* 44.
- Featherstone, Andy. “Improving Impact: Do Accountability Mechanisms Deliver Results?”, (June 2013), a joint Christian Aid, Save the Children, Humanitarian Accountability Partnership report, online: www.christianaid.org.uk/images/accountability-impact-report-2013.pdf.
- Feldman, Sara. “Development Assisted Integration: A Viable Alternative to Long Term Residence in Refugee Camps?” (2007) 22 *Praxis – The Fletcher Journal of Human Security* 49.
- Fielden, Alexandra. “Local Integration: an Under-reported Solution to Protracted Refugee Situations” (2008) UNHCR New Issues in Refugee Research, Research Paper 158 (Geneva: UNHCR), online: www.unhcr.org/486cc99f2.html.

- Fox-Decent, Evan. "The Fiduciary Nature of State Legal Authority" (2005-2006) 31 Queen's LJ 259.
- Fox-Decent, Evan & Evan J. Criddle. "The Fiduciary Constitution of Human Rights" (2009) 15 Legal Theory 301.
- Golub, Stephen. "Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative" (2003) Carnegie Endowment for International, Peace Rule of Law Series, Democracy and Rule of Law Project Working paper No 41.
- _____. "The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice" (2009) 1 Hague Journal on the Rule of Law 101.
- Goodwin-Gill, Guy S. "Refugees and their Human Rights" (2004) University of Oxford Refugee Studies Centre Working Paper No 17, online: www.rsc.ox.ac.uk/publications/refugees-and-their-human-rights.
- Gorlick, Brian. "Human Rights and Refugees: Enhancing Protection through International Human Rights Law" (2000) 69 Nordic J Intl L 117.
- Goulet, Denis. "Participation in Development: New Avenues" (1989) 17:2 World Development 165.
- Griek, Ilse. "Traditional systems of Justice in Refugee Camps: The Need for Alternatives" (2006) 27:2 Refugee Reports 1.
- Haider, Huma. "Transnational Transitional Justice and Reconciliation: The Participation of Conflict-generated Diasporas in Addressing the Legacies of Mass Violence" (2014) Journal of Refugee Studies [Advance Release].
- Harding, Joel et al. "Access to Justice and the Rule of Law" (2008) 30 Forced Migration Rev 28.
- Harding, Joel & Sheila Varadan. "A Community-Based Approach to Refugee Protection in a Protracted Refugee Situation" (March 2010) 46 Humanitarian Exchange Magazine, online: www.odihpn.org/humanitarian-exchange-magazine/issue-46/a-community-based-approach-to-refugee-protection-in-a-protracted-refugee-situation.
- Harrell-Bond, Barbara. "Can Humanitarian Work with Refugees be Humane?" (2002) 24 Hum Rts Q 51.
- _____. "In Search of 'Invisible' Actors: Barriers to Access in Refugee Research" (2007) 20:2 Journal of Refugee Studies 281.

- Harris Rimmer, Susan. "Reconceiving Refugees and Internally Displaced Persons as Transitional Justice Actors" (2010) UNHCR New Issues in Refugee Research, Research Paper No. 187, online: www.unhcr.org/4bbb2a589.pdf.
- Hathaway, James C. "Reconceiving Refugee Law as Human Rights Protection" (1991) 4:2 *Journal of Refugee Studies* 113.
- Hill, Marianne T. "Development as Empowerment" (2003) 9(2-3) *Feminist Economics* 117.
- Ho, Anita & Carol Pavlish. "Indivisibility of Accountability and Empowerment in Tackling Gender-Based Violence: Lessons from a Refugee Camp in Rwanda" (2011) 24:1 *Journal of Refugee Studies* 88.
- Holzer, Elizabeth. "What Happens to Law in a Refugee Camp?" (2013) 47:1 *Law & Soc'y Rev* 837.
- Ibrahim, Solava and Sabina Alkire. *Agency & Empowerment: A Proposal for Internationally Comparable Indicators*, (2007) OPHI Working Paper No 4, online: Oxford Poverty & Human Development Initiative www.ophi.org.uk/working-paper-number-04/.
- Inheteven, Katharina. "'Because we are refugees': Utilizing a Legal Label" (2006) UNHCR New Issues in Refugee Research, Research Paper No 130, online: www.unhcr.org/4538eaaa2.html.
- Iyodu, Bernadette. "Kenyan Refugees Included in Transitional Justice Processes" (2011) 38 *Forced Migration Rev* 52.
- Jacobsen, Karen. "The Forgotten Solution: Local Integration for Refugees in Developing Countries" (2001) UNHCR New Issues in Refugee Research, Working Paper 45, online: www.unhcr.org/3b7d24059.html.
- Kabeer, Naila. "Resources, Agency, Achievements: Reflections on the Measurement of Women's Empowerment" (1999) 30 *Development and Change* 435.
- Kaiser, Tania. "Participating in Development? Refugee Protection, Politics and Developmental Approaches to Refugee Management in Uganda" (2005) 26 *Third World Quarterly* 351.
- _____. "Participation or Consultation? Reflections on a 'Beneficiary Based' Evaluation of UNHCR's Programme for Sierra Leonean and Liberian Refugees in Guinea, June-July 2000" (2004) 17:2 *Journal of Refugee Studies* 185.
- Kiani, Maria. "Collective Efforts to Improve Humanitarian Accountability and Quality: the HAP Deployment to Dadaab" (2011) *Humanitarian Exchange Magazine* 50, online: www.odihpn.org/humanitarian-exchange-magazine/issue-50/collective-efforts-to-improve-humanitarian-accountability-and-quality-the-hap-deployment-to-dadaab.

- Lattu, Kirsti. *To Complain or Not to Complain: Still the Question* (Humanitarian Accountability Partnership: 2008), online: [www.hapinternational.org/pool/files/bbc-report-lowres\(2\).pdf](http://www.hapinternational.org/pool/files/bbc-report-lowres(2).pdf).
- Lawson, Jane Elizabeth. "What Happens After the War? How refugee camp peace programmes contribute to post-conflict peacebuilding strategies" (2012) UNHCR New Issues in Refugee Research, Research Paper No 245, online: www.unhcr.org/507e67c09.html.
- Liebenberg, Sandra. "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 S Afr J on Hum Rts 1.
- Limbu, Bishupal. "Illegible Humanity: The Refugee, Human Rights, and the Question of Representation" (2009) 22:3 Journal of Refugee Studies 257.
- Loescher, Gil, et al. "Protracted Refugee Situations and the Regional Dynamics of Peacebuilding" (2007) 7:3 Conflict, Security & Development 491.
- Loescher, Gil & James Milner. "Protracted Refugee Situations and State and Regional Insecurity" (2004) 4:1 Conflict, Security & Development 3.
- _____. "Understanding the Challenge" (2009) 33 Forced Migration Rev 9.
- Luban, David. "Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)" (2005) U Ill Rev 815.
- Lundy, Patricia & Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up" (2008) 35:2 JL & Soc'y 265.
- Macchiavello, Michela. "Forced Migrants as an Under-utilized Asset: Refugee skills, livelihoods, and achievements in Kampala, Uganda" (2003) UNHCR New Issues in Refugee Research, Working Paper No 95, online: www.unhcr.org/3f818aa04.html.
- Malena, Carmen, Reiner Forster & Janmejy Singh. "Social Accountability: An Introduction to the Concept and Emerging Practice" (December 2004) Social Development Papers – Participation and Civic Engagement, Paper No 76 (Washington DC: Social Development Department – The World Bank, 2004).
- Malkki, Liisa H. "Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization" (August, 1996) 11:3 Cultural Anthropology 377.
- Maru, Vivek. "Access to Justice and Legal Empowerment: A Review of World Bank Practice" (2009) World Bank Justice and Development Working Paper No 9/2009, online: openknowledge.worldbank.org/bitstream/handle/10986/18102/518430NWP0Acce10Box342050B01PUBLIC1.pdf?sequence=1.
- _____. "Allies Unknown: Social Accountability and Legal Empowerment" (2010) 12:1 Health and Human Rights 83.

- McCallin, Barbara. "Restitution and Legal Pluralism in Contexts of Displacement" (2012) online: Brookings-LSE Project on Internal Displacement www.brookings.edu/~media/Projects/idp/tj%20case%20studies/McCallin%20Legal%20Pluralism.pdf.
- McCrudden, Christopher. "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19:4 EJIL 655.
- McNamara, Dennis. "The Protection of Refugees and the Responsibility of States: Engagement or Abdication?" (1998) 11 Harv Hum Rts J 355.
- Merry, Sally E. "Legal Pluralism" (1998) 22 Law & Soc'y Rev 872.
- Mickelson, Karin. "How Universal is the Universal Declaration?" (1998) 47 UNBLJ 19.
- Milner, James. "Refugees and the Peacebuilding Process" (2011) UNHCR New Issues in Refugee Research, Research Paper No 224, online: www.unhcr.org/4eb25c7f9.html.
- Moore, Mick. "Empowerment at Last?" (2001) 13 J Intl Dev 321.
- NGO Monitor, "Exploiting Justice: How the UK, EU, & Norway Fund NGO Lawfare vs. Israel" (February 2014), online: [ngo-monitor.org/data/images/File/NGO_Monitor-Report_Norwegian_Refugee_Council%20\(1\).pdf](http://ngo-monitor.org/data/images/File/NGO_Monitor-Report_Norwegian_Refugee_Council%20(1).pdf).
- Nussbaum, Martha. "Beyond the Social Contract: Capabilities and Global Justice" (2004) 32:1 Oxford Development Studies 3.
- _____. "Capabilities and Human Rights" (1997) 66:2 Fordham L Rev 273.
- _____. "Capabilities, Entitlements, Rights: Supplementation and Critique" (2011) 12:1 J Human Development and Capabilities 23.
- Okogbule, Nlerum S. "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects" (2005) 3 SUR - Intl J on Hum Rts 95.
- Olivius, Elisabeth. "(Un)Governable Subjects: The Limits of Refugee Participation in the Promotion of Gender Equality in Humanitarian Aid" (2014) 27:1 Journal of Refugee Studies 42
- Potts, Helen. *Participation and the Right to the Highest Attainable Standard of Health* (Essex, UK: Human Rights Centre, University of Essex, 2008) online: University of Essex repository.essex.ac.uk/9714/1/participation-right-highest-attainable-standard-health.pdf.
- Pretty, Jules N. "Alternative Systems of Enquiry for Sustainable Agriculture" (1994) 2(25) IDS Bulletin 37.

- Pupavac, Vanessa. "Refugees in the 'sick role': Stereotyping refugees and eroding refugee rights" (2006) UNHCR New Issues in Refugee Research, Research Paper No 128, online: www.unhcr.org/44e198712.html.
- Purkey, Anna Lise. "A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations" (2014) 27:2 *Journal of Refugee Studies* 260.
- _____. "Questioning Governance in Protracted Refugee Situations: The Fiduciary Nature of the State-Refugee Relationship" (2014) 25:4 *Intl J Refugee L* 693.
- Rabkin, Jeremy. "What We Can Learn About Human Dignity from International Law" (2003-2004) 27 *Harv JL & Pub Pol'y* 145.
- Rajaram, Prem Kumar. "Humanitarianism and Representations of the Refugee" (2002) 15 *Journal of Refugee Studies* 247.
- Reyes, Jan Rachel. "Deliver Us from Our Protectors: Accountability for Violations Committed by Humanitarian Aid Staff Against Refugee Women and Children" (2009) 44 *USFL Rev* 211.
- Rowlands, Jo. *Questioning Empowerment: Working with Women in Honduras* (Oxford: Oxfam (UK and Ireland), 1997).
- Ruggeri Laderchi, Caterina, Ruhi Saith & Frances Stewart. "Does it Matter that we do not Agree on the Definition of Poverty? A Comparison of Four Approaches" (September 2003) 31:3 *Oxford Development Studies* 243.
- Schachter, Oscar. "Human Dignity as a Normative Concept" (1983) 77:4 *Am J Intl L* 848.
- Schmiechen, Malinda M. "Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps" (2003) 22 *St Louis U Pub L Rev* 473.
- Sen, Amartya. "Capabilities, Lists, and Public Reason: Continuing the Conversation" (2004) 10(3) *Feminist Economics* 77.
- _____. "Development as Capability Expansion" (1989) 19 *J Development Planning* 41.
- _____. "Human Rights and Asian Values" (1997) July 14/21 *The New Republic* 33.
- _____. "Human Rights and Capabilities" (2005) 6:2 *J Human Development* 151.
- Sharma, Bhavna. "Voice, Accountability and Civic Engagement: A Conceptual Overview" Commissioned by Oslo Governance Center, Bureau for Development Policy, UNDP (Overseas Development Institute, 2008).

- Smith, Merrill. "Development Aid for Refugees: Leveraging Rights or Missing the Point?", *World Refugee Survey 2005* (Washington DC: US Committee for Refugees and Immigrants, 2005) 4.
- _____. "Development Without Refugee Rights? A Civil Society Response" (2004-2005) 28 *Fordham Intl LJ* 1479.
- _____. "Warehousing Refugees: A Denial of Rights, a Waste of Humanity" in Merrill Smith ed, *World Refugee Survey 2004* (Washington DC: US Committee for Refugees and Immigrants, 2004) 38.
- Suchkova, Maria. "The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation" (2011) Essex Transitional Justice Network, Reparations Unit Briefing Paper No 5.
- Taylor, David. "Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?" (2014) Discussion paper prepared for Impunity Watch, online: www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf.
- Transnational Development Clinic, Jerome N. Frank Legal Services Organization Yale Law School, et al, *Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic* (Yale University, 2013).
- Turk, Volker & Elizabeth Eyster. "Strengthening Accountability in UNHCR" (2010) 22:2 *Intl J Refugee L* 159.
- Veroff, Julie. "Crimes, Conflicts and Courts: the administration of justice in a Zambian refugee settlement" (2010) UNHCR Policy Development and Evaluation Service, New Issues in Refugee Research, Research Paper No 192, online: www.unhcr.org/4cd7bfa99.html.
- Vizard, Polly. "Specifying and Justifying a Basic Capability Set: Should the International Human Rights Framework be Given a More Direct Role?" (2007) 35:3 *Oxford Development Studies* 225.
- Vizard, Polly, Sakiko Fukuda-Parr & Diane Elson. "Introduction: The Capability Approach and Human Rights" (2011) 12:1 *J Human Development and Capabilities* 1.
- Warner, Daniel. "Refugees, UNHCR and Human Rights: Current Dilemmas of Conflicting Mandates" (1998) 17:6 *Refugee* 12.
- Wilde, Ralph. "*Quis Custodiet Ipsos Custodes?*: Why and How UNHCR Governance of 'Development' Refugee Camps Should be Subject to International Human Rights Law" (1998) 1 *Yale Hum Rts & Dev LJ* 107.

Williams, Glyn. "Evaluating Participatory Development: Tyranny, Power and (Re)politicisation" (2004) 25:3 *Third World Quarterly* 557.

Wojkowska, Ewa. *Doing Justice: How Informal Justice Systems can Contribute* (Oslo: United Nations Development Programme, Oslo Governance Centre, 2006).

Wolfson, Steven. "Refugees and Transitional Justice" (2005) 24:4 *Refugee Survey Quarterly* 55.

Yamin, Alicia Ely. "Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health" (2008) 10:2 *Health and Human Rights* 1.

Young, Laura A. & Rosalyn Park. "Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project" (2009) 3 *Intl J Transitional Justice* 341.

SECONDARY MATERIAL: NEWS SOURCES

"Are They Listening? Aid and Humanitarian Accountability", *IRIN, In-Depth*, (July 2012), online: www.irinnews.org/in-depth/95731/97/are-they-listening-aid-and-humanitarian-accountability.

"Boomtown Slum" *The Economist* 405:8816 (22 December 2012) 75.

Burma Partnership. "Profiling Survey Stokes Refugee Fears", *Burma Partnership* (24 June 2013), online: www.burmapartnership.org/2013/06/17-23-june-profiling-survey-stokes-refugee-fears/.

D'Annunzio, Lisa. "Celebrating Women, Empowering Refugees", *Realizing Rights* (22 March 2012), online: realizingrights.wordpress.com/2012/03/22/celebrating-women-empowering-refugees/.

Fletcher, Martin. "A window into East African refugees' pain", (21 October 2009) *NBC News World Blog*, online: wardheernews.com/News_09/October/22_a_window_into_E_African_refugee_pain.html.

Gavlak, Dale. "Zaatari Syrian refugee camp fertile ground for small businesses" *BBS News* (29 July 2014), online: www.bbc.com/news/world-middle-east-28541909.

Gurung, Tsering Dolker. "The Rise and Fall of the Tibetan Carpet Industry" *Nepali Times* (10 June 2011), online: nepalitimes.com/news.php?id=18273#.UoO3lBrUC-U.

Hodenfield, Tor. "The Hypocrisy of Foreign Funding Laws in Ethiopia", *Open Global Rights* (25 April 2014), online: www.opendemocracy.net/openglobalrights/tor-hodenfield/hypocrisy-of-foreign-funding-laws-in-ethiopia.

Internews, “Report: Serious Communications Gaps at Camps for Somali Refugees are Putting Lives at Risk”, (September 15, 2011), online: www.internews.org/our-stories/program-news/report-serious-communications-gaps-camps-somali-refugees-are-putting-lives-.

Jennings, Michael. “International NGOs Must Address Their Accountability Deficit” (9 February 2012) *Poverty Matters* (blog), *The Guardian*, online: www.guardian.co.uk/global-development/poverty-matters/2012/feb/09/ngos-accountability-deficit-legal-framework.

“Kobane: IS ‘may soon take Syria-Turkey border town’”, *BBC News* (6 October 2014), online: www.bbc.com/news/world-middle-east-29509828.

“Number of Syrian refugees tops 3 million as insecurity grows – UN agency”, *UN News Centre* (29 August, 2014), online: www.un.org/apps/news/story.asp?NewsID=48589#.VDLuldViO.

Okoth, Dann. “IT entrepreneurs find surprise success in Kenya’s Dadaab refugee camps” *The Guardian* (4 July 2012), online: www.theguardian.com/global-development/2012/jul/04/entrepreneurs-kenya-dadaab-refugee-camps.

Saw Yan Naing, “Burmese Refugees Criticize Thailand’s Push for Quicker Repatriation” *The Irrawaddy* (15 July 2014), online: www.irrawaddy.org/burma/burmese-refugees-criticize-thailands-push-quicker-repatriation.html.

“Sudan: NGO expulsion to hit Darfur’s displaced” *IRIN* (9 March 2009), online: www.irinnews.org/report/83370/sudan-ngo-expulsion-to-hit-darfur-s-displaced.

Sullivan, Frank. “Fearing Repatriation, Mae La Refugees Shun Profiling Survey”, *Democratic Voice of Burma* (5 June 2013), online: www.dvb.no/news/fearing-repatriation-mae-la-refugees-shun-profiling-survey/28656.

Tan, Viviane. “In Thailand, birth registration gives refugee babies a good start in life”, *UNHCR News Stories* (24 September 2012), online: www.unhcr.ca/news/2012-09-24.htm.

SECONDARY MATERIAL: WEBSITES

Asylum Access. Online: Asylum Access asylumaccess.org/AsylumAccess/.

The Border Consortium. “Camps in Thailand”, online: TBC www.theborderconsortium.org/where-we-work/camps-in-thailand/.

History of Carpet in Nepal. Online: Central Carpet Industries Association nepalcarpet.org/index.php?page=history.

Humanitarian Accountability Partnership. Online: www.hapinternational.org/default.aspx.

Norwegian Refugee Council. “Information, Counselling, and Legal Assistance”, online: www.nrc.no/?aid=9137054.

Refugee Law Project. Online: Refugee Law Project www.refugeelawproject.org/.

_____. *Access to Justice Programme*, online: refugeelawproject.org/our-work/access-to-justice.html.

The Sphere Project. *The Sphere Project in Brief*, online: www.sphereproject.org/about/.

Timor-Leste Commission for Reception, Truth and Reconciliation. Online: www.cavr-timorleste.org/.

Women’s Education for Advancement and Empowerment. Online: www.weave-women.org/economic-empowerment-and-development/.

SECONDARY MATERIAL: DISSERTATIONS AND CONFERENCE PRESENTATIONS

Harding, Joel & Sheila Varadan. “New Approaches to Refugee Protection in a Protracted Refugee Situation” (Paper delivered at the Oxford Refugee Studies Centre Conference *Protecting People in Conflict & Crisis*, 22-24 September 2009) [unpublished].

Harrell-Bond, Barbara. “Towards the Economic and Social ‘Integration’ of Refugee Populations in Host Countries in Africa” (Paper delivered at the Stanley Foundation Conference “Refugee Protection in Africa: How to Ensure Security and Development for Refugees and Hosts,” Entebbe, Uganda, November 10-14, 2002) [unpublished], online: repository.forcedmigration.org/show_metadata.jsp?pid=fmo:2748.

Hyndman, Jennifer. *Geographies of Displacement: Gender, Culture and Power in UNHCR Refugee Camps, Kenya* (PhD Thesis, University of British Columbia, 1996) [unpublished].

Magarrell, Lisa. “Outreach to and Engagement of Victims on Reparations – Lessons Learned from Truth and Reconciliation Processes” (Paper delivered at the Conference: Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making, The Hague, 1 March 2007) [unpublished].

Purkey, Anna. “Transitioning to Justice: Legal Empowerment in Protracted Refugee Situations” (Paper delivered at the XV International Association for the Study of Forced Migration Conference, Bogota, Colombia, 17 July 2014) [unpublished].

_____. *Whose Right to What Justice? Humanitarian Intervention and the Administration of Justice in Refugee Camps* (LLM Thesis, University of Toronto, 2008) [unpublished].

SECONDARY MATERIAL: OTHER

Declaration on Religious Freedom Dignitatis Humanae on the Right of the Person and of Communities to Social and Civil Freedom in Matters of Religion promulgated by His Holiness Pope Paul VI on December 7, 1965, online:

www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html

Murtadha, Saad. *Accountability Cartoon*, created for a joint collaboration between The Sphere Project and the Cartoon Movement (2014), online: www.sphereproject.org/handbook/the-humanitarian-charter/humanitarian-charter-cartoons/.

Solomon, Andrew. "Justice, Accountability, and the Protection of Displaced Persons" (Paper prepared for the Annual Course on Forced Migration, Mahanirban Calcutta Research Group, Kolkata, December 1, 2009) [unpublished].

Wenar, Leif. "John Rawls", in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2008 ed, online: plato.stanford.edu/entries/rawls/#StaOveCon.