

Pluralist Justice and Protecting Peoples

The Secondary Pluralist Institutions of International Society

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Abstract

This thesis engages with recent work within the pluralist tradition of the English School which has sought to reinvigorate pluralist thought through the development of a ‘new’ or ‘revised’ pluralism predicated upon the moral value of communities and the ethical desirability of diversity in international society. This represents, in effect, an attempt to bring questions of justice, rather than simply order, to the core of pluralist thinking in the way that it has long been the core of solidarist thinking within the English School. At present, pluralist thinking on justice rests upon under-theorised ideas of the relationship between the notional moral worth of existing political communities and the historical development and contemporary functioning of international society. This thesis seeks to bridge the gap between ‘new pluralism’ and the new history of international society through an examination of the institutions of international society which work towards the achievement of pluralist justice. The question asked by this thesis, therefore, is: *‘how does international society protect communities and defend diversity in practice?’* It finds that there are three institutions that have been developed by international society to protect political communities – the primary institution of the State and the secondary institutions of ‘Shielding’ and ‘Recourse’. This thesis analyses the historical development and contemporary functioning of these institutions, uncovering dynamics of hierarchy and homogeneity that are anathema to the pluralist agenda. It also reveals possible avenues for enhancing pluralist justice within the contemporary global order, including strengthening the secondary pluralist institutions, increasing the agency of subaltern communities within international society, and rethinking current attitudes towards territorial borders and migration.

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Introduction

‘The study and practice of international relations records an unending search for an understanding of the relationship between order and justice’.¹

This thesis engages with a strand of thought within the pluralist wing of the English School of International Relations that it terms the ‘new pluralism’, a revised form of pluralism predicated on the ethical desirability of diversity in international society.² This, the new pluralists contend, ‘holds out the potential for pluralism to follow the path of solidarism towards becoming a more fully developed normative theory of international relations’.³ Their argument is that, in parallel with solidarism’s commitment to ethical cosmopolitanism, pluralism can offer an account of the ethical significance of diversity and community in international society. The argument of new pluralism, as articulated within the literature, makes three core normative claims. It posits ‘communities’ as the morally valuable units of international society,⁴ it advocates for tolerance of diversity to be the primary governing value of that society,⁵ and it contends (either implicitly or explicitly) that a pluralist society of sovereign territorial states is the best available means both of protecting communities and of ensuring a just international order.⁶ In doing so, contemporary pluralist scholars have developed an elementary concept of ‘pluralist justice’ to rival forms of

¹ Rosemary Foot, ‘Introduction’, in Rosemary Foot, John Gaddis and Andrew Hurrell, eds., *Order and Justice in International Relations* (Oxford: Oxford University Press, 2003), p. 1.

² See John Williams, *Ethics, Diversity and World Politics: Saving Pluralism from Itself?* (Oxford: Oxford University Press, 2015), John Williams, *The Ethics of Territorial Borders: Drawing Lines in the Shifting Sand* (Basingstoke: Palgrave Macmillan, 2006) and William Bain, ‘One Order, Two Laws: Recovering the Normative in English School Theory’, *Review of International Studies*, 33:4 (2007) pp. 557-575. Both Williams and Bain draw on earlier work on the ethical desirability of difference in Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000) and James Mayall, *World Politics: Progress and its Limits* (Cambridge: Polity Press, 2000) and James Mayall, *Nationalism and International Society* (Cambridge: Cambridge University Press, 1990). See also Barry Buzan ‘Culture and International Society’, *International Affairs*, 26:1 (2010), pp. 1-25.

³ John Williams, ‘Pluralism, the English School and the Challenge of Normative Theory’, in Robert Murray, ed., *System, Society and the World: Exploring the English School of International Relations*, 2nd edn. (Bristol: E-International Relations Publishing, 2015), p. 107.

⁴ The ‘new pluralists’ do agree with solidarists that individuals are always the ultimate unit of concern. However, they argue that, given the interests of individuals are best met within polities, international society should treat those communities as proxy units of concern when formulating principles of order.

⁵ This is primarily in order to achieve benefits of self-determination for communities but has a number of supplementary benefits which will be discussed in chapter one.

⁶ This argument is often found implicitly within the classical English School but recently has found more explicit expression in the work of contemporary English School scholars such as John Williams and William Bain. See Williams, *Ethics of Territorial Borders* and William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003)

justice advanced by English School solidarists. The term ‘pluralist justice’ is developed by this thesis. It refers to the argument found within the contemporary pluralist scholarship that the ability for communities within international society to adopt, develop, and protect their own ethical schema is the core facet of international justice. Underpinning this move within the pluralist wing of the English School is a clear shift away from a reliance on the canonical tradition of pluralism – including Grotius, Vattel and Pufendorf – in favour of a sustained engagement with political theorists in the liberal and communitarian traditions; in particular the works of Mill, Locke, Arendt and Burke.

Those who write at the vanguard of new pluralism are John Williams and William Bain, while James Mayall and Robert Jackson are the two most prominent scholars whose work bridges the gap between ‘classical’ and ‘new’ pluralism.⁷ Mikulas Fabry and Jennifer Jackson Preece’s writings place them more on its periphery – contributing to new pluralist thought without necessarily identifying themselves as engaged in the same normative project as Williams and Bain. These new pluralist scholars do not disavow the central claim of classical pluralism that the pursuit of order remains a necessary goal for international society. Rather, they contend that the ethics of international society are not purely contingent upon the achievement of order and, instead, suggest that the preservation of diversity and the flourishing of political communities are goals in and of themselves and key to the achievement of justice. They have moved the locus of the debate between the pluralist and solidarist wings of the English School away from the traditional focal point of humanitarian intervention towards a more holistic discussion of the merits of fortified political communities over a strengthened world society. For these scholars, the debate between solidarism and new pluralism is, therefore, no longer a question of the relative emphasis that should be given to order over justice in international affairs – it is whether a pluralist or a solidarist form of justice is preferable within international society.

⁷ Although many of the ‘classical pluralists’ make reference to the ideas of new pluralism in embryonic form.

This endeavour is valuable for three reasons. First, it is important to the development of the English School itself. The internal debate between solidarism and pluralism plays a fundamental role in sharpening the English School's observations on global order and justice, and the lack of normative theory development within the pluralist wing has stunted the growth of thought within the school as a whole.⁸ Second, this work should also be viewed as a response by the pluralist wing to the contributions of contemporary solidarists such as Andrew Hurrell, Tim Dunne and Andrew Linklater who have sought to re-conceptualise international society for the era of globalisation.⁹ It also speaks to the resurgence of interest in the management of cultural diversity within wider International Relations scholarship, exemplified by Christian Reus-Smit's recent work on diversity regimes.¹⁰ Third, a reinvigoration of pluralist thinking is necessary for the English School to both understand – and speak to – many of the most important developments within contemporary world affairs. The emergence of new pluralism has been matched by, and is in many ways a product of, an increased global focus on the value of political community within international practice and international norms. Throughout the world, recent decades have witnessed a political shift in favour of a desire for strengthened national institutions, greater insulation for political communities and contestation of fundamental principles of liberal multiculturalism. By recognising the moral worth of the concept of community and seeking to develop ethical thought which grounds it, new pluralism both speaks to contemporary challenges to global order and shifts the debate between pluralism and solidarism to address these challenges.

⁸ Buzan, *From International to World Society*, pp. 45-62. Some critics of the school, such as Ian Hall, have gone so far as to argue that the school no longer exists because it is too distorted by solidarists. According to Hall, the commitment of contemporary English School scholars such as Wheeler and Dunne to solidarism and constructivism eschews too many of the school's foundational ideas such as the centrality of states and the importance of power politics for their work to be considered as operating in the same scholarly paradigm. See Ian Hall, 'Still the English Patient? Closures and Inventions in the English School', *International Affairs*, 77: 3 (2001), pp. 931–942.

⁹ Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007) and Barry Buzan, *From International to World Society: English School Theory and the Social Structure of Globalization*, (Cambridge: Cambridge University Press, 2004).

¹⁰ Christian Reus-Smit, *On Cultural Diversity: International Theory in a World of Difference* (Cambridge: Cambridge University Press, 2018) and Andrew Phillips and Christian Reus-Smit, eds. *Culture and Order in World Politics* (Cambridge: Cambridge University Press, 2020).

However, at present there remain major deficiencies in pluralist thinking on justice. In particular, in spite of the central role of the concept of institutions in English School theory and of the significant body of recent work that has sought to reformulate this key concept, new pluralism has not developed an account of the development of pluralist institutions within international society or their normative potential.¹¹ As a result, new pluralism currently relies upon under-theorised ideas of the relationship between the notional moral worth of political communities and the historical development and contemporary functioning of international society.

This is problematic given that recent years have witnessed the development of a burgeoning body of literature within the English School which has sought to problematise the classical narrative of the development of the global order – in the process writing a new, more nuanced, and complex history of international society. In the context of this endeavour, scholars both within the English School tradition and outside of it have shown that the historical record demonstrates that the relationship between political communities and international institutions, including the state, has been deeply contested throughout the evolution of the international order.¹² Most notably, Naeem Inayatullah and David Blaney have made a strong case that, although the subject of diversity played a central role in the establishment of the sovereign-states system, the questions it raised were ultimately unresolved at Westphalia. Instead, the problem of

¹¹ In *Ethics, Diversity and World Politics*, Williams develops the concept of a primary institution of ‘Resistance’; encompassing the practices of ‘actors who seek to resist incorporation into the institutions of international society because of the way in which its constitutive and regulatory effects are inimical to their self-understandings of their own identity’. John Williams, *Ethics, Diversity and World Politics: Saving Pluralism from Itself?* p. 155. However, this institution is focused on understanding the practices of subaltern groups in resisting international order. It does not investigate the institutional make-up of the order that is being resisted. Subaltern practices of resistance have nonetheless been instrumental in shaping this wider order through processes of ‘counter-interpellation’, as discussed in Chapter 5.

¹² See Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford: Oxford University Press, 2010); Tanisha Fazal, *State Death: The Politics and Geography of Conquest, Occupation, and Annexation* (Princeton: Princeton University Press, 2007); Jennifer Jackson Preece, *National Minorities and the European Nation-States System* (Oxford: Clarendon Press, 1998); Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008); Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003); Jeremy Larkins, *From Hierarchy to Anarchy: Territory and Politics before Westphalia* (New York: Palgrave Macmillan, 2010); Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002)

competing notions of justice was enclosed or corralled within territorial borders. Blaney and Inayatullah describe this as ‘the Westphalian deferral’ of the diversity question.¹³ International society was then forced to develop supplementary mechanisms to correct for the failures of the sovereign state system to effectively protect communities and manage diversity.

These observations are insufficiently integrated into current articulations of new pluralism. For example, Williams endorses Inayatullah and Blaney’s critique of international society and advocates the need for new pluralism to move beyond the state.¹⁴ However, he does not investigate the ways in which international society has already moved beyond the state and how these supplementary practices have either improved or impaired global pluralist justice. Bain, similarly, investigates the institution of Trusteeship, a practice designed to reinforce state structures, but neglects other practices designed to protect communities or defend diversity.¹⁵ There is, therefore, a gap between the more nuanced ‘new history of international society’ and the ideal normative theory of new pluralism. This thesis seeks to bridge this gap through an investigation of the institutions of international society which work towards the achievement of pluralist justice. The question asked by this thesis, therefore, is: *‘how does international society protect communities and defend diversity in practice?’*

The primary pluralist institution of international society is – of course – the sovereign territorial State.¹⁶ This is currently the core mechanism through which international society has sought to protect communities. Access to this mechanism is mediated through the practice of state recognition – a decentralised practice in which existing members of international society invoke

¹³ Naeem Inayatullah and David Blaney, *International Relations and the Problem of Difference* (New York: Routledge, 2004), pp. 18-41.

¹⁴ Williams, *Ethics, Diversity and World Politics*, pp. 27-34.

¹⁵ Bain, *Between Anarchy and Society* and William Bain, ‘One Order, Two Laws: Recovering the Normative in English School Theory’, *Review of International Studies*, 33:4 (2007) pp. 557-575.

¹⁶ This thesis capitalises the terms used for the two secondary institutions, Shielding and Recourse. For consistency, ‘state’ is also capitalised when it refers to ‘the State’ as a pluralist institution of international society.

their collective judgment ‘about rightful membership of the family of nations’.¹⁷ However, this thesis identifies two secondary pluralist institutions of international society. The first of these institutions is that of Shielding. Since it was never possible for international society to recognise all political communities who demanded it, there were many political communities who failed to gain acceptance as sovereign states during the emergence of international society and the globalisation of the system of sovereign states.¹⁸ These political communities then found themselves within the borders of states whose majority members were hostile to their presence and resistant to any demands for greater self-determination. In an attempt to protect these communities, and stem the disorder created by their persecution and subsequent flight during periods of political upheaval, international society developed the institution of Shielding.¹⁹ This institution takes a number of forms, including minority and indigenous rights regimes and a number of international human rights instruments. The other institution developed by international society for protecting vulnerable communities is a right of Recourse in the event of a breakdown in the Shielding mechanism: in cases where communities suffer genuine persecution within one recognised community, they are then entitled to seek refuge elsewhere. While it had long been an informal practice for states to accept the refugees of friendly states in instances of war (or the political dissidents of hostile states), prior to the twentieth century there was no obligation on states to provide this benefit. The institution of Recourse was first systematised with

¹⁷ Martin Wight, ‘International Legitimacy’, in Martin Wight, *Systems of States*, ed. by Hedley Bull, (Leicester: Leicester University Press, 1977), pp. 153, 158.

¹⁸ Some scholars, such as Edward Keene, have recently argued that the term ‘expansion’ is deeply flawed as it suggests that prior to independence, colonial territories were not ‘part’ of international society. Instead, Keene suggests that the term be replaced with ‘stratification’ which more appropriately captures the change that took place in relations between Europe and the extra-European world during the period generally referred to as the expansion. According to Keene, this offers a more sociologically nuanced approach in which agents in global society occupy positions on a more thickly imagined hierarchy according to their strength, prestige, and authority. Edward Keene, ‘The Standard of “Civilisation”, the Expansion Thesis and the 19th Century International Social Space’, *Millennium: Journal of International Studies*, 42: 3, (2014), pp. 651-673.

¹⁹ Jackson Preece, *National Minorities and the European Nation-States System*. Also see Jennifer Jackson Preece, *Minority Rights: Between Diversity and Community* (Cambridge: Polity Press, 2005).

the issuing of Nansen passports in the aftermath of the First World War and became established with the 1951 Refugee Convention.²⁰

There has already been work done by some of those who fall within the broad tent of new pluralism which touches on these institutions, albeit using different terminology and approaches. For example, Fabry's *Recognising States* tracks the evolution of the practice of state recognition from 1776 to the twenty-first century. He contends that the practice of recognition was designed not only to regulate the membership of international society, but also to provide recognised communities with a degree of protection from aggressive neighbours through a process of delegitimising aggression towards – and acquisition of territory from – recognised states.²¹ For Bain, Trusteeship is the primary mechanism by which international society has sought to protect those communities which cannot make the best use of the freedom offered by the international state-based system – namely, situations in which some form of international supervision is required in a particular territory in order to both maintain order and to foster the norms and practices of fair self-government.²² Jackson Preece has tracked the development of minority rights regimes throughout the post-Westphalian period. Her work finds that the emergence of international society within Europe led to widespread displacement, forcing international society to devise an institutional response. This response was the creation of minorities regimes; a solution that was compatible with the emerging consensus of the primacy of state sovereignty and the boundaries of the nation state framework.²³

²⁰ Haddad, *Refugee in International Society*, p. 101.

²¹ Fabry, *Recognising States*, p. 12.

²² William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003). See also Bain, 'One Order, Two Laws', pp. 557-575. There is a question to answer as to whether Trusteeship should be considered a pluralist or solidarist institution of international society. Knudsen regards it as a solidarist institution. See Tonny Brems Knudsen, 'Fundamental Institutions and International Organizations: Solidarist Architecture', in Tonny Brems Knudsen and Cornelia Navari, eds., *International Organization in the Anarchical Society* (London: Palgrave Macmillan, 2018), pp. 193-195. It is not entirely clear what approach Bain takes to the question. During discussions of this project, he has suggested that his view is that Trusteeship is most accurately placed within the institution of Shielding as its role is primarily to protect communities. However, within his own work he argues that the international practice of Trusteeship is evidence of the minimal solidarity of international society and obligation that states or communities owe to one another. Bain, *Between Anarchy and Society*, p. 189-190.

²³ Jennifer Jackson Preece (1998) *National Minorities and the European Nation-states System*.

The key scholar within the international society approach who has investigated the question of refugees is Emma Haddad. In her seminal work, *The Refugee in International Society: Between Sovereigns*, Haddad asserts that the refugee is an ‘inevitable, if unintended consequence of the international states system’²⁴ and that the existence of refugees symbolises ‘the failure of the state-citizen-territory relationship assumed by the state system to seamlessly ensure international order and justice’.²⁵ However, the question of refugee populations is one that has been almost entirely ignored by the core new pluralist scholars. As argued by Hurrell, ‘it is striking to note how rarely these debates have been directly concerned with refugees, forced migration, and people movement (...) And, when these issues have been addressed, that engagement has been distinctly uncomfortable’.²⁶ In the index of Williams’ *Ethics, Diversity and World Politics* neither ‘refugee’ nor ‘asylum’ are listed.²⁷ The same is true for Bain’s *Between Anarchy and Society* and *The Empire of Security and the Safety of the People* which have no index listings for ‘asylum’, ‘refugee’ or ‘migration’. This failure to address the issue of refugee populations is part of a broader obfuscation of the question of migration within new pluralism. Indeed, following John Rawls, it seems that it is still generally assumed by pluralist scholars that the vast majority of people live out their lives in the society into which they were born.²⁸ The failure of new pluralism to address the position of refugees is a serious omission given that the question of how international society should address the issue of

²⁴ Haddad, *Refugee in International Society*, p. 1.

²⁵ Alexander Betts and Gil Loescher, ‘Refugees in International Relations’, in Betts and Loescher, *Refugees in International Relations*, p. 1.

²⁶ Andrew Hurrell, ‘Refugees, International Society and Global Order’, in Alexander Betts and Gil Loescher, eds., *Refugees in International Relations* (Oxford: Oxford University Press, 2011), p. 100.

²⁷ Williams does acknowledge that contemporary migration flows entail increasing numbers of people who are members of multiple communities: Williams, *Ethics of Territorial Borders*, p. 28; and also notes that movements of people have strained established concepts of migration and asylum to the limit, thereby challenging the place of the State in pluralist thought: Williams, *Ethics, Diversity and World Politics*, 102. However, he does not expand on either of these passing observations.

²⁸ For example, in *Law of Peoples*, Rawls argues that in the event of the realisation of a just international order then the causes of immigration would disappear: ‘The problem of immigration (...) is eliminated as a serious problem in a realistic utopia.’ John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited* (Cambridge, Mass: Harvard University Press, 1999), p. 9. While new pluralists such as Williams and Jackson do discuss the issue of migration, they have often sought to ground existing pluralist assumptions regarding the right of states to control their borders in a more explicitly normative claim that derives from the insights of political theorists, such as Mill, Rawls and Arendt, on the importance of self-determination for communities. For further discussion of this point see Christopher Wellman, ‘Immigration and the Freedom of Association’, *Ethics*, 119: 1 (2008), p. 109 and David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge, Mass: Harvard University Press, 2016).

refugee flows is only becoming more urgent.²⁹ Moreover, in failing to engage with the questions posed by refugee populations, new pluralist scholars have ignored recent work within the wider International Relations literature (led primarily by Alexander Betts) which has surveyed the growing importance of refugee issues to international affairs as well as Haddad's work within the international society tradition which has challenged prevailing assumptions within the English School that refugees are simply a transitory aberration of the international states system.³⁰

Importantly, neither Bain, Haddad, Jackson Preece nor Fabry engage with the question of community protection through a lens that analyses these mechanisms as comparable institutions serving a similar purpose. As a result, they miss key synergies and overlook the role that these pluralist institutions have played in constructing the international political and legal order.³¹ Moreover, none of the new pluralists evaluate these international practices by the normative logic that flows from the argument of new pluralism; or sufficiently explore the link between the theorised value of diversity and the extent to which the aspects of diversity that pluralists value are in fact protected and enhanced by the pluralist institutions of international society. Through undertaking a comparative analysis of these institutions, this work finds that their practical limitations, alongside a problem of unequal access of different political communities, presents challenges for the new pluralists' claims that international society is capable of delivering pluralist justice. Instead, it finds that the international state system provides the global population with fundamentally unequal access to the benefits of citizenship and community membership and, fundamentally, has failed to create structures in which all communities can enjoy the 'right to have

²⁹ At the end of 2017, UNHCR recorded 19,941,347 recognised refugees within an overall 71.44 million population of concern. See UN High Commissioner for Refugees (UNHCR) Statistical Yearbook 2017, available at <https://www.unhcr.org/figures-at-a-glance.html>

³⁰ Haddad, *Refugee in International Society*, p. 2. Haddad, like Williams, draws on Arendt considerably, noting that it was precisely against the background of the refugee crisis spawned by the Second World War that Arendt developed her argument about the loss of the 'right to have rights' - not just through direct persecution and expulsion from one's homeland, but also through being deprived of the very right to belong to some kind of organised political community, pp. 82-83. For Arendt, becoming a refugee meant, 'not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever'. Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken Books, 2004), p. 297. It is therefore doubly surprising that the question of global burgeoning refugee populations is not addressed in Williams' work, or the work of the other new pluralists.

³¹ Buzan, *From International to World Society*, p. 161.

rights’.³² The pervasive inequality in the contemporary global diversity regime is the legacy of decisions made by European order builders at the time of the emergence and expansion of international society. The nationalisation of the world, far from facilitating pluralist justice, instituted a diversity regime constituted of hierarchically ordered, like units which then – by and large – undertook to homogenise the populations resident within them. While pluralist institutions other than the State have gone some way to remedy these inequalities, in many ways they have reinforced existing hierarchies. Where the institutions have been most successful in improving rights for subaltern communities, it has been primarily a result of the agency of those subaltern communities and the international organisations set up to implement the institutions of Shielding and Recourse.

The success of both institutions of Shielding and Recourse has been equivocal in terms of diversity protection. While there are notable recent achievements in the preservation and revival of cultural diversity, in practice both institutions mandate that states within international society adopt specific forms of domestic constitution – based in liberal multiculturalism. Rather than facilitating true diversity, therefore, contemporary pluralist institutions have in some ways contributed to the homogenisation of international society. Challenges to the prevailing diversity regime from both states and non-state polities means that international society is now forced to engage with, and seek to manage, competing norms of legitimacy surrounding the formation, recognition, rights, and responsibilities of communities. So far, international society has not satisfactorily addressed the issue of diversity, instead deferring it by channelling it through existing pluralist institutions in ways that are increasingly unstable and that seriously challenge the arguments of the new pluralists.

³² The concept of communities providing structures in which individuals have the ‘right to have rights’ is indebted to Hannah Arendt and informs much of the normative thinking of new pluralism on the moral value of communities, particularly Williams. Hannah Arendt, *The Origins of Totalitarianism*.

These findings are relevant to the overall project of new pluralism because they demonstrate the need for this normative agenda to give greater consideration to both historical and contemporary international *practive* in regard to the development, recognition and regulation of international political communities. Normative theorising within the English School cannot be divorced from empirical reality. Pluralists and solidarists within the School are united in their commitment to practical reasoning. Therefore, in order for pluralism to follow the path of solidarism towards becoming a more fully developed normative theory of international relations, it needs to build into its normative reasoning a more nuanced picture of the relationship between political communities, their purported ethical value, and existing structures of international society. Doing so presents challenges to the normative arguments of the new pluralists because such an examination uncovers dynamics of hierarchy and homogeneity that are anathema to the pluralist agenda. However, it also uncovers possible avenues for enhancing pluralist justice within the contemporary global order.

Methodology

The first part of this thesis is dedicated to the identification and exploration of a ‘new’ pluralism within the English School. In explaining the key concepts of this new pluralism, this project focuses on a select number of scholars within the English School who either explicitly state that they are engaged in a ‘new’ or ‘revived’ pluralist project or whose work aligns closely with, supports or develops the core principles of this enterprise. I then seek to understand the nature of the project through an examination of their diverse thinking around the three organising principles outlined above – the moral value of communities, the governing values of tolerance and diversity, and the role of the State as the primary institution for the achievement of pluralist justice. In doing so, this part of the thesis seeks to clarify the precise links and tensions between new pluralism and the canon of political theory from which it draws.

The second part of this thesis seeks to identify the institutions of international society dedicated to the pursuit of pluralist justice, using the accepted English School understanding of institutions as ‘historically constructed normative structures’.³³ This understanding of institutions differs from that generally espoused within regime theory of ‘particular human-constructed arrangement[s], formally or informally organised’,³⁴ such as the United Nations or the European Union. These kinds of ‘institutions’ I refer to as international organisations. There are two predominant ways in which English School scholars approach the question of institutions in international society. The first, exemplified in the work of Barry Buzan, K. J. Holsti and Laust Schouenborg, is the construction of typologies ‘based on the principle of differentiating between functionally defined activities at the international level’.³⁵ This approach is ‘pre-theory in the sense that it only aspires to a categorical scheme’.³⁶ The alternative approach, advanced by Peter Wilson, Tonny Brems Knudsen and reminiscent of Bull is an empirically driven or ‘grounded’ method to identifying and understanding international institutions.³⁷ In this approach, institutions are identified not through the construction of abstract typologies but from empirical observation of practice. They are then analysed and understood from a ‘participant standpoint’, involving ‘interpretation of the meanings that social actors themselves give to their actions’.³⁸ This approach advocates that in order to understand actions, practices and institutions, it is first essential to ‘grasp the relevant meanings, beliefs and preferences of the people involved’.³⁹ The approach I take is ‘grounded’ rather than categorical. In identifying the pluralist institutions of international society,

³³ Kai Alderson and Andrew Hurrell, ‘International Society and the Academic Study of International Relations’ in Kai Alderson and Andrew Hurrell, eds., *Hedley Bull on International Society* (Basingstoke: Macmillan, 2000), p. 28.

³⁴ Robert Keohane, ‘International Institutions: Two Approaches’, *International Studies Quarterly*, 33: 4 (1998), p. 383.

³⁵ Laust Schouenborg, ‘A New Institutionalism: The English School as International Sociological Theory’, *International Relations*, 25:1 (2011), p. 28. See also Buzan, *World Society*, p. 184 and Kalevi J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge: Cambridge University Press, 2004)

³⁶ Schouenborg, ‘A New Institutionalism: The English School as International Sociological Theory’, p. 184.

³⁷ Peter Wilson, ‘The English School Meets the Chicago School’, *International Studies Review*, 14 (2012), pp. 567–590. Tonny Brems Knudsen, ‘Fundamental Institutions and International Organizations: Solidarist Architecture’, in Knudsen and Cornelia Navari, eds., *International Organization in the Anarchical Society* (London: Palgrave Macmillan, 2018), Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977)

³⁸ Wilson, *The English School Meets the Chicago School*, p. 578.

³⁹ Ibid., p. 579.

I begin from a theoretical proposition – the identification of a primary concept or ‘outcome’ to which the institutions of international society are directed, in this case the protection of political communities and international diversity. I then seek to identify and understand the institutions that have developed to achieve these outcomes.

Bull adopted a similar approach to his development of the primary institutions of international society. For Bull, the primary concept from which he proceeds is international order and, as such, the institutions of international society that he identifies are those that *may* contribute to or ‘cause’ international order – specifically diplomacy, international law, the balance of power, war and the role of great powers.⁴⁰ Bull employs a loose form of structural functionalism combined with a causal method to enquire how international order is maintained by these institutions in the face of serious challenges.⁴¹ In seeking to understand how pluralist justice *may* be achieved within international society, I identify three institutions – the primary institution of the State and the secondary institutions of Shielding and Recourse. Rather than using a functional lens through which to identify institutions of international society (like Buzan and Schouenborg), I use a causative lens – seeking to identify the *institutions of international society which may contribute to pluralist justice*. This approach – contra the typology method – allows for the observation of groupings of issue-specific regimes united by a common purpose and the identification of these groupings of regimes as ‘institutions’. Tonny Brems Knudsen adopts a similar line of analysis when investigating the evolution of solidarist institutions within international society.⁴² Using a comparable methodology, Knudsen identifies three ‘solidarist’ institutions of international society – the Responsibility to Protect, International Criminal Jurisdiction and International Trusteeship.⁴³

Throughout this thesis, I refer to the three institutions identified (the State, Shielding and Recourse) as the pluralist institutions of international society. The term ‘pluralist’ is used here as

⁴⁰ Kalevi J. Holsti, ‘Theorising the Causes of Order: Hedley Bull’s *The Anarchical Society*’, in Cornelia Navari, ed., *Theorising International Society: English School Methods*, (Basingstoke: Palgrave Macmillan, 2009) p. 127.

⁴¹ *Ibid.*, p. 131.

⁴² Knudsen, ‘Fundamental Institutions and International Organizations’.

⁴³ *Ibid.*, p. 176.

employed by the new pluralists – they are the institutions that sustain the objectives of pluralist justice. In this sense, I contend that the list of pluralist institutions presented in this thesis is exhaustive: there are only three possible means through which international society may seek to protect communities and enhance international diversity. The first is the State – the primary mechanism through which communities are organised and protected at the international level. For those communities insufficiently protected within state structures, there are only two supplementary ways in which international society may protect them: Shielding and Recourse. Shielding mechanisms protect communities *within* their home state while Recourse mechanisms provide protection to communities that are *forced to flee* their state.⁴⁴ Given the extensive literature already available on the role of the State in the achievement of pluralist justice within the work of both the new pluralists and their critics, the main focus of the empirical work of this thesis is on the secondary pluralist institutions of international society.⁴⁵

The methodological orientation of this project is one of ‘practical reasoning’, which marries a constructivist interpretive method with an ontology of ethical pluralism. I concur with Reus-Smit that both constructivism and the English School currently fall short of the standard of practical reason but that ‘placing strands of them in dialogue (...) may bring them both closer to this ideal’.⁴⁶ This thesis employs the analytic structure detailed in Reus-Smit’s recent work on diversity regimes to understand the imperatives which drive order builders to organise and manage diversity. The three imperatives identified by Reus-Smit are a) control of populations by institutionalising preferred meanings and identities, engineering consent for institutions, and limiting the scope for innovation; b) self-location of the order builder within the cultural terrain through choreographing a hierarchy within the cultural landscape which privileges or benefits the order builder and; c) generation of collective knowledge required for social and political

⁴⁴ The overlap of certain practices, such as humanitarian intervention to protect vulnerable communities, with both pluralist and solidarist institutions is addressed in Chapter Two.

⁴⁵ The use of the terms ‘primary institution’ to refer to the State and ‘secondary institutions’ to refer to Shielding and Recourse is explained at the end of Chapter Two.

⁴⁶ Christian Reus-Smit, ‘Constructivism and the English School’ in Navari, ed., *Theorising International Society*, p. 73.

coordination.⁴⁷ Reus-Smit and Andrew Phillips later characterise these strategies as processes of ‘interpellation’.⁴⁸ In operationalising Reus-Smit’s cognitive architecture on diversity regimes, this thesis engages with contemporary constructivist understandings of the social processes through which normative regimes are constructed within international society. It therefore bridges English School and constructivist methodology in order to establish a richer understanding of the motivations of the architects of Shielding and Recourse. As noted by Williams, a ‘more self-consciously “constructivist” methodology places values at the centre of enquiry and thus demands an assessment of the character of those values, including comparative and historical analysis of their development’.⁴⁹ Constructivism is therefore useful for this particular project because it ‘provides an approach through which the difficult questions posed by critical theory – questions about the construction of moral community through practices of inclusion and exclusion – can be investigated at the level of political action in a system of sovereign territorial states’.⁵⁰

As part of this project, this thesis traces the historical development of the pluralist institutions. The historical method employed is essentially comparative and diachronic, generating normative analysis through engagement in ‘historical reasoning’. As explained by Richard Little, historical reason ‘recognises that morality is an historically emerging phenomenon’.⁵¹ The norms which have influenced the development of the pluralist institutions of international society are historically emerging phenomena which derive from multiple, overlapping, and conflicting ethical traditions. In tracing the historical evolution of the secondary pluralist institutions of international society – Shielding and Recourse – this thesis builds on the work of those within the English School who have engaged with these institutions, particularly Haddad and Jackson Preece, by providing an overarching comparative historical narrative of the development of secondary

⁴⁷ Reus-Smit, *On Cultural Diversity*, pp. 13, 209.

⁴⁸ Andrew Phillips and Christian Reus-Smit (eds.) *Culture and Order in World Politics* (Cambridge: Cambridge University Press 2020), pp. 8-9.

⁴⁹ Williams, *Ethics, Diversity and World Politics*, p. 61.

⁵⁰ Heather Rae, *State Identities and the Homogenisation of Peoples* (Cambridge: Cambridge University Press 2002), p. 24.

⁵¹ Richard Little, ‘History, Theory and Methodological Pluralism in the English School’ in Navari, ed., *Theorising International Society*, p. 89.

pluralist institutions by international society. It traces the evolution of the changing balance between the imperatives of community and individual protection at varying points of the development of the institutions and seeks to understand how these institutions themselves helped shift definitions of community over time.

As with any English School project which seeks to understand the historical development of institutions, there are historiographical challenges in interpretation. An understanding of history is central to the English School's commitment to empiricism, a position that can be traced back to David Hume.⁵² Both Herbert Butterfield and Martin Wight were historians by profession and, for Bull, history took centre stage in English school theory because of its ability to 'shed light' on contemporary events.⁵³ However, despite the primacy of history within the methodological armoury of the English school, its role in the development of knowledge and theory is not uncontentious. Bain, arguably the scholar among the new pluralists who has engaged most deeply with the philosophical challenges of using history, is critical of the classical English School's predilection for 'learning lessons' from the historical record. Instead, drawing on the insights of Michael Oakeshott, he argues that history should be viewed as 'fable'. This view 'conceives historical facts as conclusions that are parts of a single world of experience which embraces both past and present in a paradoxical but nonetheless coherent system of thought'.⁵⁴ Williams endorses Bain's view of the role that history should play in English School theorising and the concept of 'narrative' is key to both his epistemological and normative approaches. This project recognises these challenges and Bain's critique of the uses of history. However, an account of the historical development of the institutions of Shielding and Recourse that incorporates multiple perspectives is essential to understand the competing narratives around these practices within contemporary

⁵² James Mayall, 'The Limits of Progress: Normative Reasoning in the English School', in Navari, ed., *Theorising International Society*, p. 210.

⁵³ Hedley Bull, 'International Relations as an Academic Pursuit', in Kai Alderson and Andrew Hurrell, eds., *Hedley Bull on International Society*, (Basingstoke: Macmillan, 2000), p. 253.

⁵⁴ William Bain, 'The English School and the Activity of Being an Historian', in Navari, ed., *Theorising International Society*, p. 156.

international society. Understanding how historical events have generated narratives of legitimacy or illegitimacy of these institutions is, for example, key to understanding contemporary state practice.

Treaties and legal texts which constitute the bedrock for most English School empirical research are an important part of this narrative, but they tell only the ‘inside story’ of international institutions; that which the order builders of international society wished to create. As noted by Richard Little, it is also essential to understand the motivations operating beneath the formal documents of international society through archival research, as well as to consider the ‘histories’ of those other than elite decision makers.⁵⁵ The focus of the primary research for the historical development of these institutions, therefore, has been the archives of the international organisations through which they have primarily developed, such as the League of Nations, the United Nations and its affiliated offices, the European and African Unions, the International Court of Justice, the Organisation for Security and Co-Operation in Europe, and the various international organisations that form the refugee regime complex. An investigation of these documents has helped to uncover the dynamics between different parties and elucidate motivations of actors. It is the result of taking this approach that I argue, for example, that community rather than individual protection was the key motivating factor for the order-builders of the institution of Recourse. However, noting Williams’ critique that such an interpretivist standpoint reifies existing patterns of inclusion and exclusion, these observations are compared and contrasted with an examination of both the practices of subaltern states and the activism or ‘resistance’ of the communities that the institutions of Shielding and Recourse were designed to protect. This thesis has therefore sought to also explore the ‘outside story’ of these institutions and to incorporate the subaltern perspective.

⁵⁵ Richard Little, ‘History, Theory and Methodological Pluralism in the English School’, in Navari, ed., *Theorising International Society*, pp. 98–99.

Using Reus-Smit's imperatives as an organising principle through which to analyse the development and contemporary functioning of the pluralist institutions of international society, this thesis is able to draw out key themes of hierarchy and homogeneity. It then seeks to elucidate a number of normative conclusions for new pluralism that can be drawn from the constructivist-informed empirical analysis. While there is significant methodological divergence between the new pluralists and differences in how they conceive of the relationship between empirical analysis and normative reasoning, all ground their normative analysis to some extent in empiricist claims. Indeed, it is a key feature of the English School that 'it presupposes a relationship between empirical and normative thinking'.⁵⁶ For Williams, normative analysis is focused on the lived experience of peoples as understood and articulated by their communities.⁵⁷ For Bain, normative analysis is deeply entwined with concepts of natural law, even where this is in tension with his commitment to pluralism.⁵⁸ Adopting a more classical approach, Jackson argues that international practice is the basis for international ethics⁵⁹ while, for Mayall, 'practical reasoning' is the link between normative theorising and empirical analysis.⁶⁰

This project therefore engages with scholars who adopt diverse methodological and normative approaches. This academic diversity is a mirror of the existential ethical diversity in international society, wherein individuals and communities derive their normative reasoning from differing ethical traditions. A pluralist normative project should seek, as far as possible, to be inclusive of this real-world ethical diversity. Indeed, I would argue that the English School's pluralistic approach to theory building requires English School scholars to operate on the basis of pluralistic methodological assumptions.⁶¹ In developing my own normative theory from empirical

⁵⁶ Little, 'History, Theory and Methodological Pluralism', p. 93.

⁵⁷ Williams, *Ethics, Diversity and World Politics*, pp. 9, 67.

⁵⁸ Bain, 'One Order, Two Laws', p. 573

⁵⁹ Robert Jackson, 'International Relations as Craft Discipline', in Navari, ed. *Theorising International Society*, p. 30.

⁶⁰ James Mayall, 'The Limits of Progress: Normative Reasoning in the English School' Navari, ed. *Theorising International Society*, p. 212.

⁶¹ *Ibid.*, p. 89.

analysis, I therefore borrow elements from all of the above approaches and synthesise them within an ontology of practical ethical pluralism.

From Jackson, and indeed from many other English School scholars, I borrow the method of practice internalism. As argued by Frost and Lechner, a practice can only truly be understood by first understanding the language, motivations and ethics of the practitioners.⁶² From an internalist perspective, the social scientist can be seen as ‘a participant in a practice whose task is to clarify, find coherence or detect incoherence, in the claims and counterclaims participants make within that practice’.⁶³ In an ethical sense, the scholar might ‘assume the role of a social critic whose job is to expose hypocrisy and acts of injustice occurring within one’s own society’.⁶⁴ In analysing the efficacy of the institutions of shielding and recourse, I therefore pay close attention to the moral purpose the institutions were created to serve by those who built and developed them. The historical section of the thesis is particularly important in evaluating this question. In interpreting primary historical documents for this project I have tried to stay true to the practice internalism approach and have paid particularly close attention to shifting patterns of language and nomenclature in relation to practices and norms associated with the development of Shielding and Recourse throughout various historical periods and in different national, international and organisational contexts. This thesis therefore seeks to understand and evaluate the pluralist institutions of international society at least in part on the basis of the stated purposes of those institutions.

However, this internal point of view only provides a single, narrow perspective for ethical reasoning. As such, I also borrow from Williams’ approach of evaluating the institutions from the perspective of the lived experiences of individuals as articulated by their communities and via a subaltern pluralism. As argued by Williams, ‘if one really wants to understand how a social structure

⁶² Mervyn Frost and Sylvia Lechner, ‘Understanding International Practices from the Internal Point of View’, *Journal of International Political Theory*, 12: 3 (2016).

⁶³ Ibid., p. 312.

⁶⁴ Ibid., p. 312.

works then one needs to look at it from the perspective of those who gain the least from the established order: those who are its victims and who struggle against it'.⁶⁵ Williams contends that subaltern perspectives are those that are articulated within the narratives of the communities themselves. Examining and understanding subaltern community narratives is essential and these narratives are too frequently excluded within English School normative theory. This project therefore seeks to incorporate the perspective of those communities most impacted by the institutions of Shielding and Recourse by, for example, examining the narratives of indigenous, minority and refugee activist groups within international fora and their practices of protest and resistance to the prevailing diversity regime.

However, there are limitations to Williams' approach: communities cannot be the only judge of their lived experience at a comparative level. A sole focus on subaltern narratives allows no mechanism to adjudicate between competing and often mutually exclusive narratives. In order to engage in macro-level comparative normative analysis, it is therefore necessary to develop some universal means of comparison. Bain's approach to this is the adoption of natural law as a universal moral code. The use of natural law as general form of measurement is, however, incompatible with an ontology of ethical pluralism, given its Western Christian foundation. Natural law has exerted profound influence on the development of international law and can arguably therefore be considered to have global effect; but adopting it as a general standard would reify existing dynamics of exclusion and subordination anathema to a pluralist agenda. In place of a 'natural law' standard, I propose instead to adopt a principle that can be clearly derived from the normative logic of new pluralism and is held in common by all new pluralists. The main universal ethical criteria against which this thesis evaluates the pluralist institutions of international society, therefore, is whether the institution is capable of furnishing individuals with the 'right to have rights'. This principle operates on two levels, the individual and the collective. I follow Williams in arguing that the moral

⁶⁵ Williams, *Ethics, Diversity and World Politics*, p. 126.

value of communities can be primarily derived from their role in providing their members with the 'right to have rights'. The pluralist institutions of international society should, therefore, protect and support the development of political communities to fulfil this function. Going further than Williams, I argue that at the same time, pluralist institutions must provide communities with the 'right to have rights' at the international level. Practices of exclusion and subordination within pluralist institutions would contravene this principle.

There are various ways in which the pluralist institutions of international society can be evaluated against this principle. One is through identifying evidence in international or domestic law for the existence of these rights – e.g. whether domestic political structures provide individuals with rights or whether international law recognises particular communities. The second is the examination of international and domestic practices of inclusion or exclusion and emancipation or oppression. In order to evaluate the contemporary efficacy of Shielding and Recourse, this thesis therefore provides a brief overview of their current operations. This includes an analysis of the extent to which the institutions are accepted by states within international society, the scope and nature of the communities they seek to protect, existing barriers to access or implementation and broad measurements (where available) of their ability to protect communities or provide structures conducive for diversity to flourish. Supplementing this approach, the thesis considers four detailed case studies of the operation of the institutions at particular times and places. The purpose of these case studies is to extend the exploration of pluralist institutions beyond what could be achieved by descriptive history or macroanalysis. The first case study investigates existing protection mechanisms for Roma communities in Europe; the second examines the development of indigenous people's rights regimes at the United Nations (UN); the third provides an analysis of the creation and development of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA); and the fourth analyses the international response to the Great Lakes refugee crisis in the 1990s.

Each case study has been chosen to illuminate particular issues facing the institutions which help to highlight elements of the broader narrative. The investigation into European mechanisms for protecting Romani communities reveals the challenges of developing Shielding mechanisms for non-territorial communities who challenge the prevailing state-based philosophy of the pluralist institutions. The case study on indigenous rights at the UN tells a story of the successful challenge by indigenous peoples and international organisations to the interests of powerful states that has left a complex legacy for international law and non-indigenous national minorities. The case of UNRWA exposes the challenges of reliance upon the institution of Recourse to protect communities in exile for prolonged periods of time. It also provides a means to explore the tensions between preserving communities and cultures in exile and ensuring individual members of those communities are able to enjoy citizenship-like rights in their host states. Finally, the case of the Great Lakes refugee crisis provides an overview of one of the most notable instances of international failure to provide protection to a displaced and vulnerable community. This logic of case study selection is best characterised as what Skocpol and Somers term a *contrast of contexts*. As such, these cases should ‘bring out the unique features of each particular case included in their discussions, and to show how these unique features affect the working-out of putatively general social processes’.⁶⁶

Taken together, this approach both develops an empirical understanding of the pluralist institutions of international society and generates normative implications for new pluralism. In synthesising the diverse approaches to ethical reasoning within new pluralism, this thesis engages with both academic and real-world existential ethical diversity to normatively evaluate the pluralist institutions of international society and develop recommendations for how pluralist justice could better be achieved.

⁶⁶ Theda Skocpol and Margaret Somers, ‘The Uses of Comparative History in Macrosocial Inquiry’, *Comparative Studies in Society and History*, 22: 2 (1980), p. 178.

The thesis proceeds as follows. Chapter one explores the concept of pluralist justice within both the work of the new pluralists of the English School and its philosophical origins within political theory. It examines, first, the posited moral value of political communities and, second, the meaning and implications of the contention that pluralism should be the primary governing principle of international society. This chapter seeks to clarify the relationship between the concept of pluralist justice as found within the writings of the new pluralists and the debate between moral universalism and moral pluralism within political theory.

Chapter two provides an overview of the pluralist institutions of international society, with a focus on the primary pluralist institution – the State. It first examines the diverse views within the work of the new pluralists on the role of the State in protecting communities and preserving international diversity. It then examines the existing criticisms of the arguments of the new pluralists both from solidarist English School theorists and cosmopolitan political theorists. It finds that the current approaches of all of the new pluralists are limited by a failure to sufficiently address pertinent criticisms of the State as an institution of community protection – and a diversity regime – and a failure to consider pluralist institutions of international society other than the sovereign state when developing their theoretical contributions.

Chapter three then outlines the historical development of the secondary pluralist institutions of Shielding and Recourse. This chapter builds on the ‘new history of international society’ and the empirical findings of this thesis corroborate the account already within this literature; that political communities evolved within international society through processes of contestation and adaptation;⁶⁷ were forged rather than discovered during the globalisation of the system of sovereign states;⁶⁸ and often perpetrated the removal, oppression or destruction of other political communities. This was a process whose central logic was a contest between the expansion of powerful communities and resistance of those less powerful.⁶⁹ Having established the history

⁶⁷ See Fabry, *Recognizing States* and Larkins, *From Hierarchy to Anarchy*.

⁶⁸ Keene, *Beyond the Anarchical Society*.

⁶⁹ See Keal, *European Conquest and the Rights of Indigenous Peoples* and Haddad, *Refugee in International Society*.

of the development of the institutions of Shielding and Recourse, chapter four then investigates the question of how effective these institutions are in protecting communities and enhancing diversity today. In order to evaluate the efficacy of these institutions, this chapter first provides a brief overview of their current operations before considering the four detailed case studies.

Chapter five explores the dynamics of hierarchy and homogeneity within the pluralist institutions of international society. It uses the analytic structure detailed in Reus-Smit's recent work on diversity regimes in order to understand the motivations and interests of the order builders who designed the contemporary diversity regime; including the desire for control of populations, self-location of the order builder within the cultural terrain, and social and political coordination.⁷⁰ It builds upon recent work of scholars such as Simpson on hierarchy in international society, drawing attention to inequalities not just between states in international society but between communities, of which a privileged few happen to be states. It also draws on the insights of Halliday to understand the homogenising dynamics of today's pluralist institutions.

The thesis then concludes with some initial reflections on how new pluralism should seek to incorporate the insights generated by this investigation into the practice of pluralist justice within international society. Recommendations include the need to strengthen the secondary pluralist institutions, increase the agency of subaltern groups within international society, respond to prospects for growing patterns of multiple community membership, rethink current attitudes towards territorial borders and migration, and consider how shifting configurations of power are likely to impact on the prospects for the achievement of pluralist justice.

⁷⁰ Reus-Smit, *On Cultural Diversity*, pp. 13, 209.

Chapter One – A Theory of Pluralist Justice

One of the oldest and most persistent questions in Western philosophy— and as far as I understand it, in Eastern thought too— has been the ‘problem’ of the one and the many.¹

The concept of an International Society, in which state practice is shaped by international norms, regulated by international institutions, and guided by moral purposes, is the central pillar of English School theorising about international relations. In Hedley Bull’s own words, ‘[a] society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions’.² At the heart of international society theory, therefore, is the contention that ‘state leaders are conscious of a minimal sense of moral community’.³ The central driving force that has furthered thinking about the nature of international society within the English School has been the debate between the ‘pluralist’ and ‘solidarist’ wings of the school over how deep this moral community is, or could be.⁴

The Pluralist-Solidarist Debate

The terms ‘pluralism’ and ‘solidarism’ derive from Bull’s 1966 essay *The Grotian Conception of International Society*. Bull used these terms to distinguish between two competing views of international society. For Bull, the central assumption of the solidarist position was ‘the solidarity,

¹ Richard J. Bernstein, *The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity* (Cambridge: Polity Press, 1991), p. 58.

² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), p.13.

³ Nicholas Wheeler, ‘Guardian Angel or Global Gangster: A Review of the Ethical Claims of International Society’, *Political Studies*, 44: 1 (1996), p.129.

⁴ Barry Buzan, *From International to World Society: English School Theory and the Social Structure of Globalization* (Cambridge: Cambridge University Press, 2004), p. 8. See also Andrew Hurrell, ‘Order and Justice in International Relations: What is at Stake?’, in Rosemary Foot, John Gaddis and Andrew Hurrell, eds., *Order and Justice in International Relations* (Oxford: Oxford University Press, 2003), p. 24.

or potential solidarity, of the states comprising international society, with respect to the enforcement of the law'.⁵ In contrast, his understanding of a pluralist international society was one in which 'states do not exhibit solidarity of this kind, but are capable of agreeing only for certain minimum purposes which fall short of that of the enforcement of the law'.⁶ It was Bull's formulation of these competing concepts that led to the emergence of the pluralist-solidarist debate within subsequent English School scholarship. His seminal treatise on international politics, *The Anarchical Society*, is, in many ways, an extended manifesto for a pluralist international system based on the classical understanding of pluralism outlined above.

The debate between the pluralist and solidarist wings of the school operates on two levels. On one level, it is a clash of divergent analytical claims about the level of solidarity present within international society. On another, it is a dispute about what kind of values international society *should* aspire to. The members of the British Committee for the Theory of International Politics which sat between 1959 and 1985 are generally – but not uncontroversially – viewed as the 'founders' of the English School. Questions about moral possibility in international life were central to this project, which Molly Cochran argues developed over three distinct phases. The early phase of the Committee (1959 – 1962) was 'heavily marked by the Christian pessimist moral scepticism of [Herbert] Butterfield, [Martin] Wight, and [Donald] Mackinnon'.⁷ In the second phase (1962-1970), 'Bull's intellectual leadership took hold of the Committee and a more minimal idea of international ethics became dominant (...) influenced by Bull's moral knowledge (not Christian pessimist) scepticism'.⁸ The third phase (1970 – 1985) was shaped by the challenge of

⁵ Hedley Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Martin Wight, eds., *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen & Unwin, 1966), p. 52. See also Benedict Kingsbury and Adam Roberts, 'Introduction: Grotian Thought in International Relations', in Hedley Bull, Kingsbury and Roberts, eds., *Hugo Grotius and International Relations* (Oxford: Oxford University Press, 1992); R.J. Vincent, 'Grotius, Human Rights, and Intervention', in Bull, Kingsbury and Roberts, *Hugo Grotius and International Relations*, pp. 241-256; and Nicholas Wheeler, 'Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention', *Millennium*, 21:3 (1992), pp. 463-487.

⁶ Bull, 'The Grotian Conception of International Society', p. 52.

⁷ Molly Cochran, 'Charting the Ethics of the English School: What "Good" is There in a Middle Ground Ethics?', *International Studies Quarterly*, 53 (2009), p. 204.

⁸ *Ibid.*, p. 204.

the Third World to the prevailing normative agenda of international society and demands for increased global justice: An 'expanded and more ad hoc British Committee (...) was compelled to examine more closely the relationship between order and justice. However, it continued to answer these questions from within its paradigm of moral knowledge scepticism (...) members of the British Committee argued for ethical positions on the basis of empirical, not moral, foundations'.⁹

There were, throughout the lifetime of the Committee, some members who adopted a more optimistic stance. Mackinnon's pessimism was tempered by the possibility of moral change and his considerations of the existence of some form of natural law, a position shared with Desmond Williams.¹⁰ R. J. Vincent's work on human rights espoused the view that rights of states derive from the right to self-determination of peoples; which requires that states have some minimal degree of civil relationship with their citizens and that international society has some role in upholding that.¹¹ Along with their engagement with political theorists in the liberal and communitarian traditions, Bain and Williams have also sought to resurrect the thinking of some of these less well remembered members of the British Committee. Wight's work is also arguably more accurately described as 'culturist' rather than pluralist as he believed international society required a some form of common moral culture to survive.¹² Wight argued that international society found its foundations in a middle-ground ethic that sat between individual and personal morality on the one hand and realpolitik or *raison d'état* on the other.¹³

However, Hedley Bull cast a long shadow over the overall intellectual contribution of the British Committee and the shape of their primary joint works, *Diplomatic Investigations* and *The Expansion of International Society*. The legacy of the British Committee for subsequent English School

⁹ Cochran, 'Charting the Ethics of the English School', p. 204.

¹⁰ Donald Mackinnon, 'Natural Law'. BCTIP Paper (1960), Bodleian Library, Hedley Bull Papers, Box 8: File 1; Donald Mackinnon, 'Free Will and Determinism in Relation to International Theory', BCTIP Paper, Bodleian Library, Hedley Bull Papers, Box 8: File 1; Desmond Williams, 'Freedom, Determinism, Responsibility and History', BCTIP Paper (1960), Bodleian Library, Hedley Bull Papers, Box 8: File 1; Desmond Williams, 'International Morality' (1961) BCTIP Paper, London School of Economics, Martin Wight Papers, File 252:2

¹¹ R.J Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), pp.113-118.

¹² Martin Wight, 'Western Values in International Relations' in Butterfield and Wight (eds.) *Diplomatic Investigations* (London: George Allen and Unwin, 1966).

¹³ Ibid., pp. 89–131.

scholars was therefore an empirical and an ethical commitment to pluralism, with Bull's articulation of a pluralist international society emerging as the central foil of later scholars.¹⁴ For Bull, the constraints imposed on international society by the prevailing condition of anarchy were empirically the most important factors in explaining and understanding the conduct of states. Although there were rules and norms that governed international society, they merely provided 'a structure of coexistence, built on the mutual recognition of states as independent and legally equal members of society, on the unavoidable reliance on self-preservation and self-help, and on freedom to promote their own ends subject to minimal constraints'.¹⁵

International society was perceived by Bull as a community for practical purposes only. Practical communities, distinct from purposive communities such as states whose members are voluntarily associated for the purpose of collective enterprise, are those which members engage in by virtue of necessity, in order to manage the pursuit of diverse purposes.¹⁶ His understanding of a solidarist international society, by contrast, was one in which not only were individuals entitled to basic rights but in which sovereignty norms were 'modified such that there is a duty on the members of international society to intervene forcibly to protect those rights'.¹⁷ For most members of the Committee, this did not reflect what they believed to be the reality of international relations: even if individuals were in principle entitled to basic rights, international society had neither the legal basis nor the collective will to enforce them.

¹⁴ Although his contemporaries, including Watson and Wight, also significantly influenced English School thinking on the matter. See Bull, *The Anarchical Society*; Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Oxford: Clarendon Press, 1984); and Martin Wight, *Systems of States*, ed. by Hedley Bull (Leicester: Leicester University Press, 1977). Some of Bull's later work suggests that he moved to a more solidarist position over time. See, in particular, Hedley Bull, *Justice in International Relations*, Hagey Lectures (Waterloo, Ontario: University of Waterloo, 1984). However, even in this later work, he reiterated the danger that the enforcement of human rights principles risked undermining international order. Until there was a greater consensus on the meaning and priority to be accorded to rights claims, attempts to enforce them—what he described as 'premature global solidarism'—would do more harm than good.

¹⁵ Kai Alderson and Andrew Hurrell, eds., *Hedley Bull on International Society* (Basingstoke: Macmillan, 2000), p. 18.

¹⁶ This framing of the distinction finds its origins in the work of Terry Nardin. Nardin's view of international society is therefore similar to an egg box – the objective is merely to keep the various purposive associations apart. See Terry Nardin, *Law, Morality and the Relations of States* (Princeton: Princeton University Press, 1983), p. 8.

¹⁷ Tim Dunne, 'The English School', in Christian Reus-Smit and Duncan Snidal, eds., *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008), p. 738.

There was a difference in methodological approach taken between the early pluralists and solidarists. Pluralists, such as Bull, favoured an approach of analysing positivist law as a means of evaluating the nature of international society.¹⁸ By contrast, what was evident in the work of more solidarist scholars such as Vincent was a greater focus on questions of natural law and a willingness to consider behaviours and norms of international society not enshrined in positivist law as evidence of solidarist practices.¹⁹ It should be noted, however, that the Bull's preference for positivist law actually went against the views of many of the classical thinkers whose work influenced the views of the British Committee, particularly Grotius – who clearly advocated for the existence of a natural law of nations.²⁰ This led to an enduring tension in Bull's work in which he favoured positivist law as the foundation and expression of international society, but found himself unable to entirely abandon the moral primacy of individuals which came out of the natural law tradition.²¹

The main distinction between the pluralist and solidarist wings of the British Committee therefore lay in the difference in their 'respective *empirical* judgements about the world as it currently is – solidarism suggesting that there is much more solidarity in the world already, and pluralism offering a more sceptical interpretation'.²² To an extent, this empirical question was always historically and geographically contingent. As explained by Linklater and Suganami;

'[T]he degree of solidarity among states may be expected to vary from one set of states to another, or from one historical period to another, neither solidarism nor pluralism, understood in this way, should be treated as stating a universal or timeless truth about international society. It may therefore be that a generally pluralist international society – or one in which a pluralist interpretation prevails and which therefore is oriented more or less exclusively towards a minimalist goal of ensuring an orderly coexistence among sovereign states – has a solidarist core or pockets of solidarism – in which a solidarist interpretation is dominant and where therefore higher goals, such as international and cosmopolitan

¹⁸ See Bull, 'The Grotian Conception of International Society'.

¹⁹ See Vincent, *Human Rights and International Relations*.

²⁰ Bull, *The Anarchical Society*, p. 152.

²¹ The contradiction in Bull's work between states as the agents of world order and individuals as the moral referent became one of the primary avenues of attack from later solidarist thinkers such as Wheeler and Dunne. See Nicholas Wheeler and Tim Dunne, 'Hedley Bull and the Idea of a Universal Moral Community: Fictional, Primordial or Imagined?' in Barbara Roberson, ed., *International Society and the Development of International Relations Theory* (London: Pinter, 1998), pp. 47-50.

²² Andrew Linklater and Hidemi Suganami, *The English School of International Relations: A Contemporary Reassessment* (Cambridge: Cambridge University Press, 2006), p. 60.

justice, are aimed at and to some extent realised. It may also be that a pluralist international society evolves over time into a more solidarist one.²³

Therefore, although the main axis of the pluralist-solidarist debate at this time was primarily an empirical question about the level of solidarism that existed, or could exist, within international society, in reality the views of English School theorists on the empirical question were often influenced by their more normative reflections. As such, distinct from – but intertwined with – their empirical assessments, the British Committee’s normative commitment to pluralism led to a consensus within their work that international society not only currently exhibited pluralist tendencies but also a) that it would always continue to do so and b) that it *should* continue to do so even though a pluralist international order was not conducive to the achievement of justice. They justified these claims both on the basis of the presumed impossibility of solidarism within a diverse world and the inherent harms in pursuing such an approach.

The pluralist consensus of the first generation of English School thought was gradually eroded over subsequent decades as later generations of theorists successfully challenged both the empirical observations and ethical assumptions of the classical pluralists. In particular, in 2000, Nicholas Wheeler’s *Saving Strangers* led the way for a fundamental normative shift within the English School in favour of a more solidarist approach. Wheeler sought to provide empirical evidence that states do act on solidarist motivations (particularly in situations of humanitarian intervention) and argued that certain injustices in world society may be rectified within the framework of international society without seriously undermining the goals of international order.²⁴ In some respects, Wheeler’s arguments are a more accurate reflection of Grotius’ position

²³ Linklater and Suganami, *The English School of International Relations*, p. 66. This observation also allows for a theoretical consideration of regional international societies, and that different regions may be able to develop higher degrees of solidarism in one or more areas. The evolution of the concept of the European Union is a key example of the achievement of a very high degree of solidarism within a particular regional setting.

²⁴ Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000). This work also drew upon and sought to respond to longstanding critiques that the society of states approach could, at best, be regarded as a ‘second-best’ account of world politics. See Chris Brown, ‘International Theory and International Society: The Viability of the Middle Way’, *Review of International Studies*, 21: 2 (1995), pp. 183-96.

than Bull's, with Wheeler essentially advocating a secularised form of natural law.²⁵ In a similar vein, work by Timothy Dunne and Andrew Linklater offered a sustained philosophical critique of the English School's 'failure to provide reasoned arguments for its prioritisation of the value of order'.²⁶ Changes within the international order itself – the end of the Cold War, the development of increasingly complex systems of global governance, the proliferation of identity-based politics, the diversification of security threats, and the instability and violence caused by global inequality – all created a political climate conducive to a positive reception for English School solidarists. By the turn of this century, some within the English School, such as Andrew Hurrell, even argued that the achievements of solidarists were so comprehensive that the pluralist position could no longer be posited as normatively viable within the English School.²⁷

'New Pluralism'

In response, a diminished pluralist wing of the School has recently sought to reinvigorate pluralist thought through the development of a 'new' or 'revived' pluralism predicated on the ethical desirability of diversity in international society.²⁸ This, the new pluralists contend, 'holds out the potential for pluralism to follow the path of solidarism towards becoming a more fully

²⁵ Christian Reus-Smit, *On Cultural Diversity: International Theory in a World of Difference* (Cambridge: Cambridge University Press, 2018), p. 108.

²⁶ Molly Cochran, 'The Ethics of the English School' in Reus-Smit and Snidal, *The Oxford Handbook of International Relations*, p. 292.

²⁷ Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007), p. 292. It should be noted that his most recent work on this topic has conceded that 'the account of a pluralist international society has tremendous ongoing power as a political project'. Andrew Hurrell 'Cultural Diversity within Global International Society', in Andrew Phillips and Christian Reus-Smit, *Culture and Order in World Politics* (Cambridge: Cambridge University Press, 2020).

²⁸ See Williams, *Ethics, Diversity and World Politics* and John Williams, *The Ethics of Territorial Borders: Drawing Lines in the Shifting Sand*, (Basingstoke: Palgrave Macmillan, 2006). Both of these draw on earlier work on the ethical desirability of difference in Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000) and James Mayall, *World Politics: Progress and its Limits* (Cambridge: Polity Press, 2000); James Mayall, *Nationalism and International Society* (Cambridge: Cambridge University Press, 1990). See also Barry Buzan, 'Culture and International Society', *International Affairs*, 26:1 (2010), pp. 1-25 and James Mayall (2000) *World Politics: Progress and its Limits* (Cambridge: Polity Press, 2000).

developed normative theory of international relations’.²⁹ Their argument is that, in parallel with solidarism’s commitment to ethical cosmopolitanism, usually via human rights, pluralism can offer an account of the ethical significance of diversity and community in international society. This account posits a central normative claim: ‘that the ethical diversity of human communities is to be valued and championed’.³⁰ The philosophical underpinnings of this claim are often found within various strands of political theory, including liberal and communitarian traditions which emphasises the necessity of pluralism and tolerance for the self-determination and wellbeing of states, nations and ‘peoples’.³¹ This represents, in effect, an attempt to bring questions of justice, rather than simply order, to the core of pluralist thinking in the way that it has long been the core of solidarist thinking. Contemporary pluralist scholars are thus seeking to embed a concept of ‘pluralist justice’ within the English School. Not only does this demonstrate an effort on the part of the pluralist wing to mirror and respond to the contributions of contemporary solidarists, such as Hurrell, Dunne and Linklater, who have sought to re-conceptualise international society for the era of globalisation,³² it also responds to recent appeals for the pluralist wing to re-engage with political philosophy.³³

The core difference between the solidarist conception of justice and the new pluralist conception of justice is as follows: for solidarists, there exist universal moral values and this means that conceptions of political and civic justice (usually formulated as human rights) are therefore also potentially universalisable. Justice is realised within international society through the pursuit of these universal moral values.³⁴ This understanding of justice is broadly aligned with principles

²⁹ John Williams, ‘Pluralism, the English School and the Challenge of Normative Theory’, in Robert Murray, ed., *System, Society and the World: Exploring the English School of International Relations*, 2nd edn. (Bristol: E-International Relations Publishing, 2015), p. 107.

³⁰ Ibid., p. 107.

³¹ Williams draws particularly on the contributions of Hannah Arendt, Bain on the work of John Locke.

³² See Hurrell, *On Global Order*; Andrew Linklater, ‘Globalization and the Transformation of Political Community’, in John Baylis, Steve Smith and Patricia Owens, eds., *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2011), pp. 528–543; and Tim Dunne and Christian Reus-Smit, *The Globalization of International Society* (Oxford: Oxford University Press, 2017).

³³ Molly Cochran, ‘Charting the Ethics of the English School: What ‘Good’ is there in a Middle-Ground Ethics?’, *International Studies Quarterly*, 53: 1 (2009), pp. 203–211, 221–222.

³⁴ See, for example, Hurrell, ‘Order and Justice in International Relations’, pp. 28–32.

articulated by cosmopolitan theorists in political theory, although solidarists within the English School are, in general, less committed to principles of distributive justice than are most prominent ethical cosmopolitans.³⁵ The classical pluralist position posits that there are very few, if any, universal moral values and argues that any attempt to enforce an international moral order would necessarily entail an imperialist project that would be heavily contested.³⁶ As such, the costs of such a policy – in terms of the detrimental impact on international order – would be prohibitive and inevitably create more human suffering.³⁷ The new pluralist position is that, although there are some universal moral values, there are such significant differences between varying communities' perceptions of political and civic justice that justice cannot be achieved simply through the pursuit of those small number of universal moral values at the international level. Rather, new pluralists argue that the primary guiding value within international society should be a toleration of diversity and that international political structures should seek to permit individual moral communities to pursue their unique conceptions of political and civic justice. This differs from the point of view of classical pluralists in that it argues that justice for individuals should be the primary goal of international society and is achievable, whilst still agreeing that individuals' justice needs are best met within polities.³⁸ The ability for communities within international society to create, develop, and protect their own ethical schema is a core facet of pluralist justice.³⁹ In putting forward this

³⁵ See Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2000) and Charles Beitz and Robert Goodin, *Global Basic Rights* (Oxford: Oxford University Press, 2011).

³⁶ This view is exemplified by Morgenthau: 'The appeal to moral principles in the international sphere has no universal meaning. It is either so vague as to have no concrete meaning that could provide rational guidance for political action, or it will be nothing but the reflection of the moral perceptions of a particular nation'. Hans Morgenthau, *American Foreign Policy* (New York: Alfred A Knopf, 1951), p. 35. Most classical pluralists assumed Western values to be far superior than competing ethical standards. See, for example, Martin Wight, 'Western Values in International Relations' in Butterfield, Wight and Bull, *Diplomatic Investigations*. This view was also shared by early solidarists, e.g. R. J. Vincent, 'Western Conceptions of a Universal Moral Order', *British Journal of International Studies*, 4: 1 (1978), pp. 20-46. Nonetheless, the classical pluralists noted that attempts to impose Western values would be heavily contested by non-Western states.

³⁷ Potential costs are usually cited as failure of humanitarian or political interventions, civil war, or erosion of norms of territorial sovereignty that, in turn, may lead to increased aggressive warfare.

³⁸ John Williams, 'Territorial borders and the English School', *Review of International Studies*, 28: 4 (2002), p. 737.

³⁹ See John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited* (Cambridge, Mass: Harvard University Press, 1999); John Stuart Mill, *Utilitarianism; On Liberty; Considerations on Representative Government* (London: J. M. Dent, 1993 [1863]); Susan Mendus, *Toleration and the Limits of Liberalism* (Basingstoke: Macmillan, 1989), pp. 22–68; Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), p. 8.

argument, these scholars refute the assumptions of earlier pluralists that the perpetuation of the state system necessarily involves a prioritisation of order over justice in international affairs.⁴⁰

Those at the forefront of this new pluralism are John Williams and William Bain while scholars such as Mikulas Fabry and Jennifer Jackson Preece inhabit the school's periphery – contributing to its thinking without necessarily advancing the core normative claims as explicitly as Williams or Bain. James Mayall and Robert Jackson both contributed significantly to the ideas which eventually coalesced into new pluralism through their advocacy of the moral benefits of diversity, tolerance and self-determination.⁴¹ Jackson, in particular, is notable as one of the first English School pluralists to acknowledge the possibility of radical solidarist change within the international system (a break from the classical position) but to reject it on the basis of a moral preference for pluralism.⁴² However, these ideas only gained prominence within the pluralist wing of the English School in more recent decades. Mayall and Jackson are therefore best considered as 'bridges' between old and new pluralism.

The distinction between new and classical pluralism is rarely made explicit within the existing literature and it is to be anticipated that some readers will dispute the above categorisation. In particular, some of those at the forefront of new pluralism, such as Williams, refer to scholars I argue as having contributed to its early development, such as Mayall and Jackson, as being members of the classical tradition.⁴³ It is true the work of both of these scholars contains elements of both classical and new pluralism. However, it is the moral preference for pluralism – regardless of the potential for solidarist transformation – expressed within the work of Mayall and Jackson that places them within the new pluralist tradition, although they could not be considered as 'core' new pluralists. Williams, Bain, Mayall and Jackson are all rightly understood as belonging to the new pluralist tradition, albeit occupying varying positions along a spectrum from classical to new

⁴⁰ Williams, 'Territorial Borders, Toleration and the English School', p. 737.

⁴¹ See Mayall, *Nationalism and International Society* and Jackson, *Global Covenant*.

⁴² Williams acknowledges these shared beliefs. See John Williams, 'Pluralism, Solidarism and the Emergence of World Society in English School Theory', *International Relations*, 19: 1 (2005), p. 26.

⁴³ Williams, *Ethics of Territorial Borders*, pp. 54, 104.

pluralism. Their approach is distinct from that of classical pluralism which advocates pluralism as a practical – and often knowingly unjust – response to unchangeable diversity within international society, not a means of achieving justice.

This chapter will now explore the concept of pluralist justice within the work of the new pluralists, focusing on the contributions of Williams and Bain and its philosophical origins within political theory. First it examines the posited moral value of political communities and then it explores the meaning and implications of the contention that pluralism should be the primary governing principle of international society. This chapter seeks to clarify the relationship between the concept of pluralist justice found within the writings of the new pluralists and the debate between moral universalism and pluralism within political theory.

The Moral Value of Communities

The first core tenet of new pluralism is that it presents communities as the morally valuable units of international society. The term community means ‘the act of inclusion in the moral world’⁴⁴ and refers to the ‘range of subjects who are included within moral calculations or within the range of moral considerateness’.⁴⁵ The concept of community is therefore key for both interpretivist and normative theorising in international relations. At its heart, the society of states is both a community in itself and represents the interaction between separate recognised communities.⁴⁶ Linklater, arguably the primary theorist on political communities, even goes so far as to contend that the primary philosophical questions in international relations theory are really about ‘the

⁴⁴ Richard Shapcott, *Justice, Community and Dialogue in International Relations* (Cambridge: Cambridge University Press, 2001), p. 3.

⁴⁵ *Ibid.*, p. 3.

⁴⁶ Although many, such as Nardin, would claim that international society is merely a practical community, not a purposive one. See Nardin, *Law, Morality and the Relations of States*, p. 8.

grounds for conferring primacy upon any one of three competing visions of community – the nation-state, the society of states, or a community of humankind’.⁴⁷

A theoretical reframing of the constituent members of international society from ‘states’ to ‘political communities’ helps to situate new pluralism within a history of theorising about international affairs that far precedes the evolution of the sovereign state.⁴⁸ Political communities existed in a multiplicity of forms long before the emergence of any kind of international society and, as argued by Osiander, it is a distinctly modern idea that individuals should be unambiguously and exclusively associated with one community and one authority.⁴⁹ However, the English School, along with many other branches of International Relations, often assumes a link between the concept of political communities and that of states that ahistoricises the development of states within the international order.⁵⁰ In fact, international society has always recognised the existence of non-state communities and has, throughout history, sought to manage and protect these communities through a range of institutions.⁵¹

This theoretical reframing also helps us to better analyse normative arguments about the nature of international society. This is because, from a normative perspective, it is clearly communities (and therefore states as communities rather than states as states) that matter morally.⁵² As noted by Kofi Annan, ‘[s]tates are now widely understood to be instruments at the service of their peoples, and not vice versa’.⁵³ Even for scholars who posit that states are the best

⁴⁷ Linklater, *Critical Theory and World Politics: Citizenship, Sovereignty and Humanity* (London: Routledge, 2007), p. 31.

⁴⁸ Edward Keene, *International Political Thought: A Historical Introduction* (Cambridge: Polity Press, 2005), p. 10-11.

⁴⁹ Andreas Osiander, *Before the State: Systemic Political Change in the West from the Greeks to the French Revolution* (Oxford: Oxford University Press, 2007), p. 5.

⁵⁰ The treatment of the state as a priori to international society is comprehensively detailed in Alexander Wendt, *Social Theory of International Politics*, (Cambridge: Cambridge University Press, 1999), p.198.

⁵¹ For a substantive discussion on the theoretical link between the concepts of political communities and states, see Andrew Linklater, *The Transformation of Political Community: Ethical Foundations in the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

⁵² This is clear in the work of the new pluralists but it is also evident in wider international relations scholarship. For example, In *Moral Purpose of the State*, Reus-Smit analyses the moral purpose of Ancient Greek and Renaissance Italian city-states as well as the states of absolutist Europe and the modern period. The first two cannot be described as states in the way that states are understood as the building blocks of international society. Rather, they are political communities differently constituted from states. Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity and Institutional Rationality in International Relations*, (Princeton: Princeton University Press, 1999).

⁵³ Kofi Annan, ‘Two Concepts of Sovereignty’, *The Economist*, 18 September 1999.

or the only legitimate method of recognising and protecting a community, it is the concept of a political community that is morally meaningful, and political communities can and do exist outside of the conceptual boundaries of states. The relationship between the ethical meaningfulness of political communities and their manifestation as state-based entities is, however, frequently blurred within the literature by the general acceptance of an essentialised link between the two concepts. In principle, a community can be constituted in a number of different ways and how communities have been understood and defined has evolved considerably throughout history. For example, although English School pluralism carries an inbuilt presumption that communities defined by ethnicity or nationality are the most meaningful for international normative theory, previous eras have attached much greater importance to other factors, such as language or religion.⁵⁴ Moreover, the concept of political communities as discreet bounded groups that act independently on the world stage sits uneasily in a historical record which demonstrates that for the majority of the lifetime of international society, most communities existed as part of empires, not as sovereign states.

That said, within the work of the new pluralists, communities remain overwhelmingly conceived as national, ethnic and primarily state-based.⁵⁵ This is unsurprising given that the notion of community as ‘a body of people unified through national association’ is deeply embedded within contemporary political theory. Rawls’ *Law of Peoples* is the seminal example of this. There are three main arguments within the new pluralist literature for why national communities or peoples should be viewed as the morally valuable units of international society. The first is that, as collective enterprises, communities generate moral duties between their members that – in aggregate – create a morally meaningful unit. This is in line with Shapcott’s understanding of community as the act of inclusion in the moral world: through creating a world of moral obligations, communities obtain

⁵⁴ Keene, *International Political Thought*, p. 10-11.

⁵⁵ It should be noted that many focus their analytic attention on meaningful political communities that are not state based but are nonetheless perceived as national or ethnic communities. See, for example, Jackson Preece’s work on national minorities: Jennifer Jackson Preece, *Minority Rights: Between Diversity and Community* (Cambridge: Polity Press, 2005).

moral value.⁵⁶ A state is, in Rawls' words, 'a cooperative venture for mutual advantage'.⁵⁷ This process generates moral duties in addition to those that are owed to humanity generally through an implicit collective moral contract with one's co-nationals.⁵⁸ This is also the thrust of David Miller's argument in *On Nationality*. His central thesis is that members of nations have obligations to meet the basic needs and interests of each other that they do not have to non-nationals, and that a nation state can ensure that these reciprocal duties are fulfilled by enforcing them on fellow citizens.⁵⁹ This line of argument is found within the work of all of the new pluralists but most clearly within Bain and, earlier, in Mayall. Bain's central argument, based on Locke's theory of obligations, is that membership of a national community both endows individuals with the possibility of achieving equality and freedom and also generates obligations for members who have achieved these goals to support other community members to achieve them.⁶⁰

The second argument, more prominent in the work of the new pluralists, is that communities create conditions in which members develop a shared culture and sense of belonging, and that these are valuable to individuals.⁶¹ Even though new pluralists generally acknowledge that 'all real cultures contain diverse, often conflicting symbols, rituals, stories, and guides to action',⁶² for them, 'plurality is not just individualism (...) humans [are] rooted, conditioned creatures, the product of a process that takes place within communities that are vital, in the sense of being both alive and dynamic, as well as being crucial to the creation of each, diverse, person'.⁶³ Williams, paraphrasing Arendt, seeks to explain why communities matter to individuals:

⁵⁶ Shapcott, *Justice, Community and Dialogue in International Relations*, p. 3. McMahan concurs, arguing that individuals have special duties to others if they are engaged in a joint collective enterprise and that a nation is such a system. Jeff McMahan, 'The Limits of National Partiality', in Robert McKim, and Jeff McMahan, eds., *The Morality of Nationalism* (New York: Oxford University Press), p.12.

⁵⁷ John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 1971), p. 84.

⁵⁸ Bain, 'One Order, Two Laws', p. 570.

⁵⁹ David Miller, *On Nationality* (Oxford: Oxford University Press, 1995).

⁶⁰ Bain, 'One Order, Two Laws', p. 570.

⁶¹ For example, in *Ethics of Territorial Borders*, Williams argues that the single commonality between human beings is that of community membership; 'the need for people to belong in order to possess a sense of identity'. Williams, *Ethics of Territorial Borders*, p. 87.

⁶² Ann Swidler, 'Culture in Action: Symbols and Strategies', *American Sociological Review*, 51: 2 (1986), p. 277.

⁶³ Williams, *Ethics of Territorial Borders*, p. 99. He ascribes this line of thought to Arendt's *Human Condition*, p. 181-92.

‘What defines us as human beings is our difference from one another. That (...) results in a profound need for human beings to live life amongst other human beings in order to know themselves through sharing their lives with different others (...) Being within a meaningful community enables people to escape the worst features of human existence (...) “loneliness”’.⁶⁴

Williams acknowledges that difference and diversity within communities is at least as great as that between communities but contends that ‘in order to recognise difference, and to act politically requires such a recognition, we must know who we are by comparison and engagement with others with whom we share much in common’.⁶⁵

For many communitarian political theorists, it is national communities alone who are able to provide individuals with this contextual identity. J.S. Mill, advancing liberal-inspired notions of a nation, argued that ‘[a] portion of mankind may be said to constitute a Nationality, if they are united among themselves by common sympathies, which do not exist between them and any others – which makes them cooperate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively’.⁶⁶ This is also the main thrust of Yael Tamir’s thesis in *Liberal Nationalism*. She argues that the right of national self-determination is grounded on the value of the distinctive life and character of the nation, as an encompassing cultural group.⁶⁷ Michael Walzer similarly contends that ‘the political community is probably the closest we can come to a world of common meanings. Language, history and culture come together (or come more closely together here than anywhere else) to produce a collective consciousness’.⁶⁸ Mayall concurs, arguing that ‘[t]he nation is ultimately a group whose identity is forged by a particular interpretation of its own history’.⁶⁹ Neil MacCormick presents a useful variant of this line of argument. He asserts that

⁶⁴ Williams, *Ethics, Diversity and World Politics*, p.21. This line of thought is often referred to as the Aristotelian argument for community value, being traced back to his *Politics*, in which he argued that only through participation in the polis can individuals achieve meaning.

⁶⁵ *Ibid.*, p.21.

⁶⁶ John Stuart Mill, *Considerations on Representative Government*, in J. M. Robson, ed., *Collected Works of John Stuart Mill*, vol XIX, chap. XVI (Toronto: University of Toronto Press, 1967 [1862]), p. 456.

⁶⁷ Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993).

⁶⁸ Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), p. 28.

⁶⁹ Mayall, *Nationalism and International Society*, p. 52.

nations as cultural groups form an important element in constituting the personal identity of their individual members as ‘contextual individuals’. Following from the Kantian ideal of respect for persons, their community must likewise be respected.⁷⁰ To promote a notion of justice that involves denying the relevance of difference in the name of equal treatment is to disregard the right of individuals to be recognised as being members of a community.⁷¹

The third – and most important – argument is that it is only within the context of community membership that the concept of individual rights makes sense. Paraphrasing Arendt, Williams argues that rights cannot be protected and are therefore meaningless without a community capable of granting and enforcing rights of individuals through an act of popular will. He explains that Arendt argued for one single right – the right to have rights. By this she meant ‘the right to belong to a political community which can grant meaning, specificity and effectiveness to the idea of being a rights holder’.⁷² Jackson Preece takes a similar line when advocating for minority rights over universal human rights.⁷³ Bain likewise argues that ‘the sanctity of human personality expresses a condition of independence that cannot be separated from, subordinated to, or placed above the independence of the political community. The development of human personality (...) demands that all persons be members of an independent political community in which they are entitled to be equal members (...) to be fully human one must be a citizen’.⁷⁴ Bain’s Lockean view of communities also contains a variation on this argument. Locke’s view is that it is only through community membership that individuals can obtain freedom and equality – both

⁷⁰ Neil MacCormick, *Practical Reason in Law and Morality* (Oxford: Oxford University Press, 2008). Iris Marion Young adopts a similar approach in her advocacy for increased group rights arguing that some of the most important features of individuals stem from their membership of groups. See Iris Marion Young, ‘Polity and Group Difference: A Critique of the Idea of Universal Citizenship’, *Ethics*, 99: 2 (1989), pp. 250-274. See also Ulrike Vieten, ed., *Revisiting Iris Marion Young on Normalisation, Inclusion and Democracy* (London: Palgrave Macmillan, 2014).

⁷¹ Some communitarians who defend the primacy of the national community also argue that this shared identity, by and of itself, gives rise to particularist duties among its members. For example, Miller contends that “in acknowledging a national identity, I am also acknowledging that I owe special obligations to fellow members of my nation which I do not owe to other human beings.” Miller, *On Nationality*, p. 49.

⁷² Williams, *Ethics of Territorial Borders*, p. 101.

⁷³ See Jackson Preece, *Minority Rights*.

⁷⁴ William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003), p. 191.

preconditions to the attainment of human happiness. For Bain, this then ties in with the first argument for particularist duties. Citing Locke, he contends that membership of a community creates an exacting obligation of assistance in order that all persons may realise the goals of freedom and equality.⁷⁵ Since individuals are able to achieve these only through community membership, it is incumbent on those who are more privileged within society to assist those who are less privileged to achieve them.⁷⁶

This sustained focus on the value of national communities or ‘peoples’ is comparatively new within pluralist thought and should be differentiated from the classical pluralist focus on the State, even if the relationship between the two is sometimes insufficiently theorised. It is also underpinned by a shift away from the traditional historical anchors of pluralist thought, such as Grotius and Vattel, in favour of political theorists within the liberal, communitarian and critical traditions.⁷⁷ This is articulated most explicitly in Williams, who attributes his inspiration for his advocacy of international toleration to Hannah Arendt,⁷⁸ and Bain, whose arguments for the value of community are taken directly from Locke.⁷⁹ This shift to a greater engagement with liberal and communitarian principles was pioneered by Jackson and Mayall. For Mayall, the value of communities can be derived from a liberal right to freedom of association.⁸⁰ For Jackson, the *Global Covenant* is primarily a means of ensuring all individuals have access to a community which gives

⁷⁵ Bain, ‘One Order, Two Laws’, p. 570. Bain notes that Waldron argues that the basic equality underlying Locke’s political thought imposes an obligation that goes well beyond the demands of treating equals equally: “the principle of basic equality is not just a matter of recognizing those who currently are our equals; it is also a matter of an affirmative duty to nurture the basis of equality in those who may become, and are evidently intended by God to become, our equals.” Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* (Cambridge: Cambridge University Press, 2002), p. 113, quoted in Bain, ‘One Order, Two Laws’, p. 569.

⁷⁶ This line of argument finds itself vulnerable, however, to attack by solidarists – who cite precisely the failure of states to ensure individual rights as evidence of the moral bankruptcy of a pluralist international order.

⁷⁷ This also reflects an explicit move away from the canonical thinkers of the English School towards a more expansive engagement with political theory. See William Bain and Terry Nardin, ‘International Relations and Intellectual History’, *International Relations*, 31: 3 (2017).

⁷⁸ Williams, *Ethics of Territorial Borders*, p. 99. See also, Arendt, *Human Condition*, p. 181-92.

⁷⁹ Bain, ‘One Order, Two Laws’, p. 570. Williams also references Locke in some of his thinking. See Williams, *Ethics of Territorial Borders*, p. 87.

⁸⁰ This is demonstrated when he argues that “[o]ne hardly knows that any division of the human race should be free to do if not to determine with which of the various collective bodies of human beings they choose to associate themselves’. Mayall, *Nationalism and International Society*, p. 51.

them rights domestically and represents them on the international stage.⁸¹ For those on the periphery of new pluralism, such as Jackson Preece and Fabry, liberal and communitarian thought directs both their research questions and policy recommendations. For Jackson Preece, it provides means and justifications to develop minority rights regimes⁸² while for Fabry, it entails a commitment to self-determination that can only be achieved by permitting communities the freedom to realise self-government and independence even at the expense of territorial change or conflict.⁸³

It is therefore clear that much of the writing within the new pluralist vein, even in Jackson and Mayall's writings, either implicitly concedes the solidarist principle that individuals should be the ultimate unit of concern in any moral deliberations or explicitly defends it. However, many of the philosophical underpinnings of the new pluralism still run contrary to universalistic and cosmopolitan ethical thought. In particular, the argument that international society should treat particularistic communities as representative units of concern when formulating principles of justice at the international level, runs contrary to the principles of cosmopolitanism. Moreover, many cosmopolitans would dispute the existence of particularist duties and argue instead for the existence of universal duties.⁸⁴ This conflict between particularistic and universalistic codes is exemplified by the specific tension between the obligations of citizenship and the obligations of humanity in the history of international thought.⁸⁵ Post-Rawlsian writing on justice has addressed the issue extensively, partly because of a lack of satisfaction with the way in which Rawls himself

⁸¹ Jackson, *Global Covenant*, pp. 14-15.

⁸² See Jackson Preece, *Minority Rights*. Jackson Preece has also explored the links between international pluralism and domestic pluralism. See, for example, Jackson Preece, Jennifer, 'Democracy, Minority Rights and Plural Societies: Plus ça Change?' *Sociology Compass*, 2: 2 (2008), pp. 609-624.

⁸³ Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776*, (Oxford: Oxford University Press, 2010). See 'Conclusion'.

⁸⁴ This argument is made most strongly in Peter Singer (1972) 'Famine, Affluence and Morality', *Philosophy and Public Affairs* 1: 3 (1972), pp. 229-243. Other cosmopolitans often adopt a weaker stance, acknowledging that particularist duties arise in some circumstances but that universal duties still exist and that a balance should be struck between these.

⁸⁵ Andrew Linklater, 'The Problem of Community in International Relations', *Alternatives: Global, Local, Political*, 15: 2 (1999), p. 140.

handled the matter.⁸⁶ Acknowledging this challenge, it is clear nevertheless that the moral meaningfulness of political communities, in particular national communities or ‘peoples’, is something that is clearly recognised in the practice of international society. For example, when we examine the key documents which constitute the backbone of international law, communities, and their right to self-determine, are clearly valued.⁸⁷ On that basis, from an English School perspective, the argument that political communities have intrinsic moral value is worthy of sustained engagement and is an important consideration in contemporary international relations theory.

Of all of the arguments advancing the moral value of communities presented in the new pluralist literature, it is the contention that only within communities are individuals able to obtain the right to have rights that is the most salient for the subsequent argument of this thesis. The arguments that the moral value of communities can be derived from their role as collective enterprises or from the sense of meaning and belonging that they give to their members are persuasive and will shape much of the coming discussion. However, it is the argument that individual rights only make sense in the context of communities that provides the most tangible way to measure the achievement of pluralist justice within international society. A key question that will be asked of all of the pluralist institutions of international society will therefore be ‘do they endow those under their protection with the ‘right to have rights’?

⁸⁶ Chris Brown, ‘Cultural Pluralism, Universal Principles and International Relations Theory’, in Simon Caney, David George and Peter Jones, eds., *National Rights and International Obligations* (Boulder, Colorado: Westview Press, 1996), p. 166. See also Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999), Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989). For justice to be achieved in the view of theorists such as Pogge and Beitz, Rawls’ original position should be the position of all individuals in the global society of humankind, not merely members of their chosen national society.

⁸⁷ See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.

Diversity, Tolerance and Pluralist Justice

Having argued that communities should be the moral units of concern for international society, the new pluralists use this foundation to move to an argument for tolerance of diversity or 'pluralism' to be the primary governing value in international society. As noted above, for the classical pluralists, ethical diversity was simply a fact of international life and, as such, international society faced no option but to accommodate it. In so doing, scholars such as Bull drew on the thought of early writers in the tradition of international law, such as Pufendorf and Vattel.⁸⁸ For both of these early scholars, international pluralism was necessary because of the imperfect and indeterminate nature of moral universals: 'The state created the realm of perfect obligation, and, although moral universals survived in relations between separate states, they did so imperfectly. They could neither be demanded nor could they be enforced outside the concrete bonds that tied citizens to the state'.⁸⁹ The classical narrative on the emergence of this pluralist international system is that it arose from the need to call a halt to the morally debilitating and materially destructive ideological war between Catholicism and Protestantism in the early stages of the formation of the modern states system. The original formula – *cuius regio eius religio* – brought peace to Europe through the forging of a political agreement to tolerate difference internationally; giving free reign for sovereigns to expunge it domestically.⁹⁰ For the most part, the normative claim of the classical pluralists was that a pluralist international society was a practical institutional adaptation to human diversity that had made possible the formation of the international states system. Any attempt to impose solidarist values or to seek to impose universal conceptions of justice internationally would therefore undermine the core pluralist normative foundation on which the states system had been built, and upon which it relied to secure ongoing support and compliance from its members.

⁸⁸ See, for example, Bull, *Anarchical Society*, p. 108.

⁸⁹ Linklater, *Critical Theory in World Politics*, p. 35.

⁹⁰ Mayall, *Nationalism and International Society*, p. 20.

By contrast, the new pluralist position is that tolerance for diversity is not merely a solution to a problem inherent in the nature of international society. Rather, toleration of diversity is something to be actively championed because it is through pluralism, not solidarism, that international justice can be achieved.⁹¹ This does not mean that the new pluralists have abandoned the claim that pluralism is beneficial to order. Rather, they dispute that the benefits of order necessitate the tolerance of injustice. There are three broad philosophical bases which the new pluralists use to advance this claim— a functional argument, an argument from moral relativism and an argument from moral pluralism.

The functionalist argument posits that a pluralist international environment best allows communities to develop conditions in which domestic justice (usually liberally conceived) can be achieved. The contention is that, within a pluralist and tolerant international order, individual communities benefit in their moral learning from diverse examples and practices. The moral development of all international society is therefore possible because a pluralist international society ‘offers different voices against which we can judge ourselves, interact with and learn from others’.⁹² Rawls is arguably the seminal political theorist to adopt this approach. For Rawls, the benefits of a pluralist political climate is that it encourages reform in a liberal direction and that the benefits of this overrides a temporary lack of justice in individual societies: ‘a liberal constitutional democracy is (...) superior to other forms of society (...) a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognise the advantages of liberal institutions and take steps toward becoming more liberal on its own’.⁹³ For Rawls, justice is universal and can be elucidated through reason; it is not culturally dependent. As such, his argument for pluralism is a functional one only – that all societies are better placed to eventually elucidate justice when given the freedom to do so. Many of the canonical thinkers within liberal

⁹¹ See Jackson, *Global Covenant*, p. 139 and Williams, *Ethics of Territorial Borders*, p. 99.

⁹² Williams, ‘Territorial Borders, Toleration and the English School’, p. 746.

⁹³ John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited* (Cambridge, Mass: Harvard University Press, 1999), p. 62.

political theory have also advanced this view. For example, Mill argues in *Principles of Political Economy* that '[i]t is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar from themselves, and with modes of thought and action unlike those with which they are familiar. (...) Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress'.⁹⁴

This instrumental or functional argument for pluralism, although prevalent, is unpersuasive for two reasons. The first is that, logically, the end goal of the pluralist international system described above is clearly one in which diversity is highly circumscribed since, over time and through mutual learning, all societies should coalesce around very similar understandings of justice. Scholars within political theory who advocate the functionalist argument – such as Rawls and Mill – do indeed state explicitly that certain political systems are to be preferred (liberal systems) and that universal principles of justice for these systems can be identified through reason. This contradicts one of the main reasons given for valuing communities – that there exist different community-based value systems across the world who should not be obliged to conform to universal moral codes. The second is that, given that this line of argument presumes that some forms of justice are in fact preferable to others, it therefore concedes that, within a pluralist system, poor standards of justice exist within many, if not most, communities in the world.

The second argument, drawn from theories of moral relativism, is that only through allowing communities to self-determine are individual members of those communities able to access the version of justice most meaningful to them.⁹⁵ This contradicts the core assumption of the functionalist argument in so far as it denies the existence of universal justice that can be understood through reason. The core proposition of moral relativism is that it 'denies that there

⁹⁴ John Stuart Mill, *Principles of Political Economy*, book 3, 17, section 5: op. cit (48/1), iii 594 (New York: D. Appleton, 1884).

⁹⁵ See, for example, Jackson Preece, 'Democracy, Minority Rights and Plural Societies', p. 99 and Bain, 'One Order, Two Laws', p. 570.

are universal basic moral demands and says different people are subject to different basic moral demands depending on the social customs, practices, conventions, values, and principles that they accept'.⁹⁶ It is 'a doctrine according to which the judgement of a man or group, since it is the expression or statement of a taste, or emotional attitude or outlook, is simply what it is, with no objective correlate which determines its truth or falsehood'.⁹⁷ The doctrine of relativism holds that there are 'no objective values (...) standards of conduct are socially conditioned—by culture, by history (...) Relativism postulates moral silence between people of different cultures and (...) presents an image of hermetically sealed populations that excludes even the possibility of international ethics'.⁹⁸ Some of Bull's writing suggests an inclination to a relativist position. He frequently referred to justice as a subjective concept (unlike order, which has an objective or universal content), and argued in 'Natural Law and International Relations' in that 'men in world politics are in conflict about the most basic moral ends (...) when this occurs there is sometimes no rational way of choosing between them'.⁹⁹ Renee Jeffery ascribes Bull's relativist-inclined views on justice to the influence of John Anderson whose 'Australian realism' entailed a rejection of ethical ideas that had no external basis of epistemological validity.¹⁰⁰ As discussed earlier, however, Bull's thinking on this question was nuanced.¹⁰¹ Although he often described the moral divide between nations as insoluble, he was unable to dismiss the conception of natural law entirely. Moreover, some of the founders of the English School took a very different approach to Bull. For example, Wight believed that a state-system could not come into being 'without a degree of cultural unity among its members'.¹⁰² This cultural unity by no means extended to all peoples but was, instead, civilisationally-bound. International societies were held together by shared norms that had

⁹⁶ Gilbert Harman, 'Is There a Single True Morality?', in Michael Krausz, *Relativism: Interpretation and Confrontation* (Notre Dame, Indiana: Notre Dame University Press, 1989), p. 371.

⁹⁷ Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, 2nd ed., (London: Pimlico, 2013), p. 80.

⁹⁸ Jackson, *Global Covenant*, p. 407.

⁹⁹ Bull, 'Natural Law and International Relations', pp. 71-81.

¹⁰⁰ Renee Jeffery, 'An Early Influence: John Anderson', in Coral Bell and Meredith Thatcher, *Remembering Hedley* (Canberra: ANU E Press, 2008), pp. 14-15.

¹⁰¹ See Buzan, *From International to World Society*, p. 37.

¹⁰² Wight, *Systems of States*, p. 33.

developed through a shared civilisational history. European international society, he believed, was held together through a unified belief in natural law derived from shared Christianity. Wight was thus deeply concerned about the possibility that international society would be fatally weakened by its expansion.

Within the broad spectrum of new pluralism, it is Jackson who comes closest to advocating a position of pure moral relativism; although even he does not agree that there are *no* universal values. Instead he advocates an expansive dictum of toleration in international affairs, contending that intervention in the affairs of a sovereign state is a *prima facie* wrong on the basis that states have a principled right to determine their own versions of domestic justice.¹⁰³ Mayall's position is more nuanced. In general, he agrees with a more maximalist interpretation of toleration based on his empirical conclusion that 'the pluralists [in international society] still hold the ascendancy' and, as such, a more limited scope would be difficult to implement in practice.¹⁰⁴ However, unlike Jackson, Mayall does not see intervention as a violation of justice *per se*.¹⁰⁵ Although he believes that a system based on non-interference was an immense achievement, he argues that 'if it is advanced as an absolute, it inevitably offends our moral sensibility (...) There must be *some* circumstances when it is right to ignore the prohibition [of interference]'.¹⁰⁶ Fabry takes a slightly different line in *Recognising States* when he argues that individual rights and tolerance for diversity would be better served under a regime of *de facto* self-determination rather than the current regime of self-determination mediated by international recognition.¹⁰⁷ For Fabry, there are some universal morals, but he appears to believe these are best met within a system of maximalist toleration.

By contrast, the core new pluralists – Williams and Bain – explicitly adopt a relatively limited principle of international toleration. Williams, unlike Jackson, believes that there are things which are intolerable to international society: 'Toleration, of course, cannot be limitless. It only

¹⁰³ Jackson, *Global Covenant*, pp. 251–252, 291.

¹⁰⁴ Mayall, *World Politics*, p. 112.

¹⁰⁵ *Ibid.*, p. 112.

¹⁰⁶ Mayall, *Nationalism and International Society*, p. 21.

¹⁰⁷ Fabry, *Recognizing States*, p. 233.

makes sense to talk of toleration if there are things that are intolerable. The violent refusal to reciprocate toleration is intolerable because the resort to violence marks an end to the political process'.¹⁰⁸ For Williams, it is essential for each individual to be permitted community membership – the key meaning-making context for that person to enjoy rights – and, thus, any attempt to remove an individual from community membership is intolerable. It cannot be tolerated that anyone should be denied access to the political world. On this basis, Williams – contrary to Jackson – argues that territorial borders can be breached where they are being used in defence of violent intolerance. In these cases, intervention is legitimate.

Bain, for his part, advocates a pluralist ethic of international order that respects difference but accommodates a fundamental principle of obligation. His contention is that 'the society of states has never been tolerant in the way that pluralists claim and it cannot be unified in the way that solidarists want'.¹⁰⁹ Rather, he argues 'tolerance in international life is far more circumscribed' than the classical pluralists assume and is tempered both by an acknowledgement that 'there has always been recognition of some moral minimum below which difference it is said to be intolerable'.¹¹⁰ Bain thus rejects the binary nature of the pluralist-solidarist debate as advanced by Bull in order to advance an argument that reconciles the coexistence of pluralism and the unity of solidarism through a 'liberal and progressive theory of obligation that reconciles the equality of human community and the freedom of the society of states in a single, ordered relationship'.¹¹¹ For Bain, moral pluralism operates in international society on top of a fundamental, thin, solidarist layer. In doing so, he argues that Keene's categorisation of two orders in international life – toleration and civilisation – were in fact less bifurcated in their geographical application than Keene would suggest.¹¹² Bain claims that 'this approach provides relief from the tension of seeing the

¹⁰⁸ Williams, *Ethics of Territorial Borders*, p. 107.

¹⁰⁹ Bain, 'One Order: Two Laws', p. 573.

¹¹⁰ Ibid. p. 559.

¹¹¹ Ibid., p. 564.

¹¹² Ibid., p. 566. See also Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002), p. xi.

society of states as a desirable kind of order or one which is merely ‘second-best’; for it affirms the value of self-directed freedom that pluralists cherish without exorcising the common projects that are so obviously a part of international life’.¹¹³

Given that the new pluralists – by and large – concede that there are, in fact, some universal moral values, how then are they able to justify an ethic of pluralism? This brings us to the third, and conceptually the most important, argument – that of moral pluralism. Moral pluralism is ‘the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathising and deriving light from each other’.¹¹⁴ For moral pluralists, ‘there is a world of objective values’,¹¹⁵ rendering the position distinct from moral relativism. Instead of claiming that there are no objective values, moral pluralism advocates for the existence of a ‘plurality of [objective] values not structured hierarchically’.¹¹⁶ Quoting Isaiah Berlin, arguably the most prominent ethical pluralist of modern political theory, Jackson says:

‘Pluralism embraces the principle of common humanity while fully respecting the dignity of different cultures and civilizations. Normative pluralism in world politics is thus not only an accommodation of human diversity but also an affirmation of common humanity via the principle of self-determination which is institutionalized after independence by the basic norms of equal sovereignty, territorial integrity, and non-intervention (...) Understood in that way, the values of human diversity and common humanity are compatible and reconcilable rather than contradictory and conflictual. The normative framework of that reconciliation is the global covenant.’¹¹⁷

Williams concurs, arguing that ‘plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anybody else who ever lived, lives or will live’.¹¹⁸ He continues that ‘I take from the English school account of pluralism an understanding that pluralism is a communal phenomenon: it manifests itself in the ways that

¹¹³ Bain, ‘One Order: Two Laws’, p. 575.

¹¹⁴ Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, 2nd ed., (London: Pimlico, 2013), p. 10.

¹¹⁵ Ibid., pp. 10-11.

¹¹⁶ Ibid., p. 83.

¹¹⁷ Jackson, *Global Covenant*, p. 409.

¹¹⁸ Original formulation in Arendt, *Human Condition*, pp. 7-8.

human communities come to develop distinctive, sometimes irreconcilable, accounts of what is ethically correct'.¹¹⁹

Theories of moral pluralism find their origins within the thought of those scholars – such as Kant and Herder – who rebelled against the Enlightenment doctrine that there is but one true answer to genuine questions (scientific or moral), that these answers are in principle knowable and that true answers are not incommensurable with one another. Rejecting this view, these scholars, most notably Herder, drew on strands of thought from early modern writers such as Giambattista Vico; who Berlin argues to be the 'true father both of the modern concept of culture and what one might call cultural pluralism'.¹²⁰ These writers rejected both the enlightenment claim of *quod semper, quod ubique, quod omnibus creditum est* and revolted against the intellectual mainstream project of the pursuit of the ideal. The tension between liberal universalists and liberal pluralists during this period led to a schism in liberal approaches to empire. While some, such as Kant, Herder and Bentham virulently opposed both the brutality of empire and its obliteration of diverse cultures, others, such as J.S. Mill advocated for a restrictive, normative understanding of nationhood that required both the bonds of fellow feeling forged by a common political culture and the capacity for self-government that was peculiar to a small group of European nations. As such, he defended Empire on the grounds that the subjected communities could not really be considered nations entitled to self-government. Imperial rule would, if anything, assist them in reaching this condition.¹²¹

Berlin is arguably the most prominent pluralist within political theory during the twentieth century. Resurrecting the arguments of the eighteenth century pluralists, Berlin contends that '[i]n the house of human history there are many mansions'.¹²² He refutes the notion that there is 'one,

¹¹⁹ Williams, *Ethics, Diversity and World Politics*, p. 4.

¹²⁰ Berlin, *Crooked Timber of Humanity*, p. 62. See also Isaiah Berlin, *The Proper Study of Mankind* (London: Vintage, 2013), pp. 361-362.

¹²¹ See Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2005). See also Sankar Muthu (2003) *Enlightenment Against Empire* (Princeton: Princeton University Press 2003).

¹²² Berlin, *Crooked Timber of Humanity*, p. 83.

and only one, true morality or aesthetics or theology and allows equally objective alternative values or systems of value'.¹²³ For Berlin, the pluralist rejection of the utopian tradition in Western thought that traces its origins to Plato's *Republic* is key because it was this political mindset of seeking for the ideal that was responsible for the gravest atrocities of the twentieth century, many of which he lived through. In addition, moral pluralism allows us to recognise that 'every culture expresses itself in works of art, of thought, in ways of living and action, each of which possesses its own character which can neither be combined nor necessarily form stages of a single progress towards a single universal goal'.¹²⁴ Moral pluralism thus contends that diversity is an inherent good in the world and conveys a belief 'not so much in the inevitability, as in the value and importance, of the singular and the unique, of variety as such; and the corresponding conviction that there is something repressive and deeply unattractive in uniformity'.¹²⁵ However, there are limits to the world of values. For Berlin, it is important not to accept as authentic values anything that we cannot understand, imaginatively 'enter' into. Of all of the three reasons for advocating a pluralist international system, the new pluralists, in general, make most use of the arguments derived from moral pluralism. That said, neither the work of the foundational scholars such as Herder or the more recent expansive discussions of moral pluralism in political theory led by Berlin are given adequate attention by the new pluralists. As such, their work does not sufficiently explore the link between the theorised value of diversity and the extent to which the valuable aspects of diversity are in fact protected and enhanced within international society.

Methodology of the New Pluralists

While there are key similarities between the new pluralists in the form of their shared ethical commitments, there are also key differences, particularly in terms of their methodological

¹²³ Berlin, *Crooked Timber of Humanity*, p. 90.

¹²⁴ *Ibid.*, p. 68.

¹²⁵ *Ibid.*, p. 58.

approaches. Both Jackson and Mayall, despite advancing normative claims that have more in common with new pluralism, adopt a more traditional English School approach to method. Jackson's is a classical method that relies upon history and 'involves observation, discernment, interrogation, diagnosis, and explication' of international events.¹²⁶ For Jackson, this classical method is epitomised by Hedley Bull's statement that 'it is the purely intellectual one of inquiring into the subject and following the argument wherever it might lead'.¹²⁷ Jackson maintains that international relations is essentially a 'craft discipline'. It is a practice undertaken by statespeople whose role places them in a particular epistemological environment. As such, the academic study of international relations must seek to understand or 'enter into' this environment – and the minds of the statespeople in question – in order to make empirical and normative judgements. He acknowledges that a pluralist approach necessarily 'discloses divergent and even contradictory ideas, values, and beliefs which must be recognized by our theories, and assimilated by them, if they are to be faithful to reality'.¹²⁸ Yet, for Jackson, 'international ethics is, by and large, created by statespeople' and not something that can be theorised from principles other than the practice of international politics.¹²⁹ As such, he contends that '[s]cholars must assess the conduct of statespeople by the standards that are generally accepted by those same statespeople'.¹³⁰ Jackson's epistemological pluralism is, therefore, the pluralism of a particular elite.

Mayall, meanwhile, is explicit that he is a 'reluctant methodologist' who believes that 'the English School serves its method when it wears it lightly'.¹³¹ Mayall views the English School – and himself – as engaged in 'practical reasoning', defined as taking 'a distinctively normative question as [a] starting point [and asking] what one ought to do, or what it would be best to do'.¹³²

¹²⁶ Robert Jackson, 'International Relations as Craft Discipline', in Cornelia Navari, ed., *Theorising International Society: English School Methods* (Basingstoke: Palgrave Macmillan, 2009), p. 24.

¹²⁷ Ibid., p. 24.

¹²⁸ Ibid., p. 26.

¹²⁹ Ibid., p. 21.

¹³⁰ Ibid., p. 30.

¹³¹ James Mayall, 'The Limits of Progress: Normative Reasoning in the English School', in Navari, ed., *Theorising International Society*, p. 209.

¹³² Ibid., p. 212.

Mayall describes his own form of practical reasoning as ‘understanding the historical development of a set of practices and unpacking their inner relationships (...) by the evaluation of opposed and contradictory claims’.¹³³ In other words, ‘in describing the practice of contemporary international relations, [Mayall’s work] seeks to offer a normative critique of this practice’.¹³⁴ He justifies this method by arguing that ‘it corresponds to how we normally discuss the world around us’.¹³⁵ This idea of ‘practical reason’ is relatively underdeveloped by Mayall, and as noted by Williams, he remains ‘entirely uncritical about the status of the knowledge that we have about the conduct of international politics’ and asserts, rather than demonstrates that history, historiography and epistemology should provide the basis for normative theorising.¹³⁶

Both Bain and Williams are critical of the classical method. For Bain, the English School’s use of history has been a main line of critique. According to Bain, English School theorists, including Jackson and Mayall, use history in problematic ways – in order to ‘shed light’ on the present or ‘learn lessons’ from the past. Bain argues that these approaches are problematic because history is not something that can be ‘discovered’; nor is it something that exists outside of the mind of the historian. Instead, drawing on the insights of Michael Oakeshott, he argues that history should be viewed as ‘fable’. This view ‘conceives historical facts as conclusions that are parts of a single world of experience which embraces both past and present in a paradoxical but nonetheless coherent system of thought’.¹³⁷ Bain argues that:

‘It is in this vein that I have explored the idea of trusteeship. I have not studied trusteeship for the purpose of deriving a transcendental meaning of the institution, or to determine the conditions which may give rise to a condition of trusteeship, but rather to understand what it denotes in the context of international society. And I have studied it historically; that is, in the context in which it arose, and as it was understood by the people at the time, to make sense of its distinct identity’.¹³⁸

¹³³ Mayall, ‘The Limits of Progress’, p. 212.

¹³⁴ Ibid., p. 210.

¹³⁵ Ibid., p. 210.

¹³⁶ Williams, *Ethics, Diversity and World Politics*, p. 59.

¹³⁷ William Bain, ‘The English School and the Activity of Being an Historian’, in Navari, ed., *Theorising International Society*, p. 156.

¹³⁸ Ibid., p. 162.

Williams also endorses Bain's view of history. He agrees that 'we cannot know what we do not know or recover a past on the basis of what is unavoidably an incomplete record that has to be interpreted through the lens of our own present and our own knowledge'.¹³⁹ In a similar approach to Bain, Williams centres the concept of 'narrative' within his epistemological pluralism and his normative theorising. For Williams, however, the primary weakness of the classical approach is its elitism. Williams' method is self-consciously eclectic. While refuting the 'craft discipline' approach of Jackson, Williams instead engages with ideas from political philosophy, social theory, sociology, as well as the English School tradition to develop his subaltern pluralism.¹⁴⁰

A key facet of English School theorising is the link between empirical investigation and normative theorising – between understanding how things are and how they should be.¹⁴¹ As noted by Williams, 'with the exception of Barry Buzan there are no contemporary, and precious few historical, English school theorists who consistently assert the separability of explanatory and normative theory'.¹⁴² Of all the scholars considered within this thesis as within the broad tent of new pluralism, none are engaged in idealised theory. Rather, they are all engaged in an academic approach that links empirical analysis with normative reasoning. They do assert, however, different philosophical bases for the relationship between the empirical and the normative.

For Jackson, the empirical *creates* the normative, leaving the scholar only to form historically and legally informed judgements based on the prevailing ethics of international statespeople. As has been noted by subsequent scholars, particularly Williams, this understanding of the relationship between the normative and the empirical is unsatisfactory as it gives almost total primacy to international statespeople as the architects of international morality, with little to no critique of their motivations for action beyond ethical conviction; and excludes other actors from a role in the development of international ethics. While Mayall's work allows for a much greater

¹³⁹ Williams, *Ethics, Diversity and World Politics*, p. 53.

¹⁴⁰ Ibid., p. 197.

¹⁴¹ Christian Reus-Smit, 'Constructivism and the English School' Navari, ed., *Theorising International Society: English School Methods*, pp. 64-67.

¹⁴² Williams, *Ethics, Diversity and World Politics*, p. 18.

role for the analyst in developing normative claims, his concept of practical reasoning remains underdeveloped and Williams would contend that the work of both Jackson and Mayall ‘relies on an asserted, not demonstrated, presumption in favour of the priority of the empirical’.¹⁴³

By contrast, Williams seeks to articulate a much more complex relationship between the empirical and the normative and to establish pluralism as an ontological rather than simply an empirical claim. For Williams, the ‘normative centrality of ethical diversity’ is established via ‘its ontological significance through an ethic rooted in lived human experience’.¹⁴⁴ Mikulas Fabry’s understanding of the relationship between the normative and the empirical is similarly rooted in the lived experience of individuals but also bears similarity to Mayall’s articulation of ‘practical reasoning’. For Fabry, the task of normative theory is to probe the basis and dynamics of [empirical political] reality and, where flaws are identified, to propose a better alternative, that is in some way embedded in human experience’.¹⁴⁵ As all individuals’ lived experience occurs within a community setting, Williams contends that ‘ethics are an epistemological phenomenon: they are rooted in and manifest the outcome of inter and intracommunity debates’.¹⁴⁶ This approach bears considerable similarity to that of Walzer in *Spheres of Justice* where he argues that justice is the creation of a particular political community at a particular time, and the evaluation we make of that justice must be generated from within that a community.¹⁴⁷ In an approach which also shares some affinity with Habermasian discourse ethics and Andrew Linklater’s development of this approach within the English School,¹⁴⁸ Williams argues that empirical judgements are therefore pluralistic and that communities that are inclusive and dynamic are the owners of their own ‘truths’ and morality. The measure for judging the lived experience of individuals is thus the articulations of those legitimate

¹⁴³ Williams, *Ethics, Diversity and World Politics*, p. 19.

¹⁴⁴ Ibid., p. 9 (chapter abstract).

¹⁴⁵ Mikulas Fabry, ‘Theorizing Secession: What Should be the Relationship Between the Ideal and the Empirical?’ in Cornelia Navari (ed.) *Ethical Reasoning in International Affairs: Arguments from the Middle Ground* (Basingstoke: Palgrave Macmillan, 2013), p. 82.

¹⁴⁶ Williams, *Ethics, Diversity and World Politics*, p. 6.

¹⁴⁷ Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983)

¹⁴⁸ Andrew Linklater, *Critical Theory and World Politics: Citizenship, Sovereignty and Humanity* (London: Routledge, 2007); Linklater, Andrew, *The Transformation of Political Community: Ethical Foundations in the Post-Westphalian Era* (Polity Press, Cambridge, 1998).

communities. In Williams' own words, '[t]he politics of the reconciliation of competing knowledge claims and the basis of authoritative judgement on the consequences of competing knowledge claims thus become the focus of pluralist assessment of the normative merits of community'.¹⁴⁹ For Williams, central to this account is 'the multiplicity of community memberships that characterize politics and ethics. This is at the core of the irresolvability of so many ethical debates about world politics (...) Pluralism does not claim to be able to resolve these dilemmas—they are *dilemmas* for the reason of their irresolvability'.¹⁵⁰ A reformed pluralism should, in his view, provide all persons with the ability to make their own choices in response to these dilemmas: 'Ensuring and enabling access to the practice of judgement is therefore crucial, central to my development of an institution of resistance, rooted in a subaltern principle, privileging those who gain least from existing power structures'.¹⁵¹ He continues that:

'A revived pluralism is not deterministic in this fashion, although it is, clearly, firmly rooted in an account of ethics that sees it as a discursive activity and one that is assessed at multiple scales and in multiple dimensions through the experience of people. It is also one that seeks to promote to a due prominence in international ethical debates the view from the subaltern—a 'view from somewhere' that is nevertheless progressive and radical, as opposed to the 'view from somewhere' of traditional pluralism, which is the view from the established top table of international society'¹⁵².

Williams is clear that his approach differs from Linklater's in important ways. Williams argues that discourse ethics, as proposed by Linklater, assumes 'the possibility of ideal speech situations, or comparable discursive moments, such that rational interlocutors will reach agreement on core principles'.¹⁵³ Williams agrees with Nancy Fraser that this depiction does not match any sort of real world encounter and, as such, its construction rationalises dynamics of exclusion.¹⁵⁴ Williams' emphasis on the subaltern counterpublic is an attempt to correct for this inbuilt bias.

¹⁴⁹ Williams, *Ethics, Diversity and World Politics*, p. 67.

¹⁵⁰ *Ibid.*, p. 194.

¹⁵¹ *Ibid.*, pp. 198-199.

¹⁵² *Ibid.*, p. 177.

¹⁵³ *Ibid.*, p. 128.

¹⁵⁴ *Ibid.*, pp. 128-129.

Bain's argument for a unified and symbiotic ethics of pluralism and obligation in international life are similarly based within empirical investigations of international practice.¹⁵⁵ However, Bain, in arguing for a theory of obligation within international society, grounds his ethical reasoning in something much closer to natural law. Following Wight, Bain contends that a natural law ethic 'survives in an awareness of the moral significance and the moral context of all political action'.¹⁵⁶ Defending this claim, he argues that 'in lieu of the higher law expressed by the reason of human community it is very difficult indeed to make sense of categorical condemnations of crimes like slavery, apartheid, and genocide'.¹⁵⁷ Under this paradigm, international practices can be judged by whether they adhere to these principles of natural law – as opposed to a judgement by members of a political community according to pluralistic standards. For Bain, the laws of obligation which coexist with principles of pluralism or toleration in international society are – at least in part – theologically derived. According to Bain, the unity of *Respublica Christiana* has left an enduring legacy of a more limited unity of humanity: 'human rights are not valuable because they are human rights: they are valuable because they are ordered to some conception of what human beings should be and how they should be treated'.¹⁵⁸ An obvious critique of Bain's natural law approach is that there are tensions with his commitment to pluralism given that the foundations of international law and Westphalian ethics are the legacy of a particular – European Christian – civilisation. Charles Taylor is among those who have noted that the taken-for granted quality of what he calls the 'immanent order' is only explicable against a very historical context. As Taylor argues, this will be 'taken-for granted' only by those who have lived within a historical world that grew out of Western Christendom.¹⁵⁹ The globalisation of some of these principles, such as

¹⁵⁵ Jackson Preece and Haddad, meanwhile, do not seek to make normative arguments in the way that Williams, Bain Jackson and Mayall do. While a reading of their work portrays underlying ethical commitments or beliefs, these are not explicitly stated or defended. Where their work does reach policy conclusions or normative judgements, it is generally achieved via some sort of practical reasoning.

¹⁵⁶ Martin Wight, 'Western Values in International Relations', Herbert Butterfield and Martin Wight (eds.) *Diplomatic Investigations*, (1968), pp. 101, 124.

¹⁵⁷ Bain, 'One Order, Two Laws', p. 573.

¹⁵⁸ *Ibid.*, p. 562.

¹⁵⁹ Charles Taylor, *A Secular Age*, (Cambridge, Mass: Belknap Press of Harvard University Press, 2007), 543.

prohibitions on slavery, apartheid and genocide, could as easily be the product of the coercive enforcement of Western, Christian morality through the development of international law.¹⁶⁰

There are benefits and limitations to all of the above approaches. Jackson's approach, while deeply flawed, does point to the importance of the principle of practice internalism. Mayall's concept of practical reasoning, albeit underdeveloped, offers 'the potential to connect pluralism to richer and more extensive discussions of the idea of practical reason and its relationship to political action and that subset of practical reason, practical ethics, that offers direct connection to normative theory'.¹⁶¹ Bain's method is useful in highlighting the role played by concepts of natural law in how international society currently engages in normative debate. However, the Western and Christian origins of natural law doctrine limit its utility as a measure by which to make comparative normative judgements. Williams' approach, focusing on community-based 'truths' and the lived experiences of subaltern counterpublics is essential to understand the reality of global practices and to counteract the exclusion of non-elite voices under a practice internalism approach.

As detailed in the methodology, I combine all the above approaches in this project. Practice internalism is key to understand the purpose that an institution is designed to serve and its philosophical core. A subaltern 'lived experience' approach is likewise essential: it is impossible to make normative judgements about an institution without foregrounding the experience of those communities most impacted by it. However, while Williams' measure for judging the lived experience of individuals by the articulations of those legitimate communities is important, individual communities cannot be the only judge of their circumstances at a comparative level as it would then be impossible to adjudicate between competing justice claims of particular communities. Consider, for example, the competing claims of Palestinian and Israeli peoples: Without the ability to adjudicate between competing and incompatible narratives, the analyst would be unable to make any moral judgements about the conduct of either community or their

¹⁶⁰ Arnulf Becker Lorca, 'Universal and European: Cultural Diversity in International Law' in Andrew Phillips and Christian Reus-Smit (eds.) *Culture and Order in World Politics* (2000), pp. 159-181.

¹⁶¹ Williams, *Ethics, Diversity and World Politics*, p. 58.

treatment by international society. Moreover, by Williams own admission, many communities do not possess the characteristics of dynamism and inclusiveness to a sufficient degree to render their stated narratives 'legitimate', yet it is essential for the analyst to be able to make some moral judgements about these communities. While incorporating the subaltern perspective is important, therefore, it cannot be the only metric. Instead, it is necessary to also consider empirical and observable metrics of community protection and diversity. The universal metrics I adopt are not those of natural law, as per Bain, as I believe that there are too many tensions between this approach and the ontological premise of new pluralism. Instead, I evaluate the pluralist institutions of international society primarily by the criteria immanent to new pluralism – whether they endow individuals with the right to have rights. In sum, this approach seeks to incorporate the diverse premises from which new pluralism stems and to reflect the existential moral diversity of international society wherein individuals and communities derive ethics from different sources, which are best understood when they exist and are considered in symbiosis.

Summary

New pluralism has advanced a convincing case for the moral value of political community and diversity within international society and has sketched out interesting principles for how we might conceive of 'pluralist justice'. A pluralist conception of justice argues that 'communities' are the morally valuable units of international society and that concepts of justice derive from and are based within communities. There are three main arguments presented within the new pluralist literature as to why communities should be treated as proxy units of concern for individuals and as units of moral concern in themselves; an argument that moral duties are created through the pursuit of collective enterprise, an argument that communities provide cultural and social benefits to their members, and an argument that communities are the context in which individuals are able to obtain rights. Of all of these arguments, it is the observation that communities are required in

order for individuals to have the ‘right to have rights’ that is most persuasive and provides the clearest metric to guide evaluation of the pluralist institutions of international society.

The new pluralists also advance three main arguments for why tolerance of diversity should be the governing principle of international society; a functionalist argument based upon ‘mutual learning’; an argument from moral relativism, and an argument from moral pluralism. On closer examination, the functional argument must be dismissed as reductive to moral universalism and the argument from moral relativism (not defended strongly by any of the new pluralists) dismissed as incompatible with the limits to tolerance advocated by the majority of the new pluralists. It is the argument that morality is pluralistic – that there exist genuinely incommensurable moral values – that provides the most persuasive argument for tolerance or pluralism within international order. When evaluating the extent to which the pluralist institutions of international society promote diversity and tolerance in international order, this thesis will therefore seek to evaluate the extent to which these institutions recognise and promote a genuinely pluralist moral world. It will do so by combining the diverse sources of ethical reasoning within new pluralism, reflecting the existential normative diversity of international and world society.

Chapter Two: Institutions of Community Protection

The position of institutions within the English School literature is a contentious one. It is often asserted that the English School, unlike regime theory, is concerned primarily with the constitutive rather than merely regulatory or functional institutions of international society.¹ This is evident within the work of Bull, who makes explicit within the *Anarchical Society* that when he talks of ‘institutions’ he does not mean intergovernmental organisations or administrative machinery but rather, ‘a set of habits and practices shaped towards the realisation of common goals’ – what regime theorists such as Keohane term ‘fundamental practices’.² Buzan similarly defines such institutions as ‘durable and recognised patterns of shared practices rooted in values held commonly by the members of interstate societies, and embodying a mix of norms, rules and principles’.³ These ‘primary institutions’ are contrasted by Buzan with the ‘secondary institutions’ talked about in liberal institutionalist theory: consciously designed regimes or organisations for dealing with various problems in international affairs.⁴ It is Bull who puts institutions on the map for the English School, arguing that there are five primary institutions of international society – Diplomacy, International Law, the Balance of Power, War and the Great Powers. Yet Bull never gives a full definition of what constitutes an ‘institution’ of international society, a problem that has continued to hamper English School thinking on the topic. In *From International to World Society*, Buzan suggests that the English School’s terminological inexactitude regarding institutions has only worsened since Bull, noting that all of the major English School theorists pose different, although overlapping, lists of primary institutions.⁵

¹ See Barry Buzan, *From International to World Society: English School Theory and the Social Structure of Globalization* (Cambridge: Cambridge University Press, 2004), p. 161.

² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), pp. 40, 74.

³ Buzan, *From International to World Society*, p. 181.

⁴ *Ibid.*, p. 166.

⁵ *Ibid.*, p. 174. Elsewhere, Nicholas Onuf argues that this is a fundamental problem of a genuinely historical English School approach – it will only ever succeed in producing long, open-ended lists of institutions, without discerning any patterns or developmental tendencies. Nicholas Onuf, ‘Institutions, Intentions and International Relations’, *Review of International Studies*, 28: 2 (2002), p. 223.

A key question unresolved by the English School is whether the sovereign territorial State should be considered an 'institution' of international society. Bull postulates that 'it is states themselves that are the principal institutions of the society of states',⁶ although he does not include the State in his five institutions on the basis that the State is a constitutive rather than a procedural institution. For James, Jackson and Wight, Sovereignty – rather than 'the State' – is the constitutive principle of interstate relations.⁷ Mayall, by contrast, identifies International Law as a kind of master institution to which Sovereignty is subordinate.⁸ Other scholars, such as Holsti, disaggregate the State from Territoriality and Sovereignty and argue that all three count as primary institutions.⁹ Buzan is correct in his assessment that this move is counter-productive, however, since it is not clear there is anything meaningful left to the concept of a state devoid of sovereignty or territory.¹⁰ Yet Buzan himself casts doubt on whether the State can be a primary institution on the basis that 'actors cannot be primary institutions (...) Primary institutions have to reflect some shared principle, norm or value'.¹¹ Instead, for Buzan, both Sovereignty and Territoriality are 'master institutions' (along with Diplomacy, Great Power Management, Equality of People, the Market, Nationalism and Environmental Stewardship).¹²

Despite the centrality of the State to their normative claims neither Bain nor Williams have explicitly engaged with the question of whether it is the territorially sovereign State or the disaggregated properties of the State – Sovereignty and Territoriality – that should be considered 'institutions' of international society. Williams' chapter on institutions in *Ethics, Diversity and World*

⁶ Bull, *Anarchical Society*, p. 71.

⁷ An overview of these positions is provided in Buzan, *From International to World Society*, p. 174.

⁸ James Mayall, *World Politics: Progress and its Limits* (Cambridge: Polity Press, 2000), p. 94. This view is supported by Nardin's assertion that 'international society is not merely regulated by international law, but constituted by it.' See Terry Nardin, 'Legal Positivism as a Theory of International Society', in David Mapel and Terry Nardin, eds., *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998), p. 20.

⁹ Kalevi J. Holsti, Thomas Biersteker and Chris Brown, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge: Cambridge University Press, 2004).

¹⁰ Buzan, *From International to World Society*, p.175.

¹¹ Ibid., p.175.

¹² Ibid., p. 174. For Buzan, 'master institutions' are the core primary institutions from which other primary institutions can be derived.

Politics suggests that he regards Sovereignty as a primary institution of international society.¹³ Bain meanwhile argues that Trusteeship itself is an international institution but does not elaborate on what *kind* of institution or on the nature of other institutions in international society – nor is this question discussed elsewhere in his work.¹⁴ However, it can be argued that much of the discussion as to whether the State, Sovereignty and Territoriality are a single bundled institution or three (or two) separate institutions is semantic for the purposes of this project. What this project is examining is the institutions of community protection within international society. Viewed through this purposive lens, it is clear that the primary community protection ‘institution’ of international society is the sovereign territorial State. The State is the institution from which individuals obtain the ‘right to have rights’ and in which international society places the responsibility for care of those individuals within its territory. It is through this lens that both the new pluralists and their detractors engage with the debate about the role of the State in international society. Therefore, for the purposes of this project the State is treated as an aggregated single primary institution as, contrary to Buzan, I argue it is perfectly possible to philosophically disaggregate the territorially sovereign State as the primary institution for community protection and individual states as actors on the international stage.

The State within ‘New Pluralist’ Theory

This section explores existing theories within new pluralism on the role of the state in protecting political communities and achieving pluralist justice. It firstly examines the diverse views expressed by pluralist scholars – both old and new – on the role of the State in protecting communities and preserving international diversity. It then examines the existing criticisms of the

¹³ John Williams, *Ethics, Diversity and World Politics: Saving Pluralism from Itself?* (Oxford: Oxford University Press, 2015), p. 117.

¹⁴ On p. 185 of *Between Anarchy and Society* he gives Bull’s list of international institutions in the course of a wider discussion of the misplaced centrality of states to English School theory but it is not clear that this constitutes a full endorsement of Bull’s list. William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003), p. 185.

state both from solidarist English School theorists and cosmopolitan political theorists. It finds that existing pluralist approaches are hindered by a failure to sufficiently address criticisms of the State as an institution of community protection and of the international state system as a diversity regime as well as a failure to consider institutions of community protection other than the State.

The previous chapter examined two of the primary contentions of the new pluralists – that communities are the morally valuable units of international society and that tolerance of diversity or ‘pluralism’ should be the primary governing value in international society. This chapter explores the diverse arguments made within the new pluralist literature on the role of the State in achieving these aims.¹⁵ English School theory is based on the fundamental idea that there is ‘something special and unique about the state’.¹⁶ This is, in part, because the school operates within an ontology of states. This is exemplified in Bull’s articulation of international society as a structure that effectively ‘sits on top of’ an existing states-system. In the theoretical work of the majority of the British Committee, states are conceived as a priori to international society.¹⁷ It is unsurprising, therefore, that a criticism made by Hurrell of traditional pluralist discussions of the State is that ‘they have an empty and unilluminating quality. They go ritualistically through distinctions between internal and external sovereignty (...) and they stress the importance of the efficiency of governments and the effective control of territory in determining questions of recognition and membership of international society. But they seem divorced from any meaningful theory of the state, and they are difficult to relate to state practice’.¹⁸

¹⁵ See Williams, *Ethics, Diversity and World Politics* and John Williams, *The Ethics of Territorial Borders: Drawing Lines in the Shifting Sand* (Basingstoke: Palgrave Macmillan, 2006). Both of these draw on earlier work on the ethical desirability of difference in Robert Jackson, *The Global Covenant: Human Conduct in a World of States*, (Oxford: Oxford University Press, 2000), Mayall, *World Politics* and James Mayall, *Nationalism and International Society*, (Cambridge: Cambridge University Press, 1990). See also Barry Buzan, ‘Culture and International Society’, *International Affairs*, 26:1 (2010), pp. 1-25.

¹⁶ Buzan, *From International to World Society*, p. 91.

¹⁷ See Hidemi Suganami, ‘The Argument of the Anarchical Society’, in Hidemi Suganami, Madeline Carr, and Adam Humphreys, eds., *The Anarchical Society at 40: Contemporary Challenges and Prospects* (Oxford: Oxford University Press, 2017), p. 24.

¹⁸ Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007), p. 50.

What can nonetheless be deduced from the work of the classical English School is that, for the British Committee, the State's primary role was as a collective security institution and it is by virtue of this that states were considered to constitute the building blocks of international order. For the British Committee, therefore, the state system – as an integrated system of self-defending units – was the best available method for ensuring international order.¹⁹ This classical pluralist defence of the State is explicitly predicated on its ability to ensure domestic order and its contribution to international order. It was generally accepted by the British Committee that without order, ethical questions like justice were 'meaningless, at least in terms of practical politics, and consequently order must be seen as a "prior value" and of almost inestimable importance'.²⁰ Beyond this idea of the state as a building block of international order and some elementary thoughts about how states act as representatives for their population on the world stage, there is little theory about the State to be found within the classical pluralist wing of the English School. This lack of a coherent theory of the State is something that the new pluralists have sought to address. Even prior to the emergence of new pluralism, pluralists such as Jackson and Mayall began to develop more coherent – albeit idealised – theories of the state. Williams, Bain, Jackson Preece and Fabry have all built on this work, developing more nuanced and critical theories of the role of the state in community protection. For new pluralism, it is necessary – but insufficient – that states, as the primary structure for political communities, must contribute to order: they must also be capable of delivering pluralist justice. This chapter will now seek to provide a broad overview of the varying theories of the new pluralists and the 'bridges' to new pluralism regarding how states contribute to the achievement of pluralist justice and what qualities states must have in order to do so, exploring linkages and contradictions between the varying theories.

¹⁹ Bull, *Anarchical Society*, pp. 288-292.

²⁰ Williams, *Ethics of Territorial Borders*, p. 64. There are, however, some elements of the core arguments of new pluralism that can be found within the classical school. For example, Bull also contends within *Anarchical Society* that states are the best proxy for ensuring justice for their citizens within an international context: 'The great mass of political mankind does not have the means of interest articulation and aggregation which...are the hallmarks of a political system. Insofar as the interests of mankind are articulated and aggregated, and a process of political socialisation and recruitment moulds a universal political system, this is through the mechanism of the society of sovereign states'. Bull, *Anarchical Society*, p. 85.

Jackson's discussion of the state in many ways resembles the language used by the classical English School. It is evident that that he remains in fundamental agreement with the arguments of the classical pluralists that '[t]he state was originally a security arrangement and that is what it still is at base'.²¹ Drawing extensively on Hobbes, he argues that '[a]rranging security for people is one of the most foundational political acts; and establishing and maintaining conditions under which a populace can be safe has long been understood as the *raison d'être* of the sovereign state'.²² Jackson's understanding of the condition of insecurity is fundamentally realist in nature: it is the result of 'dangerous or menacing people'.²³ He maintains that it is a 'fundamental reality about the human condition (...) that people must live among each other, but not everybody can be counted on to live in peace'.²⁴

All of these aspects of Jackson's work bear considerable resemblance to the arguments of the classical pluralists. However, it is in Jackson's *Global Covenant* that a significant break with the classical approach to the State is first made – something often overlooked by later theorists such as Williams who would prefer to place Jackson solely within the classical tradition. First, it is evident within the *Global Covenant* that Jackson does not treat states as *a priori* to international society in the way that Bull did for the purposes of building his theory. In fact, one of Jackson's key works, *Quasi States*, is dedicated to the role played by international society in forging states which hitherto did not exist and in many ways lack the elements of positive sovereignty that Jackson deemed necessary for effective functioning of the State.²⁵ Second, there are a number of

²¹ Jackson, *Global Covenant*, p. 186.

²² Robert Jackson, 'The Safety of the People is the Supreme Law: Beyond Hobbes but not as far as Kant' in William Bain, ed., *The Empire of Security and the Safety of the People* (London: Routledge, 2006), p. 16.

²³ Ibid., p. 17.

²⁴ Ibid., p. 17.

²⁵ Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, (Cambridge: Cambridge University Press, 1990). This contrasts with Bull's formulation of international order as a potential (always positive) add on to domestic order. As explained by Suganami, '[t]o see the significance of these comments, we need to recall Bull's basic formula: *world order = domestic order + international order*. Within this formula, he is failing to pay attention to the extent to which "international order" may not be added purely as a *positive value* to "domestic order". The pursuit of international order may curtail the enjoyment of *order* in certain domestic societies as much as it may cause *injustices* to them, though Bull only explicitly acknowledges the latter'. Suganami, 'Argument of The Anarchical Society', p. 35. For Jackson, forces within international order do have the possibility of causing domestic disorder: as in the instances where international society has recognised and buttressed quasi states unable to secure their own domestic order.

ways in which Jackson's understanding of the role of the State in international order draws much more upon the ideas of communitarian political theory than do those of Bull or other members of the British Committee. Whereas, for Bull, the rules governing international order are primarily to ensure that existing political entities are able to coexist in harmony, for Jackson jurisdictional pluralism is more than an arrangement to prevent war – it is an accommodation of human diversity via the institution of state sovereignty that enables value pluralism by placing political responsibility for creating and safeguarding particular values in the hands of local people who enjoy and exercise political independence. It is in his *Global Covenant* we hear the first arguments within the pluralist tradition about the ethical values of freedom and self-determination in an explicitly normative way. This can be seen from a comparison of Jackson's procedural norms of the Global Covenant compared to Bull's.

Bull's six basic goals of international society are (i) the preservation of the system and society of states itself against challenges to create a universal empire or challenges by supra-state, sub-state, and trans-state actors to undermine the privileged position of sovereign states as the principal actors in world politics; (ii) the maintenance of the independence or external sovereignty of individual states; (iii) peace, or the absence of war, among states as the normal condition of their relationship, to be breached only in special circumstances and according to generally accepted principles; (iv) limitation of violence; (v) observance of international agreements; and (vi) respect for one another's spheres of jurisdiction.²⁶ By contrast, Jackson's procedural norms are: (1) sovereign equality and respect for the rights inherent in sovereignty; (2) refraining from the threat or use of force; (3) inviolability of frontiers; (4) territorial integrity of states; (5) peaceful settlement of disputes; (6) non-intervention in internal affairs; (7) respect for human rights; (8) equal rights and self-determination of peoples; (9) co-operation among states; (10) fulfilment in good faith of obligations under international law.²⁷ Liberal principles of self-determination, human rights, and

²⁶ Bull, *Anarchical Society*, pp. 16-19.

²⁷ Jackson, *Global Covenant*, pp. 16-17.

international law – conspicuously absent from Bull’s work – are core to Jackson’s understanding of international society. For Jackson, the Global Covenant is much more than an arrangement to prevent war; it is ‘a society of states (...) that bridges different civilisations and cultures around the world’ in which ‘virtually every man and woman on earth is a member of a locally independent country that is generally recognised by international society’.²⁸ States within this environment are then free to pursue their ‘national interest’, insofar as their actions do not infringe the Global Covenant.²⁹ For Jackson, the Global Covenant is essentially an architecture that guarantees freedom in which individual states are able to realise their own conceptions of justice, absent from the interference of others. The State is therefore the means by which individuals are not only able to find security but are able to realise the goals of both security *and freedom*. Jackson acknowledges that not all states are able to achieve this. In order for a state to achieve Jackson’s understanding of pluralist justice, it is key that they are able to exert positive sovereignty over their territory and that the State is a coherent representation of a distinct political community that shares a common identity and national vision.³⁰

Mayall’s conception of the role of the State bears considerable similarity to Jackson’s. According to Mayall, ‘two of the deepest taproots in the human psyche [are] fear of danger and desire for freedom’ and it is the institution of the State that allows people to both free themselves from fear of danger and realise their desire for freedom.³¹ However, unlike Jackson, he acknowledges explicitly that ‘no final resolution of the relationship between self-determination and

²⁸ Jackson, *Global Covenant*, p. 13-14.

²⁹ This, in itself, is a moral obligation of the leaders of states for Jackson. He argues that ‘[e]very state has its own national interests which flow out of that particular situation and which may coincide with those of other states but need not. The national interest is not some kind of impersonal mechanism or process which automatically asserts itself in the relations of states—as positivist international relations theory implies. It is a moral idea governing the conduct of statespeople: the idea that the nation and its population are a treasure which they have the responsibility to safeguard in the conduct of their foreign policies’. Jackson, *Global Covenant*, p. 21.

³⁰ This is exemplified when Jackson writes that current boundaries are the result of ‘the desire or determination or right or obligation or tradition or resignation or some other joint inclination of certain people—who may or may not be alike in important sociological respects—to reside territorially apart as a group on a basis of independence from all other such groups’. Jackson, *Global Covenant*, p. 318.

³¹ James Mayall, ‘Security and Self-Determination’, in Bain, *Empire of Security and the Safety of the People*, p. 94.

security is available'.³² He also sees a paradox in that 'the modern state (...) rests on popular sovereignty – that is, on the self-determination of the people',³³ but that the scale and scope of conflict 'seems (paradoxically) to have been more human, or at least more restrained, before the rise of nationalism'.³⁴ The greater realisation of individual freedom through the State that has come about since the rise of principles of self-determination has therefore, in Mayall's mind, diminished global security rather than enhanced it. Indeed, according to Mayall, part of the reason for chronic global insecurity is 'the view that only nations should have states. Since there is no objective test for deciding under what circumstances a group meets the criteria for nation-hood, this view is widely translated as meaning that only existing states can have nations'.³⁵ He continues that '[t]he fetishisation of territory, which lies at the heart of nationalist pathology, stems directly from the elevation of the principle of self-determination to its present position as an allegedly inalienable human right and the only theoretically legitimate basis for statehood'.³⁶ Fabry also shares Mayall's concern that the immutability of current territorial boundaries has contributed to conflict rather than prevented it.³⁷ Nonetheless, while acknowledging the limitations of existing states, both Mayall and Fabry maintain that the State and the institutions of international society are the only forum through which these conflicts can be mediated.³⁸ Some of the arguments of Jackson Preece bear considerable similarity to Mayall's and Fabry's. She also contends that there is an 'inherent tension in human affairs between competing desires for freedom and belonging'.³⁹ She acknowledges that within traditional English School pluralist theory, 'the State cannot pose a threat to its own citizens whose personal interests are synonymous with state interests' and that this is problematic because states frequently do pose a threat to their own citizens, particularly to

³² Mayall, 'Security and Self-Determination', p. 95.

³³ Ibid., p. 99.

³⁴ Ibid., p. 102.

³⁵ Ibid., p. 104.

³⁶ Ibid., p. 108.

³⁷ Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford: Oxford University Press, 2010). See 'Conclusion'.

³⁸ Mayall, 'Security and Self-Determination', p. 96.

³⁹ Jennifer Jackson Preece, 'Cultural Diversity and Security After 9/11', in Bain, *Empire of Security and the Safety of the People*, p. 140.

minorities.⁴⁰ Jackson Preece seeks to differentiate, however, between ‘civic’ states and ‘ethnic’ states, with the latter posing a greater threat to their own citizens because ‘once the ethnic bond is accepted as the *raison d’être* of the state, cultural diversity is a fundamental threat’.⁴¹

Fabry’s work is also useful in highlighting the wider protective benefits that accrue to communities from their recognition as sovereign states. The practice of recognition is the official and normatively meaningful recognition of the *de jure* sovereignty of a political community. This entails the active construction of an inter-subjective belief in the legitimate sovereignty of a political community through the collective intentionality of international society.⁴² In his seminal work on the subject of state recognition, Fabry argued that the practice of recognition emerged as a response to the need to find a mechanism of determining the rightful membership of international society.⁴³ However, in recognizing a political community as a legitimate international actor, this also accorded that community some measure of normative protection. This protective aspect of the practice deepened from the late Middle Ages as there emerged a greater linguistic focus within treaties of recognition on the rights of political communities to protection from aggression and a more developed specification of the duties owed to the recognised community by others.⁴⁴ One reason that recognition was so valuable was precisely because of the comprehensive security benefits that accompanied it.⁴⁵

For Williams, the role of the State in the achievement of pluralist justice is more complex and contingent.⁴⁶ He argues that, ‘[t]he normative claims made by traditional pluralism are

⁴⁰ Jackson Preece, ‘Cultural Diversity and Security After 9/11’, p. 142.

⁴¹ *Ibid.*, p. 144.

⁴² John Gerard Ruggie, ‘What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge’, in *International Organization*, 52: 4 (1998), p. 869.

⁴³ Fabry, *Recognizing States*.

⁴⁴ For example, by 1649, in the Treaty of Zboriv between Hetman Bohdan Khmelnytsky and Poland, includes an affirmation by the Polish King of a litany of Cossack rights and freedoms and a recognition of their independence from Poland (Treaty of Zboriv 1649). Key provisions included the denial of access to the Polish army to Cossack territories, transfer of administrative functions and recognition of religious independence.

⁴⁵ The Treaty of Kutchuk-Kainardji (1774) is an early case of the sustained and comprehensive use of ‘protecting’ language in a recognition treaty, designed to ensure the Tartar community’s protection from both the Russian and Ottoman Empires. Treaty of Kutchuk-Kainardji, 21 July 1774, Matthew Smith Anderson, ed., *Documents of Modern History: The Great Powers and the Near East 1774–1923* (London: Edward Arnold, 1970), pp. 9–14.

⁴⁶ However, he does agree with Jackson and the British Committee that ‘a state that is constantly menaced by the “war of all against all” that lies at the root of the international condition will be unable to create such civic peace [as

fundamental to its account of international society, but they are not immutable (...) They rest on the way in which international society is a viable and valuable component of the manifestation of human diversity in world politics (...) The preservation of order as empirical regularity is therefore defensible, and indefensible, on the basis of the extent to which it offers an appropriate means for the protection of plurality'.⁴⁷ For Williams, rather than sovereignty and the society of states being the defining feature of a pluralist account, 'it is the ethical and normative diversity of human communities that should define the pluralist account of international society'.⁴⁸ In Williams' earlier work, he argues that it is the act of territorial division engendered by the existence of states that in itself permits the achievement of justice. For example, he contends in *Ethics of Territorial Borders* that there is an ethical imperative of difference which must include territorial division and separation as part of a global ethic of toleration; arguing, in essence, that for communities to achieve justice they must be able to border and separate themselves from other communities.⁴⁹ Williams' earlier work therefore suggests that the territorially sovereign state is valuable insofar as it has achieved this function.⁵⁰

However, in Williams' later work, he makes clear efforts to 'destabilize the centrality of the state as the paradigmatic instance of political community'.⁵¹ In part, this move is made in

is necessary to pursue justice] because it will permanently be having to impose exceptional security measures and burden its citizens with the needs of military service. Maintaining some kind of "international society" (...) thus becomes an ethically important goal of state policy because without this a civil society at home becomes unsustainable.' Williams relies on the writings of Jean Bethke Elshtain in developing this line of argument. He notes that she, 'points to the value of the state as being rooted in its ability to create a secure space for the population to enjoy the fruits of order, through the attainment of a vibrant civil society, and the creation of the kind of social, political, economic and judicial institutions that can enable higher goals, like culture, justice and democracy, to flourish. The creation and protection of what Elshtain calls "ordinary civic peace"'. Williams, *Ethics of Territorial Borders*, p. 34.

⁴⁷ Williams, *Ethics, Diversity and World Politics*, p. 83.

⁴⁸ Ibid., pp. 36-37. In many ways - although Williams himself does not make this link - this line of argument finds its roots in Hegelian political philosophy. This is drawn out by Mervyn Frost in *Ethics in International Relations*. Hegel's argument maintains that the value of political institutions is a function of the effect they have on humans and his central claim is that individuals need to be members of a state in a society of states if they are to flourish. Frost says, in the Hegelian view, '[s]overeign states and the system of sovereign states are necessary to the flourishing of individuality (...) The state is needed to overcome an atomized society and to provide political unity and recognition'. Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996), p. 148.

⁴⁹ Williams, *Ethics of Territorial Borders*, p. 13.

⁵⁰ Williams argues that 'this separation needs to take a territorial form or (...) that it has always taken a territorial form and that there are no compelling reasons to believe it will not continue to do so'. Ibid., p. 14.

⁵¹ Ibid., p.75.

response to what he believes to be deficits within Buzan's seminal contributions to the English School on the concept of 'world society' – specifically a failure to consider the impact on international society of economic globalisation, the proliferation of diasporas, multiple community memberships and transnational identity groupings, and the decreasing ability of states to control the flow of information to their populations. In part, it is a move made in recognition of Blaney and Inayatullah's critique of the Westphalian deferral of diversity. He also contends that 'traditional English School pluralism has a concern with particular types of social structures—political communities—and especially those political communities that successfully establish their claims to sovereignty and become states. In theory, although not so often in practice, pluralists should be interested in a far wider range of political communities than just those that form states'.⁵² Williams argues that '[a] revived pluralist account of international society (...) sees the temporary nature of international society. (...) The present constellation of international society is changing. A post-sovereign world order is not as remote a possibility as Bull portrayed' but what will remain is 'the centrality of plurality to human life'.⁵³

Yet, despite explicitly advocating a destabilisation of the State within pluralist theory, there is little indication in *Ethics, Diversity and World Politics* as to exactly how pluralist theory can move beyond the State or how international society might exploit these changes to establish institutions that are as effective as the state in protecting communities. Despite his empirical observations of the increasing salience of non-state communities, it is the State which continues to constrain Williams' political imagination.⁵⁴ As such, the State retains a position of privilege within Williams'

⁵² Williams, *Ethics of Territorial Borders*, p. 41.

⁵³ Ibid., p. 86.

⁵⁴ This was also a problem experienced by Williams' predecessors, such as Bull. In a 1972 paper titled 'International Relations as an Academic Pursuit', Bull asserted that the 'central focus of the subject embraces much more than strictly interstate politics' (p. 252) and that many of the issues that arise within this global political system 'cannot be satisfactorily dealt with in a framework that confines our attention to the relations of sovereign states' (p. 255). However, despite his acknowledgement of this, Bull ended up focusing in his magnum opus on international order and inter-state relations almost to the exclusion of other forms of world order. Hedley Bull, 'International Relations as an Academic Pursuit', *Australian Outlook*, 26: 3 (1972), pp. 251-265.

pluralist theory 'both as a form of community and as a political aspiration for non-state communities'.⁵⁵

There is, however, greater nuance in Williams' later work regarding the criteria which a state must meet in order to be judged an effective means of community and diversity protection. In *Ethics, Diversity and World Politics*, it is clear that territorial division in itself is not enough – a state must also pass two key tests in order for it to be judged as a morally valuable structure for the community that inhabits it. The first test is that the political community manifested in the State must not seek to erase the existence of other communities (this would preclude Nazi Germany for example).⁵⁶ The second is that there must be mechanisms within the structures of the State for individuals and groups to push for change – the community cannot be sclerotic. When articulating the measurement by which states can be deemed to have passed this test, Williams adopts the standard of 'good enough', justified with an appeal to Rawls' defence of non-ideal theory.⁵⁷ Beyond what is explicitly stated in his work, there is also much that can be extrapolated from Williams' justification of the moral value of communities to his necessary criteria for a moral state: if there are certain aspects of communities that make them valuable, those aspects must surely be protected and enhanced within state structures. For example, when Williams argues that it is only within the context of community membership that the concept of individual rights makes sense, this must be seen as an implicit argument (even if it is not deemed a necessary characteristic for morally valuable states) that states which grant individual rights are at least more morally valuable than states that do not.⁵⁸ By way of further explanation, Jackson Preece's work on the threat often posed by states to minority groups within their borders has important read-across to the first of Williams' criteria – that states must not seek to deny the existence of other communities. Jackson Preece's

⁵⁵ Williams, *Ethics, Diversity and World Politics*, p. 69.

⁵⁶ Williams expands upon this: 'As with Nazism, communities are defending the indefensible when claims about truths or narratives of the community's place in the world require the denial of the humanity of certain members of the community or of those outside the community'. Ibid., p. 67.

⁵⁷ Williams, *Ethics, Diversity and World Politics*, p. 96.

⁵⁸ Again, he indebted this claim to Hannah Arendt. He articulates that Arendt argued for one single right – 'the right to have rights. By this she meant the right to belong to a political community which can grant meaning, specificity and effectiveness to the idea of being a rights holder'. Williams, *Ethics of Territorial Borders*, p. 101.

work shows, in a way that Williams' does not explicitly, that this must apply internally as well as externally, suggesting that minimal minority protections must also logically be a criterion for Williams to assess if a particular state contributes positively to the achievement of pluralist justice. For the arguments of Williams to hold, states must therefore be internally pluralist as well as accepting of external pluralism.

Bain's view of the moral value of states bears considerable similarity to that of Williams but also contains echoes of Jackson. He argues that the society of states that emerged out of decolonisation;

‘embraced an Aristotelian notion of statehood [in which there is] a necessary connection between the good life and life in a state. Independent statehood holds out the possibility that men might live well by their own lights, because it is within the framework of the state that they participate in an ongoing dialogue about what is good, what is right, and what is just. The substance of this dialogue, as well as the framework within which it takes place, leads Aristotle to conclude that the state is an arrangement of justice; and outside of this arrangement of justice, the good life is either an impossible ideal or an inchoate fiction.’⁵⁹

However, he cautions that;

‘this understanding of statehood, which treats the state as having a natural priority over any particular individual, does not entail a concomitant abandonment of the value of individual sovereignty; it is, rather, to argue from a position of human dignity and from an explicit acknowledgement thereof. Indeed, it is to recognize that the realisation of human potential, the development of the faculties and the virtues that separate human beings from the subhuman and the superhuman, cannot be fulfilled fully outside of the life of a state’.⁶⁰

For Bain, diversity is also an inherent rather than a contingent good, and his pluralism is likewise rooted in a deep attachment to concepts of freedom. Bain understands the global ethic of pluralism as operating ‘on top of’ a fundamental solidarist layer.⁶¹ It is this understanding which grounds his theory of international obligation. For Bain, therefore, the core ethic of world society is solidarist, and international society operates in a ‘layer’ of pluralism on top of this fundamental

⁵⁹ William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003), pp. 190-191.

⁶⁰ Ibid., p. 191.

⁶¹ Bain, ‘One Order, Two Laws: Recovering the Normative in English School Theory’, *Review of International Studies*, 33:4 (2007), p. 570. This is in contrast to Keene's view of two principles of toleration and civilisation which operate in parallel. See Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002).

core ethic, in which political communities who are able to make good use of the freedom offered to them can determine their own destinies. The criteria for the moral worth of a state is whether that state is able to make the best use of the freedom given to it by international society, as judged by its people. States are morally desirable and ethically significant because it is within states that communities can devise their own arrangements.⁶² In order for a state to be viewed as achieving pluralist justice, there must also be an appropriate ‘fit’ between the community and the institutions that govern it.⁶³ Bain acknowledges that many states in international society do not currently pass these tests as ‘too often the political independence that comes with sovereign statehood results, not in refuges of safety, but in places of shocking violence and misery’.⁶⁴ His response, however, is that in these instances there remains an ethical imperative to assist those who, for one reason or another, cannot make best use of freedom. The ‘upper layer’ of pluralism in international society at this point ‘gives way’ and the underlying principle of solidarism or ‘obligation’ is reasserted. However, he argues that ‘the relation between human dignity and independent statehood proposes a very clear limit of which we must take notice in seeking the good of our fellow man. State sovereignty and individual sovereignty imply one another in such a way that one cannot be made subservient to the other if justice is to be done. In other words, if human beings are to be recognized as being fully human, and, indeed, if they are to live well as human beings and not as something else, they must live in a state of their own’.⁶⁵

It is clear from the preceding section that there remains no single coherent theory of the State within new pluralism. Rather, the various scholars who write within new pluralism have, over

⁶² Edmund Burke’s notion of the moral achievements of commonwealths and the ethical significance of states as transactional institutions is clearly a key intellectual influence on Bain in this regard. See Bain, *Between Anarchy and Society*, ‘Introduction’. 1

⁶³ See also Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

⁶⁴ Bain, ‘Introduction’, in Bain, *Empire of Security and the Safety of the People*, p. 6.

⁶⁵ Bain, *Between Anarchy and Society*, p. 191. Bain does qualify this statement, noting that ‘[t]his argument should not be misconstrued to mean that the sovereign state is destined to dominate the political landscape of international life; nor should it be interpreted to mean that future generations are precluded from organizing themselves politically in ways that are vastly different from our own. Human potential might be realised just as well in a single world community or in hundreds of small communities that come into contact infrequently or not at all’. However, what remains clear is that Bain’s view, in the present time, is that the moral value of the State is obtained through its function as an Aristotelian moral community. Ibid., pp. 191-192.

recent decades, articulated a number of disparate theories (many of which have evolved and changed over time) regarding the State's role in the achievement of pluralist justice and the criteria by which states can be ethically judged and that they are conscious of the need for pluralist theory to move beyond the state. What unites all of these works, however, is a clear theoretical commitment to communitarian principles of justice. States are viewed to be, in principle, morally valuable to individuals because they allow them to achieve both security from fear and the freedom to self-determine. In practice, the new pluralists pose a range of possible metrics by which states can be evaluated against these criteria, few of which are coherently articulated or defended within their work. However, what emerges clearly within the work of the new pluralists – particularly when one extrapolates from their arguments about the moral worth of community membership – is that the State remains the only institution that is capable of providing individuals with the 'right to have rights'. For Mayall and Jackson, the State is the most desirable and the only possible option. For Bain and Williams, although their work suggests that there are imaginable institutional arrangements other than states that could (in principle) perform this role within international society, the current plausible alternatives are inadequate.

This privileged role of the State is also reflected in international practice. International law codifies the State as the location of the political community from which individuals may obtain rights. The right to a nationality is instituted within the Universal Declaration of Human Rights and deprivation of nationality by states is prohibited in Article 15 of that declaration.⁶⁶ Concomitant to this is the acknowledgement of the general principle of a state's duty to admit its nationals. Similarly, Article 13 (2) of the UDHR states that 'everyone has the right to leave any country, including his own, and to return to his country'.⁶⁷ The International Convention on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the African Charter and the European Convention on Human Rights all refer to

⁶⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁶⁷ Ibid.

a right to ‘enter’ or ‘return’ to one’s country of nationality.⁶⁸ Within international law, therefore, individuals are endowed with the right to belong to one particular community – their state of citizenship – and that state is under an obligation not to prevent them accessing that community. The primary challenge from the solidarists is that, despite the State being the institution nominated by international law to provide its citizens with the ‘right to have rights’, in practice states frequently fail to ensure this.

The Challenge from Solidarism

This section examines specifically those challenges from solidarism to the new pluralist idea of the State as the most effective means of protecting communities and enhancing diversity. It does not examine broader solidarist claims about the extent of cooperation that is possible or desirable in international order. The key challenge from solidarism is that, in practice, states fail to protect their citizens and that, instead, pluralist structures of international society give rogue governments the ability to persecute their own people with impunity. As such, solidarist scholars such as Hurrell and Wheeler argue that membership of a given national community is frequently not of authentic value to its citizens and that it is often the State which endangers political communities within its own borders, particularly minorities.⁶⁹ New pluralists take a range of approaches when responding to this challenge. A retort to this offered by Jackson is that ‘[n]on-intervention is an international guarantee that makes the pursuit of the “good life” possible (...) But it is not any assurance that the good life will actually be forthcoming (...) Whether the citizens of particular states actually manage to build and enjoy their own ‘good life’, or not, is up to themselves; it is not a responsibility of international society’.⁷⁰ Given the role that international

⁶⁸ Similarly, under the Convention on the Reduction of Statelessness, state parties are prohibited from depriving a person of nationality if such deprivation would render him or her stateless. (Art 8) At present, however, few states have ratified or acceded to the convention.

⁶⁹ See Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000) and Hurrell, *On Global Order*.

⁷⁰ Jackson, *Global Covenant*, p. 373.

society has played in the construction of these states – as acknowledged by Jackson himself in *Quasi States* – the argument that it bears no subsequent moral responsibility for later outcomes is unpersuasive. Indeed, Bain and Williams, explicitly reject this maximalist view of pluralism that accepts the widespread failure of many states to provide security for their citizens. Williams, however, does not put forward explicit suggestions for how these failings can be remedied or how international society should deal with states who fail his criteria for morally valuable institutions of community protection. Bain of course observes that the failures of the sovereign state have ‘reinvigorated interest in trusteeship as a way of responding to problems of international disorder and injustice’ but cautions that the practice is inherently incompatible with human dignity.⁷¹ Similarly, Jackson Preece explicitly acknowledges that the community protection mechanisms at the basis of the state system are imperfect and discusses the ways in which international society has, throughout history, developed supplementary mechanisms to compensate for the system’s inherent failing – primarily through minority rights regimes.⁷² Ultimately, despite acknowledging the veracity of the solidarist critique, new pluralism has not developed a set of coherent responses to it.

A second challenge from solidarism is that inherent within the international states system is an entrenched inequality in the distribution of resources. It is unfortunately the case that much of the world’s population live in countries whose natural agricultural resources are frequently insufficient to feed the population. Meanwhile, other peoples are fortunate enough to live in states that either have agricultural resources in excess or mineral and energy resources sufficient to maintain the entire population in a comfortable lifestyle. It was this evident inequality that led Vincent, at the time of the British Committee, to argue that a right to subsistence should be the basis of a global human rights programme.⁷³ Solidarist or cosmopolitan scholars argue that this

⁷¹ Bain, *Between Anarchy and Society*. p. 140.

⁷² Jennifer Jackson Preece, *National Minorities and the European Nation-States System* (Oxford: Clarendon Press, 1998).

⁷³ Ana Gonzalez-Pelaez, ‘Retrospective: R.J. Vincent’s contribution to the basic rights discourse’, *The International Journal of Human Rights*, 8: 1 (2004), pp. 111-121.

inequality is not primarily the fault of domestic structures of impoverished states, but rather a prima facie unequal distribution of resources. As indicated by Caney, '[a] system of democratic states is quite compatible with massive global inequalities (including inequalities of opportunity) and is consistent with a world in which some are consigned to lives of gruelling poverty'.⁷⁴ Pogge elaborates on this, arguing that accounts of global poverty that explain it in terms of 'domestic' factors, such as whether a state is democratic or not, are radically incomplete for they overlook the international factors influencing whether or not a state is democratic.⁷⁵ This is a challenge for the new pluralists because, if true, it would clearly be impossible for many states in the world to have access to sufficient resources to deliver pluralist justice to their populations. Williams addresses this question in his consideration of distributive justice in *Ethics, Diversity and World Politics*. Rejecting the 'view from nowhere' approach advocated by cosmopolitans, Williams argues that global inequality can be conceived as similar to cultural harm. He states that '[p]resent distributive outcomes are unjust not because they fail to accord with the logic of the universal-individual logic of justice, but because they bring about situations in which human beings are radically excluded: their ability to participate in a meaningful, communal life is denied because of their inability to access a share of the world's resources and services necessary to do so'.⁷⁶ He acknowledges that distributive justice is problematic for a revived pluralism, but offers little in the way of a prescriptive solution to the issue other than arguing that it is 'easy to be confident that more just distributive solutions than those that presently exist are possible, but this will always be a plural position—solutions as opposed to a singular, globally just solution—because of the way in which

⁷⁴ Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2000), p. 169.

⁷⁵ Thomas Pogge, 'The Influence of the Global Order on the Prospects for Genuine Democracy in the Developing Countries', *Ratio Juris*, 14: 3 (2001), pp. 330–338, 341–343. One illustration of this point concerns corruption. Pogge points out that where states lack economic wealth they are vulnerable to corruption from external bodies.

Democratic institutions cannot persist and function effectively because officials and politicians can be bribed by foreign companies and politicians (pp. 333–334). Whether a state functions democratically or not thus depends on international factors. Pogge illustrates his case further by drawing attention to what he terms the 'international borrowing privilege' (pp. 334–335) and the 'international resource privilege' (pp. 335–337).

⁷⁶ Williams, *Ethics, Diversity and World Politics*, p. 173.

human political engagement through multiple community membership engenders incompatibility in the multiple scales and locations at which ethics exist'.⁷⁷

The Challenge from Liberal Theory

There are many within the liberal tradition who accept the first two tenets of new pluralism – that communities are the morally valuable units of international society and that tolerance of diversity or ‘pluralism’ should be its primary governing value – but dispute the third tenet that the international states system remains the best available option in which the protection of communities and tolerance for diversity may be realised. The first line of challenge that has been voiced by liberal opponents of this claim is that sovereign states are not necessary to the achievement of the goals of pluralism. For example, Neil MacCormick, notable for propagating a Kantian argument for national self-determination, emphasised that his arguments ‘certainly do not support the facile assumption that sovereign statehood is the only acceptable status fitted to the essence of nationhood’.⁷⁸ Similarly, Caney, when engaging with the Hegelian line of argument, says that, ‘[w]hat matters from a Hegelian point of view is being reconciled with a political unit and being recognised by other members of that unit. This, however, does not require that the political unit be a territorial unit (an essential feature of a state). Nor does it require that the political regime in question have unlimited authority (another essential feature of a state). Two central features of the State—territoriality and sovereignty—are, therefore, not required for this good’.⁷⁹ While Caney’s definition of sovereignty as ‘unlimited authority’ does not reflect international law or practice – both of which recognise limits on states’ authority over their citizens, his core argument – that for individuals to gain the benefits of community membership, it is not necessary for a polity

⁷⁷ Williams, *Ethics, Diversity and World Politics*, p. 173

⁷⁸ Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982), p. 264.

⁷⁹ Caney, *Justice Beyond Borders*, p.171.

to be territorially bound or for it to maintain authority over its members to the extent that sovereign states are able – is persuasive. This line of criticism is partially addressed in the work of the new pluralists, particularly Williams and Fabry who both argue that those political communities who do not have states often seek to attain them precisely because of the unique benefits they bring, including the protective benefits of international recognition.⁸⁰ As noted earlier, Williams also agrees that there are many non-state political communities that are morally valuable and that a revived pluralism must learn to look beyond the State – even if the State retains a privileged position. The issue of whether non-state forms of political communities are able to access the same benefits of community and diversity protection is one of the core questions that this thesis seeks to answer and so a fuller engagement with this line of critique will be found in subsequent chapters.

Many political theorists also question the automatic preference of the ‘nation’ as the most morally meaningful political community an individual may belong to or derive their identity from. Cosmopolitan theorists such as Caney, Buchanan and Singer argue that a person’s identity might be defined in terms of any number of categories – religion, gender, class, ethnicity, profession, nationality, region, or citizenship – and it is not clear why nationality or citizenship should trump all other identity categories.⁸¹ There are a number of potential responses to this challenge. The first is that there is nothing inherent within a pluralist system of nation states that automatically precludes individuals from also being members of communities defined by other categories. Buzan is foremost among the thinkers who have critiqued the inbuilt assumptions of solidarism that a solidarist international society would necessarily be cosmopolitan. He makes the point persuasively that it is possible that a solidarist international society may be governed by autocratic and intolerant

⁸⁰ Williams, *Ethics, Diversity and World Politics*, p. 69. See also Fabry, *Recognizing States*.

⁸¹ See Caney, *Justice Beyond Borders*, p. 31, Peter Singer (1972) ‘Famine, Affluence and Morality’, *Philosophy and Public Affairs* 1: 3 (1972), pp. 229-243, and Allen Buchanan, ‘What’s so Special about Nations?’, in Jocelyne Couture, Kai Nielsen and Michel Seymour, eds., *Rethinking Nationalism* (Calgary: University of Calgary Press, 1998), pp. 283–309. A related point made by Caney is that pluralists assume ‘a rather static concept of nationality [that] fails to recognize that national sentiments may alter with the creation of new political structures (...) the very character of the nation may then change’. Caney, *Justice Beyond Borders*, p. 179.

principles, such as Islamic fundamentalism or a communist people's republic.⁸² As such, there is nothing in principle about the nature of political communities that renders them more likely to display internal intolerance (and thereby allow people to more freely express non-national identities) than a global community of humankind.⁸³ The second is that, while in principle, there is no reason to suppose individuals could form state-like communities around other unifying characteristics such as gender or profession, so far they have not yet done so. Looking at the world as it is today, therefore, there is good reason to argue that national communities are for most people the most morally – and practically – meaningful communities.

The second challenge raised by liberal opponents is that state borders – as they are currently manifested – are not contiguous with the borders of the political communities or nations that are morally meaningful to the new pluralists. For the arguments of the new pluralists to be meaningful, it is not necessary that the boundaries of ethically meaningful communities be entirely contiguous with the boundaries imposed by the states system. It is clear, however, that if there was no relationship between the two then the claim that the current states system is the best available means of protecting community diversity does not hold. The existence of national, ethnic and religious minorities is problematic for new pluralism because they are living proof of the imperfect realisation of the principle of self-determination within international society. However, in reality very few states in the international system could be described as homogenous. While '[h]umankind is currently politically organised into approximately two hundred sovereign, territorial states, each one embodying a separate normative tradition shaped by the vagaries of its history and its political, ethnic, religious and other traditions (...) extensive diversity remains at the sub-state level'.⁸⁴ Although the idea of state sovereignty postulates contiguity between territorial boundaries and politically significant identities, throughout history the two have rarely coincided. Caney is one of the most prominent liberal thinkers to have advanced the criticism that pluralist theories of the

⁸² Buzan, *From International to World Society*, pp. 139–47.

⁸³ *Ibid.*, pp. 139–47.

⁸⁴ Jackson Preece, Jennifer (2005), *Minority Right: Between Diversity and Community*, p. 4.

State 'assume that one can easily pick out national communities, thereby discerning who belongs and who does not, and can accordingly map political institutions onto national communities. Such a precise and uncontroversial conception of who belongs to which nation is, however, often rare. Edges are frequently blurred and different people may deploy different criteria of nationality resulting in different accounts of the membership of a nation (...) In some instances national identity as such is relatively uncontested (...) but these certainly should not be assumed to be the norm'.⁸⁵

Instead, it can only be argued that the boundaries of morally meaningful political communities and nation states are indeed sufficiently divorced from one another as to pose considerable challenges for the core claim of new pluralists. This is true both of the earliest entrants to international society and the later ones. Attempts in the early twentieth century to revise territorial boundaries in Europe to ensure that they were more contiguous with the boundaries of national communities proved prohibitively difficult and destabilising. Sir Ivor Jennings's famous statement summed up the challenges faced by the post-WWI architects of the new world order: 'On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people'.⁸⁶ Turning to the postcolonial world, the vast majority of current territorial boundaries bear little to no relationship to the patterns of pre-colonial political communities. The immutability of existing territorial borders following the widespread use of the principle of *uti possidetis* in determining the borders of postcolonial states means that significant portions of the world's population currently live in states which bear little resemblance to patterns of community settlement. As argued by Kolstø; '[w]hile the principle of the self-determination of peoples is enshrined in the UN Charter, this right is interpreted as pertaining to the entire population of a state only, not to any of its territorial or cultural subgroups. The community of recognised states has thus been closed at both ends. While no members are

⁸⁵ Caney, *Justice Beyond Borders*, p. 179.

⁸⁶ Quoted in Anthony Whelan, 'Wilsonian Self-Determination and the Versailles Settlement', *The International and Comparative Law Quarterly*, 43: 1 (1994), pp. 99-115.

thrown out, the entrance gate has been strictly guarded and new applicants are routinely turned away'.⁸⁷ This problem is acknowledged by many communitarian thinkers within political science, such as Walzer who argues that there are 'a growing number of states in the world today where sensibilities and institutions aren't readily shared'.⁸⁸

A subset of this general challenge is the argument that many states in the world are the product of an illegitimate history of expropriation, colonisation and genocide. This argument is exemplified in Paul Keal's book *European Conquest and the Rights of Indigenous Peoples*.⁸⁹ In this work, he argues that many of the most powerful states in the world today – those that were created through European conquest – are morally illegitimate because they were founded through the subordination of and violence against indigenous peoples.⁹⁰ The question of indigenous peoples has long been ignored by the pluralist wing of the English School. In *Indigeneity and the International*, Karena Shaw makes the telling point that in *The Anarchical Society* 'Bull quietly excludes all those who have not achieved the Western state form from discussion'.⁹¹

These criticisms are seriously problematic for the claims of the new pluralists since they mean that a significant portion of the world is not able to reap the rewards of community membership within a sovereign state that meets the criteria laid out by the new pluralists of a morally meaningful community.⁹² There are various approaches to this question taken by the core,

⁸⁷ Pal Kolsto, 'The Sustainability and Future of Unrecognized Quasi-States', *Journal of Peace Research*, 43: 6 (2006), p. 738.

⁸⁸ Walzer, *Spheres of Justice*, p. 29. Other scholars, such as Pogge, have taken issue with a more fundamental aspect of this argument. Pogge says that it is 'unclear what groups are to count as peoples. Does Rawls want to count any group of persons residing together within the territorial boundaries of a state? What about the Kurds, the Jews, the Chechens, the Maori, the Sami, and hundreds of other traditional and aboriginal nations, which often transcend state borders or are nested within one another? Secondly, it is unclear how each of the recognized peoples is delimited. Is this decided by passport, culture, descent, choice, or any combination of these and perhaps other criteria? Can persons belong to several peoples or to one at most?' Thomas Pogge, 'The Incoherence Between Rawls' Theories of Justice', *Fordham Law Review*, 72: 5 (2004), p. 1743.

⁸⁹ Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, (Cambridge: Cambridge University Press, 2003).

⁹⁰ See also Paul Keal, 'The Anarchical Society and Indigenous Peoples', in Suganami, Carr, and Humphreys, *Anarchical Society* at 40.

⁹¹ Karena Shaw (2002) 'Indigeneity and the International', *Millennium: Journal of International Studies*, 31: 1 (2002), p. 63.

⁹² Many would argue that Rawls' seminal theory on this topic specifically limits the benefits of pluralism to Western society by disavowing that non well-ordered peoples qualify as 'peoples' at all. See Philip Pettit, 'Rawls's Peoples', in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006), p. 44.

‘bridge’ and peripheral new pluralists. Jackson, in the *Global Covenant*, almost ignores it completely; arguing that current boundaries, even if they are not entirely contiguous with the historical boundaries of nations or people, are still the result of some ‘joint inclination of certain people (...) to reside territorially apart as a group on a basis of independence from all other such groups’.⁹³ By contrast, both Mayall and Fabry acknowledge the seriousness of this challenge within their work and locate the solution in a re-evaluation of international society’s current prohibition on territorial revision. Fabry argues that where borders of political communities and recognised states are not contiguous, the fault lies predominantly with an overambitious international society which has sought to draw borders on behalf of others. He argues instead that ‘*de facto* statehood (...) demonstrates to outsiders, better than anything else devised so far, a political community’s sanction of independent existence’ and advocates a return to this practice.⁹⁴

Another response – articulated by Mayall and Bain – is that, even where state boundaries are not contiguous with the boundaries of political communities, the State creates the institutions wherein a political community can develop. This is what Wight referred to as the ‘revolution in loyalties’ that takes place during state formation and consolidation in which an ‘inner circle of loyalty expand[s]’ and ‘an outer circle of loyalty [shrinks]’.⁹⁵ However, this argument is vulnerable to the criticism that, in practice, the process of state formation involved the forceful creation of communities through the suppression or annihilation of minority cultures within the territory of concern.⁹⁶ As argued by Tilly et al, the nation states of the modern world owe their existence to the processes of violence and territorial contestation that have taken place over the preceding millennia.⁹⁷ That today’s nation-states have come to be reified within the modern international system is more a result of the ‘totalising project’ that took place over the last century in which

⁹³ Jackson, *Global Covenant*, p. 318.

⁹⁴ Fabry, *Recognizing States*, p. 221.

⁹⁵ See Martin Wight, *Systems of States*, ed. by Hedley Bull, (Leicester: Leicester University Press, 1977). Bain also argues for a variation on this view in Bain, ‘One Order: Two Laws’.

⁹⁶ See, for example, Keal, *European Conquest and the Rights of Indigenous Peoples*.

⁹⁷ Charles Tilly, ed., *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 2005).

states sought to construct homogenous national communities, than a result of naturally arising communal affinity.⁹⁸ Williams, by contrast, acknowledges that today's states are an imperfect realisation of his version of pluralist justice and seeks to find a solution in which state-based communities are able to retain their privileged status while non state-based communities are able to access a range of other (unspecified) protective mechanisms.⁹⁹ Ultimately, although all of the scholars who fall within the broad church of new pluralism acknowledge the historically contingent and contested nature of many borders, these observations are usually downplayed within their work in favour of the argument that, whatever the origins of some territorial arrangements, nation states as they currently exist are and should remain, the most ethically meaningful communities within international society.¹⁰⁰ Even Williams, whose work goes furthest in acknowledging the failures of the state, is unable to offer either an assessment of how international society has sought to remedy these failings or how new pluralism should, in practice, seek to move beyond the state.

Evaluating the State

The new pluralists are correct in their assessment that the State remains the primary pluralist institution of international society. It is the only political structure within international society that can currently provide individuals with meaningful citizenship rights or the 'right to have rights'. However, while the State is often a highly effective means of community protection and a structure in which limited diversity can be preserved, access to meaningful citizenship

⁹⁸ Philip Corrigan and Derek Sayer, *The Great Ark: English State Formation as Cultural Revolution* (Oxford: Blackwell, 1985).

⁹⁹ John Williams, 'Territorial Borders, Toleration and the English School', *Review of International Studies*, 28: 4 (2002), p. 740.

¹⁰⁰ For example, Williams pays lip service to the observation that current borders are the result of historical processes of change and contestation (p. 740 of 'Territorial Borders, Toleration and the English School') but then emphasises that they remain the primary delineators of international societies' political communities (later on p.740.) Similarly, Mayall acknowledges that some current borders are the result of historic accident (p. 476) but then goes on to argue that the process of state-building itself forged a cohesive national identity that came to supersede prior identities (p.748). James Mayall, 'Sovereignty, Nationalism and Self-Determination', *Political Studies* 47: 3 (1999), pp. 474-502.

remains highly unequal. The legacy of the process through which the international state system was developed and consolidated pertains to this day with many states having failed to develop meaningful national political communities. The sovereign State, as it exists today, is insufficient to ensure the achievement of global pluralist justice yet attempts within new pluralist literature to ‘move beyond the State’ are only elementary and fail to take into account the empirical work by scholars such as Jackson Preece, Haddad and Bain on pluralist institutions of international society other than the sovereign state. Nor do any of the new pluralists evaluate these institutions in a comparative or holistic way. It is this gap in the literature which this project seeks to remedy – by providing an overview of the historical development and contemporary functioning of the secondary pluralist institutions of international society. I argue that there are two ‘secondary’ pluralist institutions of international society which move beyond the State – Shielding and Recourse. Together, these primary and secondary institutions constitute what Christian Reus Smit would term the global diversity regime.

The Secondary Pluralist Institutions of International Society

This thesis argues that there are two secondary institutions which are designed to supplement or compensate for a state’s failure to ensure the protection of particular communities within its borders. The focus of these institutions has historically been upon protecting persecuted ethno-national (and, to a lesser extent, linguistic and religious) minority communities. However, over time both institutions have expanded the scope of communities eligible for protection to also include groups of individuals linked by characteristics such as sexuality or political affiliation. The first of these secondary pluralist institutions is that of Shielding. The institution of Shielding refers to the matrix of legal and normative instruments developed by international society to persuade, coerce or compel states to refrain from active persecution or violence against minority communities within their borders. In the words of Li-Ann Thio, it is the ‘set of techniques within

international law which protect minorities by promoting their peaceful coexistence on a principled basis (...) within the framework of the existing state'.¹⁰¹ There exists a spectrum of potential options ranging from state self-reporting to outright military intervention which in theory could be used to enforce state compliance with their international obligations to protect communities within their borders. These possibilities include voluntary rapporteur missions, voluntary mediation, international review of a state's performance, public criticism, mandatory rapporteur missions or mediation missions, judicial review, withdrawal of membership in international organisations, trade sanctions, and humanitarian intervention. Some of the existing mechanisms have been created on the basis of specific treaties or declarations; others manifest as international organisations. There are currently a number of different varieties of Shielding mechanisms in operation within the international system, including:

Minority Rights Regimes. Initially an instrument designed to promote friendly inter-state relations and stem the disorder created in Europe by the persecution of minorities during the evolution of European international society, minority rights regimes have now become an integral part of international governance. These regimes are designed to protect ethnic or linguistic minorities whose presence in a particular state may be deemed the result of the 'imperfect realisation of self-determination within the present states system'.¹⁰² These regimes are designed to protect groups 'numerically inferior to the rest of the population of a state, in a non-dominant position, well defined and historically established on the territory of that state, whose members—being nationals of the state—possess ethnic, religious, linguistic, or cultural characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion, or language'.¹⁰³

¹⁰¹ Li-Ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Boston: Martinus Nijhoff Publishers, 2005), p. xxx.

¹⁰² Jennifer Jackson Preece, *Minority Rights: Between Diversity and Community*, (Cambridge: Polity Press, 2005), p. 3.

¹⁰³ This is the definition of minorities given by Jennifer Jackson Preece in her study *National Minorities and the European States System*. Drawing on existing definitions within the academic literature and the documents of

Indigenous Peoples Regimes. Paul Keal, in his work on indigenous peoples, adopts the definition of indigenous peoples employed by UN Special Rapporteur José Martínez Cobo as those which have ‘a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them’.¹⁰⁴ Regimes designed to protect the indigenous communities are to be distinguished from national minority rights regimes for two reasons. First, the relationship between indigenous communities and the State that they are located within is often different in fundamental ways from the relationship between states and non-indigenous national minorities. Notably, indigenous peoples ‘share a common experience of subjection to colonial settlement’ and are ‘the prior occupants of land colonised’.¹⁰⁵ Second, and as a result of international recognition of these differences, the practice of international society has been to accord indigenous peoples different rights and protection regimes than those accorded to non-indigenous national minorities. In particular, indigenous peoples are often believed to be deserving of enhanced rights to self-determination as well as collective rights to ownership and use of land as a result of their unique situation within the international order.¹⁰⁶

international organisations, Jackson Preece argues that it is essential to go beyond broader definitions along the lines of ‘as a particular kind of community, especially a national or similar community which differs from the predominant group of the state’ in order to a) distinguish between ‘minorities by force’ and ‘minorities by will’ under the general rubric ‘minority’. According to Jackson Preece, ‘this is an important distinction since the kind of protection suited to ‘minorities by force’ (anti-discrimination and equal civil liberties) is profoundly different from the kind of protection suited to ‘minorities by will’ (special rights to education, language, and culture designed to ensure the preservation and development of national minority identities)’ (p. 28); and b) following Caportorti, to exclude immigrants, migrant workers and refugees on the basis that, unlike the national minorities described above, these groups are not capable of making legitimate claims to political independence. I agree with Jackson Preece on both of these points and find her definition the most useful within the literature for the purposes of this study. Also p. 28.

¹⁰⁴ Quoted in Keal, *European Conquest and the Rights of Indigenous Peoples*, p. 7. Original in José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, Vol V, *Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub.2/1986/7, Add 4, para 379 and 381.

¹⁰⁵ Keal, *European Conquest and the Rights of Indigenous Peoples*, pp. 8-9.

¹⁰⁶ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007) p.11.

Global Doctrine of Human Rights. The global doctrine of Human Rights must be considered an element of the institution of Shielding because of the central role played by its key documents, such as the Universal Declaration on Human Rights and the International Convention on Civil and Political Rights (ICCPR), in providing many of the normative foundations for the institution of Shielding in the post-1945 period. Initially displacing minority protection regimes in the period 1945-1990, human rights doctrines now operate alongside group rights regimes; both providing a normative basis for enhanced minority and first nation peoples regimes, revealing the tension between the universalist and particularistic approach to minority rights issues.

There are some practices that arguably fall within the institution of Shielding – such as humanitarian intervention, where it is done to protect specific vulnerable communities – which are understood as solidarist behaviours by the majority of English School theorists and are even claimed by some – such as Knudsen – to be solidarist institutions in their own right. While it is true that, in some instances, humanitarian intervention may be undertaken either wholly or partly to protect vulnerable communities, this thesis would maintain that humanitarian intervention should be considered a solidarist practice (or institution) of international society. This is because the underlying values on which the practice are based (responsibility to protect) are predominantly solidarist in so far as they are directed towards the protection of individuals – as demonstrated by the equally regular use of humanitarian intervention where there is no specific community at risk – such as in the event of natural disasters, political upheaval in a particular state or conflict that is not community based. While humanitarian intervention may therefore sometimes manifest as the protection of vulnerable communities, it is not predominantly to protect the community as a community that intervention is undertaken. It is instead to protect the individuals of that community.

The other secondary pluralist institution is that of Recourse. The institution of Recourse refers to what is described elsewhere in the international relations literature as the refugee regime

complex.¹⁰⁷ This regime complex is comprised of international legal instruments, multilateral treaties, international organisations, soft law instruments, and global norms. The core purpose of the institution of Recourse is the creation of legally and normatively binding agreements which commit states and international organisations to offer protection for communities in the event of a breakdown in the Shielding mechanism. The attribution of refugee status to an individual or community is given on the basis that international society has assessed that the individuals' government 'is no longer able or willing to provide such a safeguard and the refugee must find an alternative source of protection'.¹⁰⁸ In cases where communities have suffered persecution within their own state, they are then entitled to seek refuge elsewhere.

The international refugee regime complex is not generally understood within the wider IR literature as an institution that is designed to protect communities within international society. Rather, it is widely believed that it was one of the first institution of international society that was developed to protect *individuals as such*; specifically to ensure that the international community provided substitute protection for those individuals who fled their country of origin because their own state is unwilling or unable to ensure access to their most fundamental rights.¹⁰⁹ However, like Haddad, I contend that refugee protection is 'more of a pluralist idea designed to fit into the international states system based on positive international law rather than a universal and solidarist conception brought about by human rights norms'.¹¹⁰ This is partly (as argued by Haddad) because the decision to accede to the 1951 Convention and subsequent instruments was influenced more by reasons of national and international security than by humanitarian concerns.¹¹¹ More importantly, however – at least for the purposes of this project – an examination of both the motivations of the international actors who founded and advanced the institution and the

¹⁰⁷ Alexander Betts, 'The Refugee Regime Complex', *Refugee Survey Quarterly*, 29: 1 (2010), pp. 12–37.

¹⁰⁸ Emma Haddad, *The Refugee in International Society: Between Sovereigns*, (Cambridge: Cambridge University Press, 2008), p. 3.

¹⁰⁹ See, for example, Alexander Betts, 'Survival Migration: A New Protection Framework', *Global Governance*, 16: 3 (2010), p. 361.

¹¹⁰ Haddad, *Refugee in International Society*, p. 89.

¹¹¹ *Ibid.*, p. 92.

trajectory of the institution's development since reveal that the primary purpose of the institution of Recourse, both in design and practice, is the protection of *communities*, not individuals. This analysis demonstrates that the institution of Recourse emerged as a pluralist response by international society to the challenges of mass displacement and vulnerability of particular communities during the twentieth century.

If the sovereign territorial State is the primary pluralist institution of international society, what kind of institutions are Shielding and Recourse? Again, English School scholars differ on the question of what categories or types of institution operate within international society. Buzan is arguably the English School theorist who has most thoroughly re-worked the concept of institutions within the English School, creating a robust typology that has become the template for much subsequent work. According to Buzan, there exist three categories of institution – master, derivative and secondary. His master institutions are Sovereignty, Territoriality, Diplomacy, Balance of Power, Equality of People, Inequality of People, Trade and Nationalism.¹¹² From these master institutions flow a number of 'derivative' institutions. So, for example, International Law and principles of Non-Intervention are both derivative institutions of Sovereignty while Bilateralism and Multilateralism derive from Diplomacy. 'Secondary' institutions are, in Buzan's typology, specific international organisations, laws and regimes such as the UN, the World Trade Organisation or the Kyoto Protocol.

Williams utilises Buzan's typology to develop his own master primary institution of 'Resistance'. In adding the institution of Resistance to Buzan's categorical scheme, Williams seeks 'to recognize that there are actors who seek to resist incorporation into the institutions of international society because of the way in which its constitutive and regulatory effects are inimical to their self-understandings of their own identity, through the way in which it excludes or marginalizes the social practices that are key to their constitution as social actors'.¹¹³ For those who

¹¹² Buzan, *From International to World Society*, p. 187.

¹¹³ Williams, *Ethics, Diversity and World Politics*, p. 155.

adopt Buzan's typologies within their own work, including Williams, Shielding and Recourse are probably best understood as 'derivative' institutions, derived primarily from the master institution of Nationalism, with some derivation from other master institutions including Resistance, Sovereignty, Equality of People – whence Human Rights and Humanitarian Intervention are also derived – and Inequality of People. However, my preference – and the approach followed within this thesis – is for a 'grounded' rather than 'categorical' approach to identifying and examining international institutions. There are a number of reasons for this:

Firstly, Buzan's typology does not necessarily provide much analytical insight for understanding the institutions of Shielding and Recourse. Both institutions can be seen as deriving to different degrees from a number of his master institutions. While both developed within an ideological context of Nationalism, the principles of Equality of People and Inequality of People have also strongly shaped the institutions, as have concepts of Sovereignty. Moreover, there are elements of both Shielding and Recourse – particularly notions of international responsibility for the preservation of diversity – that cannot be derived from any of Buzan's primary concepts. While both institutions have certainly been influenced by Buzan's master institutions, they are therefore not reducible to them.

Secondly, Buzan's is not the only categorical scheme within English School literature and scholars differ on the question of what categories or types of institution operate within international society. Holsti, for example, differentiates between 'foundational' and 'procedural' primary institutions. His foundational institutions include the State, Sovereignty, Territoriality and International Law while his procedural institutions are Diplomacy, Trade, Colonialism and War.¹¹⁴ Shielding and Recourse do not fit neatly into either of Holsti's categories either, although they are arguably closer to procedural institutions. However, neither fit Holsti's definition of 'primary institution; (which includes both foundational and procedural) given that both are issue-specific

¹¹⁴ Kalevi J. Holsti, 'The Institutions of International Politics: Continuity, Change and Transformation', paper presented at the ISA Convention, New Orleans, (March 2002), pp. 9–10.

regimes and cannot be considered ‘fundamental practices’ in the way that Territoriality, Trade or Diplomacy are. Reus-Smit, by contrast, identifies three layers in modern international society. The deepest layer he calls ‘constitutional structures’, which are similar to Holsti’s foundational institutions. Constitutional structures reflect a hierarchy of ‘deep constitutive values: a shared belief about the moral purpose of centralized political organisation, an organising principle of sovereignty, and a norm of pure procedural justice’.¹¹⁵ The middle layer Reus-Smit calls ‘fundamental institutions’, which are ‘those elementary rules of practice that states formulate to solve the coordination and collaboration problems associated with coexistence under anarchy’ such as Bilateralism, Multilateralism and International Law.¹¹⁶ These bear considerable similarity to Holsti’s procedural institutions. Reus-Smit’s third layer is ‘issue-specific regimes’, which appear similar to Buzan’s secondary institutions. Once again, the institutions of Shielding and Recourse seem to lie somewhere in between Reus-Smit’s second and third layers. They are not quite basic rules of practice, such as International Law or Multilateralism but at the same time they are broader than Reus-Smit and Buzan’s conceptions of issue-specific regimes which refer to particular organisations or instruments of international law. Indeed, both Shielding and Recourse contain within them multiple issue-specific regimes; as well as Human Rights which Buzan would contend is a derivative primary institution in itself.¹¹⁷ Reflecting this, Reus-Smit argues that diversity regimes, as he speaks of them in *On Cultural Diversity*, straddle all institutional levels.¹¹⁸

It is, in part, this confusion over competing typologies and the difficulty of placing individual practices within them which led Peter Wilson to advocate for a return to a grounded, empirical approach to the study of international institutions. His other criticisms include the

¹¹⁵ Christian Reus-Smit, ‘The Constitutional Structure of International Society and the Nature of Fundamental Institutions’, *International Organization*, 51: 4 (1997), p. 556.

¹¹⁶ *Ibid.*, p. 557.

¹¹⁷ The status of human rights as an institution of international society is unclear, even within the solidarist literature. Some solidarists (e.g. Tonny Brems Knudsen, *Humanitarian Intervention and International Society: Contemporary Manifestations of an Explosive Doctrine* (London: Routledge, 2012), p. 39) want to push human rights almost to the status of an institution, while others (e.g. Wheeler, *Saving Strangers*) talk about it more ambiguously in terms of a norm of international society.

¹¹⁸ Reus-Smit, *On Cultural Diversity*, p. 212.

inexhaustive nature of lists which are derived conceptually rather than empirically and that, '[f]ashioned in the abstract, without reference to actor perceptions and understandings, lists of international institutions will always be in the eye of the beholder, and taxonomies of them similarly groundless'.¹¹⁹ Wilson argues that the English School should abandon the functional differentiation approach, advocating instead a return to the classical method of the English School focused on achieving the Weberian concept of *verstehen*, a notion of understanding which involves 'interpretation of the meanings that social actors themselves give to their actions'.¹²⁰ Under this approach, empirical practice is allowed to lead theory, ensuring that the conceptualization of institutions and the theory developed to understand their operation is reflective of the practice and language of those who populate the institutions in the real world. Wilson cites Bevir and Rhodes, arguing that 'interpretive approaches start with the insight that to understand actions, practices and institutions, we need to grasp the relevant meanings, beliefs and preferences of the people involved'.¹²¹

The approach that I take is much more closely aligned with that of Wilson. While I do not pretend to have fulfilled the criteria of Wilson's proposed methodologically taxing 'grounded theory', which involves the importation of onerous discourse analysis methods from sociology, I do adopt the participant standpoint approach; using the understanding that practitioners or 'order builders' of the institutions as the basis from which to understand the historical development of Shielding and Recourse and to evaluate their contemporary functioning. I judge these institutions, at least in part, by the principles and standards developed by their creators.

As noted earlier, Williams is critical of this approach, arguing that the practice used as the empirical basis by Wilson is exclusively elite practice. From Williams' subaltern perspective, 'such documentary sources are unlikely to adequately reflect the lived experience of the poor and

¹¹⁹ Peter Wilson, 'The English School Meets the Chicago School', *International Studies Review* 14 (2012), p. 577.

¹²⁰ Ibid., p. 578

¹²¹ Ibid., p. 579.

repressed'.¹²² However, as argued by Wilson, while it is key to understand the motivation and values of international elites, 'this does not mean that these meanings, beliefs, and preferences are holy writ and should be accepted uncritically (but) that such interpretative data are essential to a rich, textured, and nuanced explanation of the studied human world'.¹²³ It is true that many of the primary sources used in this project to develop understanding of the institutions of Shielding and Recourse are indeed primarily those of elite practitioners. However, this project does also examine subaltern narratives, including practices of resistance by indigenous, minority and refugee communities. It also seeks to evaluate the functioning of these institutions empirically through the use of some general metrics and to judge them against the principle of endowing individuals and communities with the 'right to have rights'.

This thesis seeks to explore different – albeit related – questions to those identified by Williams in his exposition of the institution of Resistance. Essentially, the approach that I have sought to adopt seeks another avenue to answer Williams call for a revived pluralist account of institutions and seeks to complement, but not replicate, his approach.¹²⁴ Rather than using a functional lens to identify institutions operating in international society, this project therefore adopts a grounded approach to identifying pluralist institutions of international society. Tonny Brems Knudsen also adopts a similar line of analysis when investigating the evolution of solidarist institutions within international society.¹²⁵ Knudsen's 'solidarist' institutions are the Responsibility to Protect, International Criminal Jurisdiction and International Trusteeship.¹²⁶ Like myself, Knudsen finds the functional approach posited by Buzan inadequate to conceptualise his 'solidarist' institutions as he notes that while they may seem to be derived from some of Buzan's fundamental institutions, such as international law or war, they are not reducible to them.¹²⁷

¹²² Williams, *Ethics, Diversity and World Politics*, p. 135.

¹²³ Wilson, 'The English School Meets the Chicago School', p. 579.

¹²⁴ Williams, *Ethics, Diversity and World Politics*, p. 143.

¹²⁵ Tonny Brems Knudsen, 'Fundamental Institutions and International Organizations: Solidarist Architecture', in Tonny Brems Knudsen and Cornelia Navari, eds., *International Organization in the Anarchical Society* (London: Palgrave Macmillan, 2018).

¹²⁶ Ibid., p. 176.

¹²⁷ Ibid., p. 196.

Knudsen's approach is to characterise his solidarist institutions as primary institutions in their own right on the grounds that they stand alone as constitutive principles. He too reserves the term 'secondary institutions' for international organisations such as the UN, yet this thesis disagrees with this approach for two reasons. Firstly, it seems obvious that both pluralist and solidarist institutions, such as the Responsibility to Protect and Shielding or Recourse, are different in nature from the fundamental institutions of International Law or War. They are issue-specific and are not constitutive of the nature of international society in the same way. They therefore cannot properly be termed primary institutions. Secondly, the use of the term 'secondary institutions' to refer to international organisations, such as the UN, is generally unsatisfactory. The relationship between these normative 'secondary institutions' and international organisations is complex – international organisations are often the primary instrument or manifestations of such institutions. As argued by Knudsen, 'international organisations are not pseudo-institutions as Hedley Bull (...) once indicated. They are, rather, the most important frameworks for the reproduction and change of fundamental institutions, and thus for the maintenance and development of international order and justice'.¹²⁸ This thesis therefore refers to bodies such as the UN as international organisations, not as secondary institutions. Having established the terminological framework upon which this project can proceed, this thesis will now detail the historical development of both of the secondary pluralist institutions of Shielding and Recourse from a comparative perspective.

¹²⁸ Knudsen, 'Fundamental Institutions and International Organizations', p. 198.

Chapter Three: The Historical Development of Shielding and Recourse

‘On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people’.¹

This chapter outlines the historical development of the secondary pluralist institutions of Shielding and Recourse. As argued by Christian Reus-Smit, all international orders have developed ‘diversity regimes’ and the great moments of order building that have occupied IR scholars – Westphalia, Vienna, Versailles, San Francisco, and post-1945 decolonisation – have all involved the construction of such regimes’.² This chapter investigates the key moments in the development of the secondary pluralist institutions of Shielding and Recourse – the Congress of Vienna, the Congress of Berlin, Versailles, the end of the Second World War and the end of the Cold War. It finds that both institutions developed ‘at precisely those moments when the spatial framework of the state system was being modified and new anomalies between the pattern of human communities and international boundaries—insiders and outsiders—were being created’.³ This is a pattern that recurs over successive centuries when – at each moment of system reconfiguration, normative change combines with political imperative to create or deepen institutions which – in many ways – impinge upon the sovereignty of states in order to protect vulnerable communities and preserve international order.

Reus-Smit’s work is useful in providing an analytic structure by which to understand the motivations of the order builders who created this diversity regime and this chapter provides empirical analysis to enrich his concepts. Reus-Smit argues that three imperatives drive order builders to organise diversity and turn extant cultural heterogeneity into authorised forms and expressions of difference. These are a) control of populations through institutionalizing preferred

¹ Quoted in Anthony Whelan, ‘Wilsonian Self-Determination and the Versaille Settlement’, *The International and Comparative Law Quarterly*, 43: 1 (1994), pp. 99-115.

² Christian Reus-Smit, *On Cultural Diversity: International Theory in a World of Difference* (Cambridge: Cambridge University Press, 2018), p. 13-14.

³ Jackson Preece, *National Minorities and the European Nation-States System*, p. 56.

meanings and identities, engineering consent for institutions and limiting the scope for innovation; b) self-location of the order builder within the cultural terrain – usually at the apex of the cultural hierarchy; and c) social and political coordination – including the avoidance of conflict and resolution of disputes through building collective knowledge and agreed practices.⁴

During the emergence of international society, European order builders were indeed able to institutionalize preferred meanings and identities in which the sovereign territorial state became the principle unit of political authority and nationalism the ordering principle of Europe. An analysis of the early historic development of the institutions of both Shielding and Recourse demonstrates that European order builders were motivated by a desire to mitigate the negative externalities of this process for those communities who became minorities within the new states. However, in so doing, they were also able to limit the scope for innovation in how nationalism should be interpreted by deciding themselves which communities qualified for nation states, enforcing minority regimes onto new entrants of international society and providing limited protective benefits for those communities made refugees by the process of nation-building. Altogether, the grand attempts to govern diversity within Europe demonstrate a much greater desire on the part of European order builders to limit, control and order diversity than a desire to expand it.

This chapter works within and seeks to contribute to the new history of international society by tracing and comparing the development of the institutions of Shielding and Recourse. It also builds on the work of those new pluralists who have engaged with these institutions – particularly Haddad and Jackson Preece – providing an overarching comparative narrative of the development of secondary pluralist institutions within international society. It traces the evolution of the changing balance between the imperatives of community and individual protection at

⁴ Reus-Smit, *On Cultural Diversity*, pp. 13, 209.

varying points of the development of these institutions and seeks to understand how they helped shift definitions of community over time.

The Problem of Minorities and the Emergence of the Institution of Shielding

The concept of ‘minority’ is a relatively recent one – dating from the 1919 Paris Peace Conference when the term was included in the peace treaties with the successor states of the Habsburg Empire, Ottoman Empire and Prussian Kingdom.⁵ However, the ‘problem of minorities’ predates the elevation of the principle of national self-determination as the primary criteria for legitimate statehood within international society. Long before the emergence of European international society, individual states or state-like entities developed graded forms of citizenship that offered protection to certain minority groups within their borders. The clearest example is the protection offered to Jewish communities within Europe during the Middle Ages and Early Modern periods.⁶ Another is the 1648 Treaty of Westphalia, which contained protective clauses for religious minorities, even while instituting the rule of *cujus regio, ejus religio*.⁷ Likewise, both the Treaty of Nijmegen (1678) and the Treaty of Ryswick (1697), which settled disputes arising from the struggle between France and Spain to control the Netherlands, guaranteed the

⁵ J. A. Laponce, *The Protection of Minorities* (Berkeley: University of California Press, 1960), p. 3, quoted in Jennifer Jackson Preece, *Minority Rights: Between Diversity and Community* (Cambridge: Polity Press, 2005), p. 11.

⁶ This either took the form of simple edicts declaring that Jewish Communities would be protected or a legal instrument which brought the Jewish communities under the ownership of the King or ruling lord through enslavement, serfdom or rigorous taxation. See Yitzhak Baer, *A History of the Jews in Christian Spain* (Philadelphia: Jewish Publication Society of America, 1992), pp. 40–57 and Henry Richardson, *The English Jewry under Angevin Kings* (London: Methuen, 1960), p. 109. Towards the beginning of the late medieval - early modern period other embryonic forms of minority regimes began to emerge. These early examples include the Edict of Saint-Germain, a decree of tolerance promulgated by Catherine de' Medici in 1563 which provided limited tolerance to the Huguenots in the Catholic realm, and the Treaty of Madrid in 1621 which guaranteed religious amnesty to Protestants in Valtellina. While the first of these was a unitary declaration on the part of a European monarch, the latter had guarantors; namely the King of France, Louise XIII and the Swiss Confederation.

⁷ With a view to alleviating the lot of religious minorities, the Treaty of Osnabruck provided that ‘subjects who in 1627 had been debarred from the free exercise of their religion, other than that of their ruler, were by the Peace granted the right of conducting private worship, and of educating their children, at home or abroad, in conformity with their own faith; they were not to suffer in any civil capacity, nor to be denied religious burial, but were to be at liberty to emigrate, selling their estates or leaving them to be managed by others’. In Leo Gross, *Essays on International Law and Organization* (Dordrecht: Springer Science, 1984), p. 5.

continued enjoyment of all ‘honours, dignities and benefices’ both ‘secular and ecclesiastical’ to Christians of all denominations in the transferred territories.⁸ These guarantees were reaffirmed within the Treaty of Utrecht (1713) and similar minority guarantees are present in the Treaty of Oliva (1650), the Treaty of Dresden (1745), the Treaty of Hubertusburg (1763), and the Treaty of Paris (1763).⁹ These early Shielding mechanisms were primarily focused upon the protection of religious minorities within the Christian political-religious authority matrix of Europe. Such rights were not granted to minorities by virtue of their humanity or by the dictates of natural law. Rather, they were the gift of the sovereign, given in the interests of maintaining international order and often at the behest of another sovereign.¹⁰

As nation states consolidated and European international society began to take shape in the late eighteenth century, the process revealed existing linguistic and ethnic divisions within the emerging nation states and codified new ‘national’ divisions. Minorities – as political outsiders whose identities contradicted the principle that legitimated emerging political communities – often fell victim to policies of homogenisation during the process of state building.¹¹ As a result, the emergence of the nation-state system within Europe was accompanied by waves of violence and displacement of those communities who came to be minorities within the newly formed states. The French Revolution was arguably ‘the beginning of the state being defined on national grounds, and the development of the formalised concepts of “citizen” and “foreigner”’.¹² The Declaration of the Rights of Man and Citizen of 1789 granted natural and inalienable rights to those possessing French citizenship but not to non-citizen residents. This was followed by a passports law in 1797 and a codified definition of aliens in the new constitution of 1799. Those expelled from France in

⁸ Quoted in Jennifer Jackson Preece, *National Minorities and the European Nation-States System*, (Oxford: Clarendon Press, 1998), p. 57.

⁹ Ibid., p. 57.

¹⁰ An example is in the Treaty of Paris (1763) where George II of Great Britain gave Roman Catholics in lands formerly belonging to France the freedom to practise their religion as a gesture of good faith towards Louis XV. Jackson Preece, *National Minorities and the European Nation-States System*, p. 58.

¹¹ Ibid., p. 3.

¹² Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008), p. 53.

the post-revolutionary period were not only religious minorities but also those seen as outside the new 'national' identity of France. The advance of the Napoleonic Empire then served to export notions of nationality to the subjugated territories, notions which persisted with the empire's demise and needed to be addressed in the post-war settlement.

It was in an attempt to protect these newly identified minority communities – and stem the disorder created by their persecution and subsequent flight during periods of political upheaval – that international society began to develop legal and institutional means to shield them from policies of homogenisation, ethnic cleansing and genocide.¹³ At the beginning of the nineteenth century, Western European powers, when agreeing treaties of recognition or other matters with new Eastern European States, began to include provisions that would guarantee states' treatment of minorities.¹⁴ The Final Act of the Congress of Vienna in 1815 is an early example of this practice. In the course of redistributing territories in post-Napoleonic Europe, European order builders also sought to ensure protection for the new minorities being created. Article 1 of the General Treaty, which partitioned Poland between Russia, Prussia and Austria, also gave Poles the right to maintain their own national institutions. Similar guarantees can be found in the General Treaty regarding the inhabitants of the newly unified Belgium and Holland, lands transferred from Sardinia to Geneva and the transferred cantons of Bern and Basel.¹⁵ The Congress of Vienna is also noteworthy as the first time that minorities were described in an international treaty in national rather than religious terms.¹⁶

Large-scale displacements became increasingly common throughout Europe as other countries engaged in similar national projects to France. The revolutions in Italy and Poland during the 1820s and 1830s created waves of refugees, as did the later unifications of Italy and Germany.

¹³ Jackson Preece, *National Minorities and the European Nation-States System*. Also see Jackson Preece, *Minority Rights*.

¹⁴ Haddad, *Refugee in International Society*, p. 99.

¹⁵ Clive Parry, *The Consolidated Treaty Series* (Dobbs Ferry, New York: Oceana Publications, 1969), lxiv, pp. 457-481

¹⁶ Li-Ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Boston: Martinus Nijhoff Publishers, 2005), p. 20.

As a result of the wars of German unification, France expelled 80,000 Germans in 1870 alone.¹⁷ The Prussian Law of 1842, the Netherlands Aliens Act of 1848, the nationality laws of Austria, Italy and Russia in the 1860s, and the British Naturalisation Act of 1870 are all examples of nationality laws enacted during this period which sought to exclude some residents from citizenship of the newly consolidating European states. As a result, minority clauses within international treaties became increasingly common during the course of the nineteenth century. It also became a more prominent topic of European international discussions as the shift away from dynastic principles of legitimacy to those of nationalism and popular sovereignty forced changes to the way in which states responded the questions of migration and ethnic and religious minorities.¹⁸

It was in the nineteenth century in the aftermath of the Napoleonic Empire, therefore, that the institution of Shielding truly emerged – with the gradual imposition by international society of clauses within international treaties that required emerging states to protect national minorities within their territory as a condition of their continued membership of the society of states.¹⁹ Europe also for the first time began to involve itself in the protection of minorities outside of Western and Central Europe. For example, the Congress of Aix-la Chapelle in 1818 received a petition on behalf of the Jews of Tsarist Russia and discussed the issues of Jews in Austria and Prussia.²⁰ The 1856 Treaty of Paris – which recognised the Ottoman Empire as a member of European international society – included clauses calling upon the Sultan to respect the rights of Christians in his Empire.²¹ Even further afield, the 1858 Treaty of Tientsin signed by China in the course of the Opium Wars included a promise to uphold the freedom of Christians in China to both practice and proselytise their religion.²²

¹⁷ Haddad, *Refugee in International Society*, p. 56.

¹⁸ Martin Wight, *Systems of States*, ed. by Hedley Bull, (Leicester: Leicester University Press, 1977), chapter 6.

¹⁹ Rechel Bernd, *Minority Rights in Central and Eastern Europe* (London: Routledge, 2009), pp. 3–16.

²⁰ Carol Fink, 'The Paris Peace Conference and the Question of Minority Rights', *Peace and Change*, 21: 3 (1996), p. 274.

²¹ Treaty of Paris (1856) Article IX. See Harold Temperley, 'The Treaty of Paris of 1856 and its Execution', *Journal of Modern History* 4: 3 (1932), p. 391.

²² Parry, *Consolidated Treaty Series*, cxix, p. 166.

The Congress of Berlin in 1878 marked another watershed moment in the development of minority rights.²³ The Congress culminated in a treaty between Austria-Hungary, France, Germany, Great Britain, Russia, and Italy on the Settlement of Affairs in the East, which recognised the independence of Romania, Serbia and Montenegro. In articles XXVII and XXXIV of the Treaty the new states of Montenegro and Serbia committed to uphold the religious freedom of Muslim communities within their territories as a condition of recognition by the Great Powers of their independence.²⁴ The national minority guarantees imposed on Romania were even more far reaching, committing Romania to the protection of religious freedom and civil rights for all minorities and to the protection of any citizens of the recognising powers resident in Romania.²⁵ The far-reaching nature of these minority rights clauses was unparalleled and has led scholars such as C. A. Macartney to argue that the Berlin Congress was the ‘most important of all international bodies concerned with national minority rights prior to 1919’.²⁶

The nascent minority rights regime of Europe created during the eighteenth and nineteenth centuries was only partially successful in its aims, as demonstrated by the ongoing challenge of expulsions of non-nationals during processes of nation consolidation. However, it can be argued that these regimes provided limited protection for some national minorities through the establishment of legal and normative pressure upon states to ensure the safety and wellbeing of national minorities within their borders. Yet the lack of any real enforcement mechanism meant that the normative or soft law pressure that the regimes were designed to generate was insufficient to coerce states to protect minorities within their borders. As such, discontented minority groups

²³ Fink, ‘Paris Peace Conference and the Question of Minority Rights’, p. 274.

²⁴ Parry, *Consolidated Treaty Series*, clviii, pp. 182-184.

²⁵ Ibid., p. 187. According to Jennifer Jackson Preece: ‘Behind such great power national minority dictates was the presupposition that peoples outside of Western Europe were backward if not intrinsically inferior and therefore required great power tutelage in those matters—such as national minority questions—which could potentially threaten international order and stability as defined by great power interests. In this regard, the Romanian provisions of article XLIV are similar to the treaties imposed upon China, many of which concerned the right of European civilians resident there’.²⁵ Jackson Preece, *National Minorities and the European Nation-States System*, p. 62. However, in the creation and enforcement of these minority regimes, it is clear European powers were genuinely motivated to reduce international disorder created by the emergence of these new states.

²⁶ C.A. Macartney, *National States and National Minorities*, 2nd ed. (New York: Russell & Russell, 1968), p. 166.

presented an increasingly volatile element within the international relations of Europe towards the end of the nineteenth century and beginning of the twentieth.²⁷ At the turn of the twentieth century, European international order broke down and the slow collapse of the Ottoman and Austro-Hungarian empires created another minorities crisis within Eastern Europe, resulting in large-scale violence and massacres which compelled thousands of minorities to flee their homes.²⁸ Ethnic groups fought for independence, national cohesion and territory, resulting in the emergence of weak and unstable states, and the creation of mass refugee flows within Europe. Attempts to make nationality and territorial boundaries coincide left millions without homes, including over 100,000 Turkish refugees fleeing Bulgarian forces, 177,000 Muslim refugees who came to Turkey in 1912, and over two million Poles, five million Russians and one million Germans displaced throughout Europe by the early 1920s.²⁹ By 1926 'the refugee population in Europe was estimated at 9.5 million, while more than twenty million individuals were displaced within states'.³⁰

The Consolidation of Shielding and the Emergence of Recourse Post-1919

In the aftermath of the First World War, new states emerged from the ashes of empire, all of which contained significant minority populations. International society was therefore again confronted with the need to find a means of accommodating the 'new minorities' within Europe. These events both coincided with and influenced a normative shift within international society that placed even greater emphasis on the values of self-determination and the need to protect

²⁷ Fink, 'Paris Peace Conference and the Question of Minority Rights', p. 274.

²⁸ Haddad, *Refugee in International Society*, p. 99. It should be noted that even before the outbreak of the First World War, pogroms against Jews in Russia and the Balkan wars of 1912-13 unleashed millions of refugees within Europe.

²⁹ Nevzat Soguk, *States and Strangers: Refugees and the Displacement of Statecraft* (Minneapolis: University of Minnesota Press, 1999), p. 103 and Michael Robert Marrus, *The Unwanted: European Refugees from the First World War through to the Cold War* (Philadelphia: Temple University Press, 2002), pp. 45-49.

³⁰ Haddad, *Refugee in International Society*, p. 99.

communities. President Woodrow Wilson had taken the United States into the First World War in April 1917 in order that 'the world be made safe for democracy'.³¹ The following January he delivered a speech to the United States Congress in which he outlined the 'Fourteen Points' on which he believed the post-war settlement should be based. These principles did not include national self-determination as a universal human right, as is often erroneously asserted. However, in outlining the practical proposals for the reconstitution of European order, Wilson's speech both advanced the paramount ethical importance of the protection and self-determination of communities and reflected the normative shift against conquest and dominion that had already taken place within international society.³²

At the Paris Peace Conference in 1919, the Supreme Council established the 'Committee on New States and for the Protection of Minorities'. It recommended that all of the new states recognised in the final peace treaties be compelled to sign minority rights treaties as a precondition of diplomatic recognition and, in the case of Serbia, Montenegro and Romania, as a prerequisite for the granting of specific territories. The Polish Minority Treaty was the first to be signed, on the same day as the Peace of Versailles, and is often referred to as the Little Treaty of Versailles. It was this treaty that became the template for the subsequent agreements. The minority 'regime' of the League of Nations was ultimately based on minority treaties relating to Poland, to the Kingdom of Serbs, Croats and Slovenes, and to Czechoslovakia, Romania and Greece; on minority commitments made by Austria, Bulgaria, Hungary and Turkey in peace treaties; and on unilateral commitments made by Albania, Lithuania, Latvia and Estonia.³³ These new treaties set up the League of Nations as a guarantor of minority rights and gave national minorities mechanisms

³¹ Alfred Cobban, *National Self-Determination* (London: Oxford University Press, 1945), p. 45.

³² Woodrow Wilson, Fourteen Points, Speech to Congress (8 January 1918). Available at https://avalon.law.yale.edu/20th_century/wilson14.asp. Retrieved 4 September 2018. For a fuller examination, see Erez Manela, *The Wilsonian Moment and the International Origins of Anti-Colonial Nationalism*, (New York: Oxford University Press, 2007).

³³ One non-European country, Iraq, also made a unilateral commitment in regard to its Kurdish minority. See Jackson Preece, *National Minorities and the European Nation-States System*, p. 68.

through which to appeal directly to the League.³⁴ However, they relied upon the willingness of member states of the League to intervene or take punitive action against states which violated their commitments. Minorities who had a 'kin state' willing to fight for their cause were therefore much more likely to be protected under these mechanisms. Additionally, Article XIV of the Covenant of the League of Nations established the Permanent Court of International Justice (PCIJ). Within the remit of the PCIJ was the settlement of international disputes which related to minorities in the event that a member state or the League itself requested such a judgement. This therefore gave additional redress mechanisms to those minorities who had a kin state able to pursue redress through the PCIJ. For those without a kin state, access to the PCIJ was through the League alone.

It is also at this point that the institution of Recourse first emerges. The combination of the overwhelming human crisis unfolding within Europe, the historic failure of existing minority regimes, and the shift in normative values within international society meant that any response which relied solely upon the constitutional provisions of inter-state treaties was now understood to be insufficient. It had become necessary for international society to develop an institution to protect communities that could operate in parallel with the nation-state system but that did not solely rely upon individual nation states to protect all communities within their borders. Responding to this need, the League of Nations created the High Commission for Refugees, appointing Fridtjof Nansen, a Norwegian diplomat, as High Commissioner.

National legislation referring to 'refugees' had first emerged in Europe as early as the seventeenth century alongside the development of nationalist laws.³⁵ One of the earliest examples of national laws governing refugees were those enacted in England in response to the flight of the French Huguenots. Following the revocation of the Edict of Nantes in 1685, an estimated 200,000 to 1 million Huguenots fled to neighbouring Protestant countries such as England, the

³⁴ League of Nations, 'Resolutions and Extracts of the Protection of Linguistic, Racial or Religious Minorities by the League of Nations', (Geneva: League of Nations, 1929), pp. 162–163.

³⁵ For a more detailed account of the history of legislation concerning refugees, see Grahl Madsen, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, 1966).

Netherlands, Switzerland, Norway, Denmark, and Prussia, and it was in regard to these exiles that the term ‘refugee’ was first coined.³⁶ In response to the influx of French refugees, the English government ‘made mass grants of denisation so that the refugees were granted permanent residency rights and enjoyed certain citizenship rights’.³⁷ Other European nations soon adopted similar forms of legislation in order to deal with the Huguenot refugees in the late seventeenth century as well as other subsequent refugee flows within Europe in the eighteenth century. However, while it had long been an informal practice for states to accept the refugees of friendly countries in instances of war (and the political dissidents of hostile states), prior to the twentieth century there was no *obligation* on states to provide this benefit. As such, it can be argued that the institution of Recourse, as an international obligation, only emerged in the aftermath of the First World War, in the form of the Nansen passport regime.³⁸

Nansen’s most pressing task was to deal with the flood of refugees generated by the Russian civil war, which saw approximately 800,000 refugees flee the country in just a few years. This situation was compounded when these refugees were made stateless through Lenin’s revocation of citizenship for all Russian expatriates in 1921. When initially charged with devising a response to the crisis at the Russian border, Nansen favoured repatriation of Russian refugees but, after the first few repatriated refugees were shot by the Soviets, he was compelled to look for a solution elsewhere.³⁹ Convening the Conference on the Question of the Russian Refugees on 24 August 1921, Nansen put forward proposals that Russian refugees be issued with travel documents which allowed them free passage across Europe. The passport would give the bearer protection from deportation and the right to move between countries in search of family and employment.⁴⁰ The basis of the passport regime and the practice of the reciprocal recognition of travel documents

³⁶ Haddad, *Refugee in International Society*, p. 52.

³⁷ Ibid., p. 53.

³⁸ Ibid., p. 101.

³⁹ Correspondence of the High Commission for Refugees, League of Nations Archive 45/25659/14509, correspondence relating to the expulsion of Russian and Jewish refugees from Poland.

⁴⁰ League of Nations, ‘Conference on the Question of the Russian Refugees: Resolutions Adopted by the Conference on August 24th, 1921’, Official Journal, 2nd year No. 8, October 1921, pp. 899-902.

among nation states had only recently been established under the League of Nations. Nansen's proposal was therefore to utilise this emerging practice and persuade states to recognise refugee travel documents in the same way as they recognised the new national passports.⁴¹

These proposals were accepted and the first Nansen passports were issued following an international agreement reached at the Intergovernmental Conference on Identity Certificates for Russian Refugees, convened by Nansen in Geneva from 3 July to 5 July, 1922.⁴² Hundreds of thousands of passports were subsequently issued to Russian refugees, allowing them freedom to travel and work throughout those states within Europe that recognised the documents. This was the first time that stateless people had any sort of legal identity. Following Nansen's death in 1930, the issuing of passports was handled by the Nansen International Office for Refugees within the League of Nations.⁴³ In 1933, the arrangement was broadened to also include Armenian, Assyrian, and Turkish refugees.⁴⁴ The office was closed in 1938 and passports were thereafter issued by the Office of the High Commissioner for Refugees in London. By 1942, approximately 450,000 Nansen passports had been issued and were honoured by governments in 52 countries.⁴⁵

Aside from the work of LNHCR, the League of Nations also took an active part in facilitating controlled population exchange that would otherwise have been characterised as refugee flows. The Congress of Berlin of 1912 and the Convention of Adrianople of 1913 initiated the practice of population exchange, but the transfers were terminated at the outbreak of the First World War. Following the end of the war and the emergence of new states, the practice was

⁴¹ Meanwhile, the International Labour Organisation (ILO) concluded a series of labour rights conventions which were increasingly applied to migration, following its creation in 1919. See Claudena Skran, *Refugees in Interwar Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995), p. 99.

⁴² League of Nations, 'Conference on the Question of the Russian Refugees: Resolutions adopted by the Conference on August 24th, 1921', Official Journal, 2nd year No. 8, October 1921, pp. 899-902. See also, Alexander Betts and Lena Kainz, *The History of Global Migration Governance* (Refugee Studies Centre Working Paper no 122, 2017), p. 1.

⁴³ League of Nations, 'Constitution of the Nansen International Office for Refugees', Official Journal, 12th year, No. 2, February 1931, Annex 1263, pp. 308-311.

⁴⁴ Friedrich Nansen, 'Plan for the Issue of a Certificate of Identity to Armenian Refugees', 31st May 1924. Submitted for the consideration of interested governments by Dr. Nansen, High Commissioner for Russian Refugees in execution of the Resolution of the Council of the League, adopted on September 28, 1923. League of Nations, Official Journal, No. 7-10, 1924, pp. 969-970.

⁴⁵ Documents from the League of Nations Archives, *Refugee Survey Quarterly*, Volume 22, Issue 1, 1 April 2003, Pages 71-73, <https://doi.org/10.1093/rsq/22.1.71>

reinstated under the supervision of the League of Nations. The 1919 Treaty of Neuilly saw around 100,000 Bulgarians exchanged for 35,000 Greeks. The 1923 Treaty of Lausanne then forcibly relocated 1.5 million Greeks and 400,000 Turks, while those who had fled the war were prohibited from returning. As such, the inter-war system of dealing with refugees was ultimately:

‘based on the coercive displacement of different groups of individuals (...) Whole populations could be shifted to a different political jurisdiction, where their individual rights would be protected by the new state and their sentimental communal attachments would be safeguarded via membership in a homogeneous nation. The right of states to expel or cleanse themselves of national minorities was not questioned as such, even where this resulted in mass refugee flows’.⁴⁶

Nevertheless, the issuing of the Nansen passports demonstrated a recognition on the part of European international society that, at least in the case of many refugee communities, a humanitarian solution could not be found that would have enabled the displaced to be resettled immediately in one particular territory. Rather, in this case it was clear that other states would have to share the refugee burden and, in order to do so, the international community needed to recognise refugees as stateless people.

The introduction of the Nansen passport was the first systemised institutional Recourse mechanism. It was also explicitly a measure targeted at the protection of communities rather than individuals. This is demonstrated by the observation that the Nansen passport was awarded on a group basis – one had to be a member of a designated national group in order to qualify, and each time a new national group was added to the list of those eligible for passports, this required the approval of the League of Nations. In this way, the Nansen passport system, as the first Recourse institution of international society, differed from earlier practices of sanctuary that were targeted at individuals.⁴⁷ Moreover, the Nansen passport was only ever designed as a temporary measure. Eventually, it was assumed that the holder of a Nansen passport should return to his or her country

⁴⁶ Haddad, *Refugee in International Society*, p. 120.

⁴⁷ For instance, practices of offering sanctuary at specific religious sites or offering political asylum to individuals fleeing enemy regimes, both of which dated back to antiquity and were, generally, available to all who claimed them. See, for example, Godefroy Weidmann, Ritter Marville, and Sirmond, *Codex Theodosianus* (1736), books 9 and 16, which outline the laws of religious sanctuary within the Roman Empire.

of origin and, reflecting this, the passport did not entitle them to citizenship rights in their host country nor did it give guidance to states on how to approach questions of citizenship for long-term resident refugees.⁴⁸ In the eyes of the international community, regardless of their treatment at the hands of the states from which they were fleeing, the refugees remained members of their home states. Reflecting this assumption, the constitutions of all refugee agencies during this period set out specific life spans for their respective organisations, based on the assumption that once existing refugees had been repatriated, the refugee problem would have been solved and the organisations would no longer be needed. The United Nations High Commissioner for Refugees (UNHCR) continues this tradition: it remains a temporary agency of the United Nations and its constitution requires renewal every five years.

In the 1930s, both fragile institutions of Shielding and Recourse came under strain. The minorities clauses in the various treaties of recognition were, for the most part, never truly accepted as legitimate by the states who had been coerced to enter into them and were widely viewed as a violation of the principles of sovereignty then espoused by international lawyers. The far-reaching nature of some of the treaty provisions and the limited bargaining power of the states the treaties were imposed upon lent credence to the argument that the agreements had not been entered into voluntarily, thus hindering the efforts of international society to enforce them.⁴⁹ Moreover, most minorities at the time felt that these treaties were an unsatisfactory form of indemnity offered to those communities who were denied the self-determination promised to them by Wilson's new ideology.⁵⁰ In other words, the institution of the League of Nations minorities regimes was taken as a signal by many minorities that, despite Wilson's promises of self-determination for all communities, the initial redistribution of territory and re-drawing of borders in Europe, however unsatisfactory, was a 'one-off affair' and 'not to be repeated despite the fact that many nation-

⁴⁸ Otto Hieronymi, 'The Nansen Passport: A Tool of Freedom of Movement and of Protection', *Refugee Survey Quarterly* 22: 1 (2003), pp. 36-47.

⁴⁹ Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), pp. 32-34.

⁵⁰ Andre Liebich, 'Minority as Inferiority: Minority Rights in Historical Perspective', *Review of International Studies*, 34: 2 (2008), pp. 243-263.

states continued to possess national minorities'.⁵¹ Compounding this, the League of Nations minorities regime was only truly effective in protecting minorities who had a 'kin state' able to advance their cause within the League Structures. This also had the effect of incentivising some states to invoke the provisions of the minorities' clauses to justify invading or intervening in other countries. Nazi Germany justified its invasion of Poland and Czechoslovakia, for instance, on the grounds that both Poland and Czechoslovakia were violating the treaty rights of ethnic Germans on their soil.⁵² The ambivalence of the new states of Europe to the minority regimes enforced upon them, combined with the failure to realise the self-determination ambitions of many national minorities within Europe, and the inability of the League of Nations to adequately enforce the minorities guarantees, meant that in practice many national minorities within Europe continued to face discrimination and persecution within the inter-war period.

As for the nascent refugee protection organisations, the LNHCR was dissolved in 1930. Although other international organisations were convened to take its place, including the Nansen International Office for Refugees in 1928 and the High Commissioner for Refugees from Germany in 1933, the 1930s marked a sea change in the treatment of minorities within international society. The severe economic depression that swept over Europe during this time significantly reduced the willingness of governments to bear the costs of welcoming refugees. Furthermore, the nature of the primary refugee crisis of the 1930s – the flight of Jews from Nazi-controlled territory – was particularly challenging for states to deal with in a way that would not have caused domestic unrest, given that Jews were still conceived as the perennial outsiders of European society: eventual repatriation to the territories they were fleeing did not appear realistic in the way it had done with other refugee flows.⁵³

⁵¹ Jackson Preece, *National Minorities and the European Nation-States System*, pp. 8-9.

⁵² Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), p. 29.

⁵³ Already, earlier Jewish refugee movements across Europe had led states to adopt restrictions on acceptance of refugees. According to Haddad, the 120,000 Jewish refugees who managed to enter Britain between 1880 and 1914 helped bring about the introduction of the British Aliens Act of 1905. See Haddad, *Refugee in International Society*, p. 101.

International society found itself unwilling or unable to tackle the root cause of Jewish refugee flows within Europe – their persecution in Nazi Germany. The persecution of Jews was first discussed in the Council of the League of Nations in May 1933, following receipt of a petition from a Jewish man who had lost his employment in Upper Silesia, allegedly because of his Jewish status. Minority rights guarantees were in force in this region following the 1922 Geneva Convention between Germany and Poland. However, according to Norman Bentwich, the Council did not feel that it was in a position to tackle the broader question of Jewish persecution in Germany as to do so would constitute an infringement of sovereignty. This position was formalised in 1936 when the League Assembly made clear that ‘a refugee only became a refugee on leaving his country of origin, and that the High Commissioner could, therefore, only enter into negotiations with the Governments of the countries of refuge’.⁵⁴ International inaction combined with individual states’ refusal to accept significant numbers of refugees meant that Nazi Germany’s initial policy of forced expulsions graduated to a policy of mass extermination.⁵⁵ The system of international refugee protection launched by Nansen in the aftermath of the First World War failed in its most crucial test. International order then broke down again in 1939, obliterating in the process both institutions of Shielding and Recourse.

Post-World War II and the Era of Human Rights

Although the principle of self-determination for peoples was included within the UN Charter, in reality the concept of minority treaties that emerged at the Paris Peace Conference was

⁵⁴ League of Nations, ‘International Assistance to Refugees: Report Submitted by the Sixth Committee to the Assembly’, 1936 [LN.1936.XII.B.12], 3. This was also apparent in the statement of the Dutch foreign minister who introduced the topic when it was brought before the League Assembly, who claimed, ‘We have no wish to examine the reasons why these people have left their country; but we are faced with the fact that thousands of German subjects have crossed the frontiers of the neighbouring countries and refused to return to their homes for reasons which we are not called upon to judge.’ Norman Bentwich, *The Refugees from Germany April 1933 – December 1935* (London: George Allen & Unwin, 1936), p. 58.

⁵⁵ Robert Darst, ‘Guaranteed Human Beings for Sale: The Collaborative Relocation of Jews from Axis Europe 1933-45’, *Journal of Human Rights*, 1: 2 (2002), pp. 220, 223.

all but abandoned in the aftermath of the Second World War on the grounds that such treaties were both unnecessary and destabilising. Following the experience of the inter-war years, it was believed that minority protection could induce political discord by hardening differences between communities, enabling political actors to capitalise on national, ethnic, religious, and linguistic differences to gain political power, and providing an excuse for aggressive powers to intervene in the affairs of weaker countries – thereby threatening the political stability and territorial integrity of states. In a few short years, minority rights virtually disappeared from the international vocabulary and was instead replaced by a universal standard of conduct for all states; namely the Universal Declaration of Human Rights (UDHR). To establish this new universal mechanism, international society took the unusual step of creating an entire new body of international law that relied neither upon positivist understandings of how international law can be created nor on existing bodies of customary or agreed international law. The UDHR expanded existing definitions of political communities beyond national or religious groups to those denoted by gender, language and political belief. It also demanded equal standards of all states in their treatment of all citizens, purporting to make both of these principles core facets of international law. In order to strengthen their claim to have established these principles in law, the architects of the UDHR relied heavily upon ethical imperatives, concepts of rights already abundant within national legal contexts, and supportive declarations of states.⁵⁶ Another key development during this period was the criminalisation of genocide in 1948 with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.

It was well understood in Europe at the time that the human rights approach would not give minorities what they needed to be able to maintain their languages and cultures or to exercise some form of local or regional autonomy. Without codified rights for minorities, centuries-old communities and regional cultures were unable to resist the nation-building and assimilationist

⁵⁶ Ilias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (Cambridge: Cambridge University Press, 2013), p. 12. See also Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (London: University of California Press, 2008), pp. 16-61.

policies of the State. In many cases, the homogenising efforts of state builders during the post-war period were highly successful. A case in point is Poland where ‘a negative shift in global attitude toward the rights of minority groups provided an opportunity for Polish elites to rapidly and radically reduce ethnic heterogeneity through ethnic cleansing strategies’.⁵⁷ Work by Sarah Cramsey and Jason Wittenberg compares the policies directed at social homogenisation of the Polish state in the inter-war period with the post-war years. It finds that during the inter-war years Poland abided by the letter, if not the spirit, of the minority guarantees it was party to under the League of Nations. During this time, its policies of internal homogenisation were directed at education and internal resettlement of its (primarily Ukrainian) minorities. Although Poland signed the Minorities Treaty unwillingly, it needed the support of larger allies such as Britain, France, and the United States to safeguard its sovereignty against the potential of either German or Soviet incursion.⁵⁸ By contrast, in the post-war period, ‘the diminution of minority rights opened the door for far more radical homogenisation policies. After World War II (...) the Polish state leadership forcibly relocated minority groups either to their neighbouring “homelands” or to ethnically Polish areas within the state, where they could be more easily assimilated’.⁵⁹ During the period of repatriations between October 1944 and June 1946, 482,000 Polish Ukrainians departed for the Soviet Union. According to Cramsey and Wittenberg, in rough terms, ‘300,000 were forced to do so, 100,000 were effectively coerced by nearby violence or homelessness, and the rest chose to leave’.⁶⁰ They argue that the key factor in determining Polish homogenisation policies was the political opportunity structure provided by international institutions. According to their findings, the League of Nations’ system of minority guarantees raised the cost (or at least the perceived cost) to a state of pursuing a domestic policy strategy not in accord with prevailing standards of

⁵⁷ Sarah Cramsey and Jason Wittenberg, ‘Timing is Everything: Changing Norms of Minority Rights and the Making of a Polish Nation State’, *Comparative Political Studies*, 49: 11 (2016), p. 1481.

⁵⁸ Ibid., pp. 1489-1490. They add that “[i]f the Minorities Treaty had been irrelevant to Polish elites, there would have been no reason for Warsaw in 1934 to formally renounce it, a decision that apparently was greeted with great fanfare in Poland.” Ibid., pp. 1490.

⁵⁹ Ibid., pp. 1486-1487.

⁶⁰ Ibid., p. 1495.

legitimacy – for example, through the threat of sanctions or refusal of cooperation in other areas. When these regimes were abandoned in favour of universal standards, much more radical homogenisation policies became possible.⁶¹ For some contemporary commentators, the fact that human rights norms did not protect minorities from this long-term assimilationist outcome was a regrettable limitation, but for many others it was in fact an important virtue. The experience of the League of Nations, it was felt, showed that the needs of minorities must be subordinated to the larger interest ‘in making the national state secure, and its institutions stable, even at the cost of obliterating minority cultures and imposing homogeneity upon the population’.⁶²

The UDHR was later supplemented by a range of regional human rights legal instruments including the International Covenant on Civil and Political Rights (ICCPR), which was adopted in 1966 and came into force in 1976. The ICCPR makes direct reference to minorities but frames the issue of minority rights in individual rather than collective terms. This is in keeping with the Covenant’s stated purpose, which is to codify civil and political rights in ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’.⁶³ Article 27 of the ICCPR states that persons belonging to ethnic, religious, or linguistic minorities ‘shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’.⁶⁴ This framing of minority rights focuses on the individual right to engage in activities with others of their group. It

⁶¹ Cramsey and Wittenberg, ‘Timing is Everything’, pp. 1483-1484. They continue, ‘[i]n the inter-war period, Ethnic Poles comprised just over two thirds of the population, with the remainder comprising mostly Ukrainians, Jews, Germans, and Belarusians. Assimilation through education and internal settlement policies is most likely to be successful not where the minority is relatively large and thus has the demographic reserves to resist these incursions (as in interwar Poland), but where it is relatively small and thus more vulnerable to being demographically overwhelmed (as in postwar Poland). Ethnic cleansing, by contrast, is the only feasible option for creating ethnic homogeneity in the short term when the minority is relatively large. It follows that, absent external constraints, the “rational” policy for Warsaw would have been to pursue ethnic cleansing in the interwar period and assimilation in the postwar period. That the reverse of this “rational” policy is what actually took place testifies, in our view, to the international importance of minority group rights.’ Ibid., p. 1494.

⁶² Inis Claude, *National Minorities: An International Problem* (Cambridge, Mass: Harvard University Press, 1955), pp. 80-81.

⁶³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Preamble, p. 172.

⁶⁴ Ibid., Article 27, p. 179.

does not make reference to a group's collective right of autonomy per se.⁶⁵ Similarly, Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (also adopted in 1966 and came into force in 1976) states that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.⁶⁶ It also states that '[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'.⁶⁷ However, nowhere does the ICESCR indicate that these provisions apply to non-state groupings. On the subject of minorities specifically, the only mention made is in Article 13, which gives the right to parents, should they choose, to 'educate their children in non-state schools which ensure the religious and moral education of their children in conformity with their own convictions'.⁶⁸ These instruments constituted the primary legal basis for the institution of Shielding up until the late 1980s and, even today, constitute a legal cornerstone of the institution. An analysis of the legal instruments created during the post-war period and the practice of states demonstrate that during this time the institution of Shielding shifted from a pluralist institution focused on protecting the communities not in possession of their own states to an institution based more on universalist principles of human rights. In practice, this left many minorities vulnerable to the assimilationist policies of states.

A similar shift took place in regard to the institution of Recourse as the international refugee protection regime was broadened in scope and the right to Recourse came to be grounded in notions of human rather than community rights – although community membership remained

⁶⁵ The individualistic thrust of Article 27 is underscored by the fact that it can be made the basis of a complaint before the Covenant's monitoring body, the Human Rights Committee, which is empowered to hear only individual, not collective, claims. This is in contrast to Article 1 of the Covenant, which guarantees a right of self-determination to all 'peoples'. Given its collective nature, Article 1 cannot form the basis of an individual complaint.

⁶⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Article 1, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 5.

⁶⁷ Ibid., p. 5.

⁶⁸ Ibid., Article 13, p. 8.

key to accessing the institution. The Second World War created a wave of refugees even greater than the First World War. By 1945, 30 million people were displaced within Europe in a scene described as a 'long, slow moving mass of humanity'.⁶⁹ The scale of the crisis once again forced the international community to adopt emergency measures. These included the re-introduction of the Nansen passport and the creation of various organisations aimed at repatriating refugees such as the Intergovernmental Committee on Refugees (IGCR), the United Nations Relief and Rehabilitation Administration (UNRRA) and the International Refugee Organisation (IRO). Taking over from their inter-war predecessors, these bodies were once again established with the aim of eventually 're-territorialising' the displaced. However, the constitution of the IRO, adopted by the United Nations on 15 December 1946, defined 'persons of German ethnic origin' who had been expelled, or were to be expelled from their countries of birth into post-war Germany, as individuals who would 'not be the concern of the Organisation'.⁷⁰

UNRRA was established in 1943 to coordinate and administer measures for the relief of 'victims of war' in all areas under allied control, including the repatriation of displaced persons. In May and June 1945, 80,000 individuals were repatriated every day by the UNRRA, amounting to 5.25 million displaced persons in those two months alone. However, by the beginning of 1946, there were still 1.7 million displaced persons in Europe.⁷¹ Due to changes in boundaries and widespread practices of denationalisation by states, large numbers of refugees were unable to return to their pre-war country of origin. The UNRRA was effectively disbanded by 1946 and was then superseded by the IRO. Moving from the crisis and relief approach of the UNRRA, the IRO was tasked with bringing about a 'rapid and positive solution to the problem of bona fide refugees

⁶⁹ Mark Wyman, *Displaced Persons: Europe's Displaced Persons 1945-1951* (Ithaca, New York: Cornell University Press, 1998), p. 15. See also Haddad, *Refugee in International Society*, p. 129.

⁷⁰ Haddad, *Refugee in International Society*, pp. 129-130.

⁷¹ This included 850,000 individuals refusing repatriation, 250,000 pre-war refugees such as Armenians, Assyrians, Russians and Saarlanders, and 320,000 refugees from Germany, Austria, the Sudetenland and Republican Spain. See Wyman, *Displaced Persons*, p. 37; and Leon Gordenker, *Refugees in International Politics* (New York, Columbia University Press, 1987), pp. 23-24; and Paul Tabori, *The Anatomy of Exile: A Semantic and Historical Study* (London: Harrap, 1972), pp. 283-284.

and displaced people'.⁷² It was mandated with the repatriation, protection and resettlement of the so-called 'last million' whose cases the UNRRA had failed to solve. By the end of its four-year life span the IRO had settled, resettled or repatriated over one million displaced persons and refugees.⁷³ Yet all the time it was solving existing cases, new ones were being created, with one group of refugees merely being replaced by another.

While the stated purpose of these organisations remained the same as those developed in the inter-war years, they were operating in a significantly altered normative context. The United Nations Charter signed on 26 June 1945 laid the basis for a rapid development in international law concerning the status of refugees that was located within the growing field of human rights legislation and the emerging principle of individual rights. Specifically, Article 14 of the Charter stated that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. Shortly after, the institution of Recourse became a fully-fledged practice of international society with the pronouncement of the 1951 Convention relating to the Status of Refugees and the creation of the UNHCR. Article 35 of the 1951 Convention gave the UNHCR an explicit mandate to monitor implementation of the Convention. At the time, this instrument was said to mark 'a new level of world morality', comprising 'the most comprehensive charter' regarding refugee rights and an extensive international code of ethics for refugees.⁷⁴ Building on the conventions of the inter-war period, it established a broad base of rights for refugee communities and expanded the scope of those who could claim refugee status. The right to Recourse was now given to all persons who '[a]s a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a

⁷² Aristide Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989), p. 22.

⁷³ Tabori, *The Anatomy of Exile*, p. 286.

⁷⁴ United Nations, Department of Public Information, *Magna Carta for Refugees* (New York: 1951).

nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it'.⁷⁵ Therefore, whereas in the aftermath of the First World War the LNHCR was merely empowered to develop *ad hoc* solutions to human displacement in Europe, the post-Second World War era enabled the development of a formal, treaty-based regime with mechanisms for surveillance of state compliance.

The 1951 Convention was followed by a stream of legislation specifically concerning refugees. These included the 1954 Convention Relating to the Status of Stateless Persons; the Council of Europe's 1957 European Convention on Extradition; the 1959 European Agreement on the Abolition of Visas for Refugees; the 1961 UN Convention on the Reduction of Statelessness; and the International Labour Organisation's Convention Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, also of 1961. Most multilateral instruments were based on the 1948 Universal Declaration of Human Rights.⁷⁶ A number of regional agreements on refugee protection have also since emerged that reinforce the refugee regime and adapt elements of the 1951 Convention to meet regional specificities, including the 1969 OAU Convention (Africa), the 1984 Cartagena Declaration (Latin America), and the 2004 European Council Asylum Qualification Directive (EU).

The core principle of the 1951 Convention and its supplementary regional regimes is non-refoulement, which asserts that a refugee should not be forced to return to a country where they face serious threats to their life or freedom.⁷⁷ This is now considered a rule of customary

⁷⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, p. 137.

⁷⁶ Haddad, *Refugee in International Society*, p. 78.

⁷⁷ This principle holds that 'no Contracting State shall expel or return ('refouler') a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' It is the key international legal obligation on states. See Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 117. The principle does not however act as a positive obligation on states of admission to their territory. Ibid., pp. 17, 122.

international law.⁷⁸ However, the 1951 Convention did not establish, as is often argued, a general right of Recourse – even though this right was given in the 1948 UDHR on which it was based. Rather, it initially stipulated that the right of Recourse was limited to those persons fleeing events that had occurred before 1951, which in practice was limited to events that had occurred in Europe before 1951.⁷⁹ Refugees outside of Europe were almost entirely excluded from its purview. Moreover, the Convention required that, in order to qualify for refugee status, an individual must demonstrate that their ‘well-founded fear of persecution’ stemmed from their membership of some form of persecuted community. Even in the post-Second World War era of individual rights, therefore, community membership was key to the attainment of a right of asylum. As such, while the establishment of the Convention was a significant step, it was not revolutionary and is better characterised as a systematisation of many existing rights to Recourse that had evolved within the context of the generalised breakdown of order during World War II, and applied only to those communities deemed worthy and in need of protection within that context.

The 1967 Protocol to the 1951 Convention removed the temporal limitations on who could claim the right of Recourse and also sought to emphasise the global scope of the institution.⁸⁰ However, even with the temporal limitations removed, it remained necessary for an individual to be a member of a designated community in order to qualify for protection. In the amended 1951 Convention, those communities were defined as peoples who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group

⁷⁸ Alexander Betts, ‘The Refugee Regime Complex’, *Refugee Survey Quarterly*, 29: 1 (2010), p. 12. ‘Although the applicability of the 1951 Convention has periodically been called into question in recent years, the continued relevance and importance of the principle of non-refoulement has regularly been underlined. It applies both to refugees, within the meaning of Article 1 of the 1951 Convention, as well as to asylum-seekers while their claim is being processed. Indeed, according to UNHCR’s Executive Committee, the principle holds both at the border and within the territory of a state, ‘irrespective of whether or not [the individuals] have been formally recognized as refugees.’ UN High Commissioner for Refugees (UNHCR) ExCom, ‘Non-refoulement’, Conclusion No. 6 (XXVIII) (1977) paragraph (c).

⁷⁹ UN High Commissioner for Refugees (UNHCR), *Convention and Protocol Relating to the Status of Refugees*, Resolution 2198 (XXI) adopted by the United Nations General Assembly (1967) Article I (B), available at <http://www.unhcr.org/3b66c2aa10.pdf>, retrieved 24 May 2019, p. 15.

⁸⁰ Ibid., p. 51.

or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it', without temporal or geographic limitation.⁸¹ While the removal of these limitations meant that this definition was far more expansive than those used previously, the ability to claim refugee status remained determined by community membership.

During the Cold War, the concept of asylum took on a new status within Western Europe as new flows of refugees came from the Soviet Union and those countries within its sphere of influence. These refugee flows were limited, unlike those that were caused by the outbreak of war across the continent, meaning that it was easier for Western European governments to accept asylum claimants without facing significant domestic resistance. Moreover, the refugee flows from East to West were interpreted, and exploited, as testament of the moral bankruptcy of the Soviet regime. Reserving the refugee label solely for individuals who feared 'persecution' served to promote western liberal values at the expense of Soviet values. As such, many would regard the Cold War period (at least in Europe) as the heyday of the institution of Recourse, at least for those fleeing communism.⁸² The same generosity was not applied to refugees from outside Europe where decolonisation had created seismic refugee movements in Africa and Asia.⁸³ The creation of India and Pakistan in 1947 led to the flight or expulsion of 8 million people,⁸⁴ while in the early 1960s, 150,000 Tutsi refugees fled Rwanda for Uganda, Burundi, Tanzania and Zaire. The first Sudanese war (1955-1972) created 170,000 refugees and another half a million internally displaced people, and by the end of the 1970s 250,000 refugees had fled Rhodesia. But 'these large-scale movements of refugees were constructed by western states as "national problems", outside the

⁸¹ UNHCR, *Convention and Protocol Relating to the Status of Refugees*, p. 14.

⁸² Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York: Oxford University Press, 1993) pp. 55-74.

⁸³ Ibid., pp. 61-62.

⁸⁴ Randall Hansen, 'State Controls: Borders, Refugees and Citizenship', in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014), p. 256.

scope of the international, yet in practice heavily European, refugee protection regime'.⁸⁵

According to Haddad:

'Refugees from developing countries constituted a problem for the West quite different from that posed by European refugees. First, as they were fleeing widespread violence and civil war, the 1951 Convention criterion of individual persecution rarely applied. Second, most refugee flows were regionalised and by extension therefore outside the West, both for reasons of geography and due to ethnic, linguistic and cultural ties (...) Thus the emphasis on resettlement that underpinned the entire Cold War European approach to solving the refugee problem was inappropriate for the new refugees of the 1970s and 80s'.⁸⁶

In terms of 'solutions' to the non-European displacements, the UNHCR ameliorated some of the political problems involved by focusing initially on emergency assistance in the 1960s, then repatriation and some attempts at integration in neighbouring countries in the 1970s. An estimated 15 million refugees were repatriated during the 1970s, a figure that included 10 million Bangladeshis, 200,000 Burmese, 300,000 Cambodians and 250,000 Nicaraguans.⁸⁷ In this way non-European refugees were prevented from accessing a right of Recourse to residence in Western countries while Western states could still appear to be meeting their obligations as moral international actors.⁸⁸

Agency of Postcolonial States

The agency of new actors within the international system – particularly the leaders of postcolonial states – were instrumental in shaping the development of both Shielding and Recourse in the post-war period. As noted by Phillips and Reus-Smit, resistance movements in European colonies 'directly challenged the racial and civilizational hierarchies' of international order and were 'ultimately successful in discrediting and displacing race and hierarchy as formal categories of cultural identification, so destroying colonial empires' normative foundations'.⁸⁹

⁸⁵ Haddad, *Refugee in International Society*, pp. 149-150.

⁸⁶ Ibid., p. 151.

⁸⁷ Loescher, *Beyond Charity*, p. 82.

⁸⁸ Haddad, *Refugee in International Society*, p. 151.

⁸⁹ Andrew Phillips and Christian Reus-Smit, eds., *Culture and Order in World Politics* (Cambridge: Cambridge University Press 2020), p. 36.

However, ‘in articulating their recognition claims through demands for national self-determination, anti-colonial actors reinforced the centrality of nationality as a salient axis of cultural difference’.⁹⁰ Moreover, practical considerations soon poured cold water over the ambitions of postcolonial leaders to reshape the fundamental principles of the postcolonial order. African revolutionary leaders such as Kwame Nkrumah, the first Prime Minister and President of Ghana, who vocally supported ideas of radical re-shaping of postcolonial political structures and a rejection of the Westphalian nation state prior to independence, shifted their position on this very rapidly when in power; and were instead instrumental in the reification of existing borders in Africa and the consolidation of the nation state framework.

Prior to decolonisation, Nkrumah was the leading advocate of a postcolonial revolution in practices of territoriality in Africa, calling on other leaders to eradicate ‘the artificial divisions and boundaries which are responsible for the Balkanisation of our continent’.⁹¹ At the All African Peoples Conference held in Accra in December 1958, Nkrumah led the conference to call for the abolition or readjustment of colonial frontiers at an early date.⁹² However, within a few short years the vast majority of postcolonial African leaders had reversed their positions on the question of inherited boundaries. During the process of decolonisation, the majority of the new leaders ‘realized the risk involved in abolishing the entire colonial territorial framework or in systematically revising all existing boundary regimes. Such a policy would inevitably have raised the spectre of endless conflict’.⁹³ The result was that, at the institution of the Organisation of African Unity (OAU), Article 3 (3) of the Charter affirmed every member’s adherence to ‘respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence’.⁹⁴ Even so, territorial disputes quickly dominated the agenda of the nascent regional

⁹⁰ Phillips and Reus-Smit, eds., *Culture and Order in World Politics*, p. 36

⁹¹ Cited in Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (2002), p. 116

⁹² Saadia Touval, ‘The Organization of African Unity and African Borders’, *International Organization* 21:1 (1967), p. 102.

⁹³ Lalonde, *Determining Boundaries in a Conflicted World*, p. 116

⁹⁴ Organisation of African Unity, *Charter* (1963), <https://www.refworld.org/docid/3ae6b36024.html>

organisation. In the months prior to the Cairo OAU conference in 1964, the organisation had been called upon to intervene in the Algerian-Moroccan War (Autumn of 1963) and in Somalia's dispute with Ethiopia and Kenya. Both these disputes and another, between Ghana and Upper Volta, were scheduled to be discussed at the conference.⁹⁵ An additional dispute – between Dahomey and Niger – had also arisen and, though not addressed directly by the OAU, contributed to the generally bitter sentiment regarding the subject of territory.⁹⁶ These disputes led many African leaders to fear that territorial squabbles were seriously impeding the prospects for pan-African solidarity.⁹⁷ Thus, at the Cairo meeting the Assembly of Heads of State and Government reaffirmed 'the strict respect by all member States of the Organization for the principles laid down in Article III, paragraph 3 of the Charter' and declared 'that all member States pledge themselves to respect the frontiers existing on their achievement of national independence'.⁹⁸

These efforts to strengthen state structures within Africa impacted upon the minority regimes by serving to legitimise repressive activities of postcolonial leaders. Given the impossibility of reallocating discontented peoples to another state, repressive or homogenizing practices of state-building were seen as to some extent necessary to prevent widespread insecurity. Nkrumah was a case in point of a postcolonial pro-democracy leader who, when in power, rapidly enacted repressive measures to quell threats to the security and integrity of the post-independence state. While postcolonial states were, in general, willing to sign and ratify the various human rights instruments developed in the post war period – and in many cases were instrumental in their development, their practices, particularly in relation to minority rights, often differed sharply from their rhetorical commitments. As will be detailed subsequently, many postcolonial nations remain unwilling to countenance significantly strengthened minority and indigenous rights regimes because of the perceived threat to internal and regional stability.

⁹⁵ Lalonde, *Determining Boundaries in a Conflicted World*, p. 118.

⁹⁶ Ibid., p. 118.

⁹⁷ Ibid., p. 118.

⁹⁸ OAU, *Resolution on Border Disputes*, in Ian Brownlie, ed., *Basic Documents in African Affairs* (Oxford: Clarendon Press, 1971), p. 360.

However, while international pressure to respect minority rights was in many ways resisted by postcolonial African leaders, they played a much more positive role in developing the institution of Recourse. During the 1960s, most of the world's refugee populations were in Africa.⁹⁹ These refugee communities came primarily from territories under Portuguese colonial administration and the white racist regimes of South Africa and Zimbabwe, as well as those post-independence states undergoing severe internal conflict.¹⁰⁰ UNHCR struggled to respond effectively to the burgeoning refugee crisis in Africa as refugee populations there were not covered by the 1951 Refugee Convention. Political considerations were a further complication: Portugal objected to UNHCR identifying those fleeing their colonial administration as refugees.¹⁰¹ As a result, Felix Schnyder, who was High Commissioner from 1961 requested that UN General Assembly extend his authority to respond the growing extra-European refugee crisis. In 1961, the United Nations gave UNHCR the authority to assist both 'refugees within his mandate and those for whom he extends his good offices'.¹⁰² This allowed UNHCR to avoid indirect accusations against Portugal or the newly independent states of persecuting their people by 'obviat[ing] the need to make individual determinations of eligibility'.¹⁰³ In 1965 the distinction between refugees who fell under the formal mandate of the UNHCR and those for whom the good offices were extended was terminated when the General Assembly requested the High Commissioner to provide protection and permanent solutions to all refugee communities within his competence'.¹⁰⁴

This still left gaps in coverage. UNGA resolutions making new refugee communities the concern of UNHCR were recommendations only and did not incur obligations on sovereign states. Stemming from a desire to develop an institution of recourse that was fit for purpose in the

⁹⁹ Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1996), p. 77.

¹⁰⁰ Ibid., pp. 77–78.

¹⁰¹ Ibid., pp. 77–78.

¹⁰² UN General Assembly, *Report of the United Nations High Commissioner for Refugees*, 18 December 1961, [A/RES/1673\(XVI\)](#).

¹⁰³ Loescher, *Beyond Charity*, p. 80.

¹⁰⁴ UN General Assembly, *Reports of the United Nations High Commissioner for Refugees*, 7 December 1965, [A/RES/2039\(XX\)](#).

African context – and to show solidarity with communities under Portuguese colonial administration and white racist rule – the Organisation of African Unity (OAU) began developing plans to establish an African Refugee Convention independent of the 1951 Convention. Both UNHCR and Western states feared that such a move could ‘politicise refugee problems on the African continent and act as a possible conflict of authority and source of competition to the (supposedly) universal regime’.¹⁰⁵ This spurred on existing efforts to broaden UNHCR’s mandate through the development of a ‘protocol’ to supersede the geographic and temporal limitations of the 1951 Convention. In 1967, this protocol was finalised by Schnyder’s successor Sadruddin Aga Khan, and quickly signed and ratified by a large number of states, including some that were not signatories to the 1951 Convention (although some that were signatories to the Convention, such as Turkey, did not accede to the Protocol).

The OAU were convinced to adopt a complementary instrument to the global regime in the form of the 1969 Convention, rather than a separate declaration. The 1969 Convention still pushed the boundaries of the institution of Recourse by stating that the term ‘refugee’ should apply to ‘every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’.¹⁰⁶ This expanded the definition of refugee beyond those that were directly persecuted to include a wide range of other communities forced to leave their homes because of widespread violence.

The expansion of UNHCR’s mandate to include populations outside of Europe brought with it a new kind of refugee problem. For the majority of these refugee communities, resettlement either in their host state or in the developed world was not a viable option. UNHCR’s mandate therefore pivoted from ensuring protection and facilitating resettlement towards providing large

¹⁰⁵ Haddad, *The Refugee in International Society*, pp. 154-155.

¹⁰⁶ Organization of African Unity Convention, *Governing the Specific Aspects of Refugee Problems in Africa*, CM/267/Rev. 1 (10 September 1969).

scale humanitarian assistance for refugee populations until such a time as they could safely return to their home country.¹⁰⁷ There were two primary regional exceptions to this – Latin America and Southeast Asia. The actions of states within these regions were also fundamental to the evolution of the institution of Recourse. Over the course of the 1970s, Latin America underwent a series of internal crises including military coups in Argentina, Chile and Uruguay. The repressive policies of military juntas created mass refugee flows during this period. Contrary to the experience of Africa, the resettlement effort for these refugees, both in the West and in neighbouring states, was highly successful (with the sole exception of the United States). Latin America had a long tradition of the practice of asylum prior to this crisis and '[m]ost Latin American governments responded by filling their embassies to capacity with refugees seeking diplomatic asylum'.¹⁰⁸ This show of regional solidarity spurred a rapid response by UNHCR and other agencies as well as greater willingness on the part of Western governments to facilitate resettlement. As a result, the Latin American crises 'spawned a worldwide diaspora, as the exiles were resettled in forty-four different countries with the assistance of the UNHCR'.¹⁰⁹

The Indochina refugee response was also characterised by an initially broadly successful repatriation programmes, albeit for different reasons. Beginning in 1975, the region experienced a major refugee crisis, driven by the war in Vietnam as well as internal conflicts in Cambodia and Laos. In this instance, neighbouring states were unwilling to countenance either integrating Vietnamese, Cambodian or Laotian refugee communities or maintaining them in refugee camps within their territories indefinitely. As such, they made clear that first entry would only be granted to these refugees on the understanding that the West made firm commitments to settle them permanently outside of the region.¹¹⁰ Both Malaysia and Thailand made good on their promises to turn away these refugees if these commitments were not forthcoming and pushed away boatloads

¹⁰⁷ Loescher, *Beyond Charity*, p. 83.

¹⁰⁸ *Ibid.*, p. 85

¹⁰⁹ *Ibid.*, p. 86

¹¹⁰ *Ibid.*, pp. 86-87

of refugees, resulting in significant casualties. At a conference in Geneva in 1979 a solution was reached wherein over thirty countries agreed to resettle these refugees in exchange for Thailand and Malaysia granting first entry.¹¹¹ Over time, this generous treatment incentivised greater movements of people and compassion fatigue set in within resettlement nations, leading to a long backlog of cases in first entry states.¹¹² As a result, the majority of Southeast Asian countries initiated ‘a series of deterrent measures to discourage new and future arrivals (...) including detention in closed camps, forcible repatriation, push-offs, and more drownings at sea’.¹¹³ Contrary to the Latin American case, where regional solidarity spawned a successful global repatriation programme, the actions of Southeast Asian states – although initially successful – led over time to a decreasing willingness of Western states to accept largescale resettlement programmes and left a legacy of policies deeply hostile to the effective functioning of the institution of Recourse in the region. Alexander Betts has highlighted that international institutions, particularly UNHCR, also played a key role in the success or failure of North-South cooperation in these cases. Failure on the part of UNHCR to persuade Northern and Southern countries that their interests were aligned in the African context hampered cooperation and limited Northern willingness to support or resettle African Refugees. In both the Latin American and Indochinese cases, however, Betts argues that UNHCR was able to more effectively align disparate interests and facilitate cooperation.¹¹⁴

The End of the Cold War and the Resurgence of Pluralism

Since the collapse of the Soviet Union, or even shortly before, there has been something of a resurgence in focus on group rights, often as a sub-set of human rights, but also through a

¹¹¹ Loescher, *Beyond Charity*, p. 87.

¹¹² Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009), p. 113.

¹¹³ Loescher, *Beyond Charity*, p. 87

¹¹⁴ Betts, *Protection by Persuasion*.

resurrection of pre-1945 ideas on the needs of national (and now also indigenous) minorities.¹¹⁵ A key forum for this development has been the United Nations. In 1992, the General Assembly passed the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. The preamble to this declaration locates this document within the broader United Nations' commitment to human rights. However, its contents bear some resemblance to the language of the League of Nations' minorities regime in that the preamble of the text also emphasises that the promotion and realisation of the rights of persons belonging to minorities would contribute to the strengthening of friendship and cooperation among peoples and states, and that the United Nations has an important role to play regarding the protection of minorities.¹¹⁶ The contents of the declaration also mark a substantive shift from the focus on non-discrimination or assimilation of minorities as citizens of states evident in the post-1945 UN documents in favour of a policy of protecting the autonomy of minority communities and the internal diversity of states. It does not itself contain any specific enforcement measures despite initial proposals to do so because agreement on these was not forthcoming. In addition to passing this declaration, the UN also established the Working Group on Minorities in 1995 as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights. In 2007, the Working Group was replaced by the Forum on Minority Issues, established by Human Rights Council Resolution 6/15.¹¹⁷ During this period, the UN also appointed several Rapporteurs to oversee a number of issues relating to minorities, including the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, first appointed in 1993; the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, first appointed in 2001; and the Independent Expert on minority issues, first appointed in 2005 (now the Special Rapporteur on Minority Issues).

¹¹⁵ Kymlicka, *Multicultural Odysseys*, p. 4.

¹¹⁶ UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135.

¹¹⁷ UN Human Rights Council (UNHRC), Forum on Minority Issues, Resolution 6/15, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_15.pdf, retrieved 15 February 2019.

These developments at the UN have been complemented by the development of regional mechanisms for minority protection over the same period. In 1992, the Organisation for Security and Cooperation in Europe (at that time, the Conference on Security and Co-operation in Europe, CSCE) established the office of the High Commissioner on National Minorities. Its creation was decided by the participating states in the Conference on Security and Co-operation in Europe in Helsinki, and contained in the Helsinki Summit Declaration.¹¹⁸ The High Commissioner is intended to be an instrument of conflict prevention at the earliest possible stage, by providing ‘early warning’ and ‘early action’ with regard to tensions involving national minority issues which, in the judgement of the High Commissioner, have the potential to develop into a conflict within the OSCE area, affecting peace, stability or relations between participating states, requiring the attention of, and action by, the OSCE.¹¹⁹ Another example is the creation of the European Commission against Racism and Intolerance (ECRI), under the auspices of the Council of Europe. ECRI was set up by the first Summit of Heads of State and Government of the Council of Europe in 1993 as a body entrusted with the task of combating racism, racial discrimination, xenophobia, anti-Semitism and intolerance in greater Europe.¹²⁰ The Organisation of African Unity and its successor, the African Union, have developed comparable mechanisms with a basis in the African Charter on Human and Peoples’ Rights. The primary agency dedicated to monitoring and enforcement is the African Commission on Human and Peoples’ Rights. An additional protocol to the charter has now been adopted and has entered into force providing for the establishment of an African Court on Human and Peoples’ Rights.¹²¹

¹¹⁸ Organisation for Security and Cooperation in Europe (OSCE), ‘Helsinki Summit Declaration’ in *CSCE Helsinki Document 1992: The Challenges of Change* (1992), available at <https://www.osce.org/mc/39530?download=true>, retrieved 10 February 2019, p. 9.

¹¹⁹ OSCE, ‘Helsinki Summit Declaration’, pp. 9-10.

¹²⁰ Council of Europe, *Vienna Declaration* (9 October 1993), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680536c83, retrieved 14 December 2018.

¹²¹ African Commission on Human and Peoples’ Rights, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, available at <https://www.achpr.org/legalinstruments/detail?id=45>. Retrieved 30 July 2019.

Today, therefore, the institution of Shielding is comprised of various international legal instruments at both the global and regional level. International bodies such as the United Nations (UN), the Council of Europe (COE), the Organisation for Security and Cooperation in Europe (OSCE) and the African Union perform a rule- or norm-making function – albeit one that is often consensus-based and generally without the power of compulsory enforcement. Although in many cases these declarations and conventions are not judicially enforceable, the judicial avenues for redress, particularly those based in regional mechanisms, are increasing. International society has therefore now come to include, alongside those traditional rights which states could claim against one another, a growing number of human and national minority rights that non-state communities can claim against states.

Scholars such as Kymlicka argue that, taken together, these developments show that post-1945 models of assimilationist and homogenising nation-states are increasingly being contested, and often displaced, by newer ‘multicultural’ models of the State and of citizenship.¹²² The last twenty-five years in particular have seen a proliferation of efforts to develop international norms of minority rights, at both the global and regional levels. This has led some to claim that an underlying policy preference for pluralism now ‘shapes the development of international norms, processes and institutions in the field of minority protection, which aims to safeguard the existence and identity of minority groups through spatial and personal forms of autonomy’.¹²³ As a result, it is contended that ‘minority protection is integral to a civilised standard of international good governance that legitimises states’.¹²⁴ Particular advances have been made in the realm of rights for indigenous persons. However, it should be noted that, despite these significant normative and legislative advances, many states remain wary of conceding these rights to minorities within their

¹²² Kymlicka, *Multicultural Odysseys*, p. 3.

¹²³ Li-Ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Boston: Martinus Nijhoff Publishers, 2005), p. xxxi.

¹²⁴ *Ibid.*, p. xxxii.

borders and there is sustained contestation of many of these developments in international and regional fora, as will be explored in the next chapter.

By contrast, as the institution of Shielding has gained strength – at least in terms of its integration into international law – the institution of Recourse has been gradually eroded since the end of the Cold War. Europe’s insulation from the refugee crises in the developing world was brought to an abrupt end in the 1980s as the costs of inter-continental transportation declined and the number of refugee migrations surged. Following the collapse of the Berlin Wall and the removal of the ideological incentive to welcome refugees from Eastern Europe, the idea of the refugee changed from the dissidents fleeing communism to those from beyond Europe’s shores fleeing not persecution but state fragility and economic deprivation. The significant increase in refugee numbers in the 1990s and early 2000s led to claims in many Western countries that their governments had ‘lost control of their borders’. Governments soon sought to reassert control over their borders through efforts to block asylum seekers’ access to their territory. They expanded visa requirements, introduced substantial fines for airlines that allowed asylum seekers to travel without correct documentation,¹²⁵ and enlarged deportation mechanisms.¹²⁶ In practice, this has resulted in developed states being able to obfuscate their commitments under the Convention while justifying these actions under the guise of legitimate governance of the cross-border movement of peoples. Despite the widespread acceptance of the institution of Recourse by international society in principle, few of the world’s citizens or governments appear to agree that they should shoulder their fair share of the burden of this institution.¹²⁷ Transposition of international commitments into domestic law has also been haphazard, and court rulings in Western countries have become eccentric:

¹²⁵ Hansen, ‘State Controls: Borders, Refugees and Citizenship’, p. 254.

¹²⁶ A 2011 study found that, in the U.S. and the UK, developments in infrastructural capacity and legal powers to deport, along with a new-found public and official enthusiasm for expulsion, had seen a tripling and doubling, respectively, of the number of non-citizens who leave these states under the threat of coercion since 1997. Bridget Anderson, Matthew Gibney, and Emanuela Paoletti, ‘Citizenship, Deportation and the Boundaries of Belonging’, *Citizenship Studies*, 15: 5 (2011), p. 550.

¹²⁷ Robert Mandel, ‘Perceived Security Threat and the Global Refugee Crisis’, *Armed Forced and Society*, 24: 1 (1997), p. 87.

‘[R]efugees in identical circumstances will be granted asylum in the courts of some nations but refused it in others; even within the same country, they will be granted asylum in some years but not others. Eccentricity is compounded by systemic omissions. For fifteen years, Somalis fleeing the ultimate state collapse did not qualify for asylum in some European countries because they had not been “persecuted”. What began as coherent common rules for responding to persecution have evolved into chaotic and indefensible responses to the problem of mass flight from disorder’.¹²⁸

As a result of Western policies of obfuscation, most of the world’s refugees are now hosted by developing states, and there are no formal obligations on developed states to contribute to ‘burden-sharing’ through resettlement or financial support. In 2018, almost 90 per cent of the world’s refugees were located in the developing world and just ten countries housed 60 per cent of the global refugee population.¹²⁹ This places significant burdens on those countries that are the direct recipients of refugee flows in ways that clearly impact upon their populations. Moreover, it gives rise to perverse incentives on the part of first-arrival states to mistreat refugees or refuse to abide by their commitments under the Convention unless developed countries agree to resettle them or contribute to burden-sharing.¹³⁰ This means that refugees often receive only the most basic form of Recourse and are even vulnerable to active mistreatment by their host states who adopt such a strategy in order to pressure wealthy states into lending greater support and to deter the arrival of further refugees. As a result, there is now almost universal non-compliance with the socio-economic rights specified in the Convention: ‘Most host states place serious restrictions on the right to work; nor are these the only parts of the Convention that are ignored. From Australia to Kenya to Jordan to Hungary, governments turn away refugees at the border, or threaten to expel them, without even assessing their claims’.¹³¹

In recent years, there have been a number of attempts to expand the definition of what counts as a refugee in order to provide protection to communities previously unrecognised by international society. Some of these have achieved limited success. For example, international

¹²⁸ Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (London: Penguin Books, 2018), p.5

¹²⁹ Betts and Collier, *Refuge*, p. 1.

¹³⁰ Christopher Croke, *Moral Hostages: Refugee Co-operation and Burden Sharing During the Indochinese Refugee Crisis 1975-1996*, DPhil, University of Oxford (2015).

¹³¹ Betts and Collier, *Refuge*, p. 7.

LGBT rights organisations have campaigned consistently for greater access to Recourse for LGBT refugees fleeing violently homophobic regimes despite the issue of sexuality not being mentioned explicitly within the 1951 Convention. Refugee claims on the basis of sexual orientation started to emerge at the beginning of the 1990s.¹³² Although, especially in early cases, such claims were usually based on political opinion or religion, sexual orientation became accepted as the basis for a particular social group claim in most major refugee-receiving nations by the mid-1990s.¹³³ In 2008 the UNHCR published guidance on the issue, which encouraged states to accept claims relating to sexual orientation and gender identity.¹³⁴ They grounded this claim in the wording of the 1951 Convention which stated that ‘membership of a social group’ which entailed a well-founded fear of persecution was sufficient to allow individuals to claim asylum.

However, achieving asylum or refugee status on the basis of sexual orientation remains linked to a large number of legal and procedural obstacles.¹³⁵ Despite recognition on the part of Western governments that LGBT persons face significant persecution in many parts of the world, applications based on LGBT status remain among the least likely to succeed. Recent data from the UK Home Office, for example, suggests that the overwhelming majority of those who claim asylum on the basis of LGBT status are rejected.¹³⁶ Moreover, in a 2015 report on the UNHCR’s Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees, the UNHCR noted that: ‘LGBTI asylum-seekers and refugees are subject to severe social exclusion and violence in countries of asylum by both the host community and the broader

¹³² Jenni Millbank, ‘A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003’, *Social Legal Studies*, 14: 1 (2005), p. 116.

¹³³ Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’, *The International Journal of Human Rights* 13: 2/3 (2009), p. 405.

¹³⁴ UN High Commissioner for Refugees (UNHCR), ‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, Protection Policy and Legal Advice Section, Geneva (2008), p. 4. Available at <https://www.refworld.org/pdfid/48abd5660.pdf>, retrieved 11 June 2019.

¹³⁵ See Janna Weßels, ‘Sexual Orientation in Refugee Status Determination’, *Working Paper Series 74*, University of Oxford Refugee Studies Centre (2011).

¹³⁶ May Bulman, ‘Number of LGBT+ asylum seekers refused by Home Office soars by 52%’, *The Independent*, Thursday 29 November 2018. Available at <https://www.independent.co.uk/news/uk/home-news/lgbt-asylum-seekers-home-office-uk-applications-2018-a8658951.html>, retrieved 16 July 2019.

asylum-seeker and refugee community'.¹³⁷ In part, the high refusal rates are likely a result of the enhanced challenge of proving membership of the LGBT community as compared to an ethnic or religious community. However, it is likely that these high refusal rates are also due in part to the resistance to accept the LGBT community *as a community* and thereby individual members as deserving of the institution of Recourse. In the 2015 report, the UNHCR observed that no UNHCR office reported having facilitated voluntary repatriation of asylum seekers whose claims were based on their LGBT status. Instead, nearly all pursued resettlement as the primary option.¹³⁸ This again makes the LGBT community relatively unique within the broader institution of Recourse as it is one of the only communities for whom resettlement is considered the primary option.

Similarly, despite overwhelming pressures in the form of environmental refugee flows from the poorest parts of the developing world, in particular the Horn of Africa, international society has resisted calls to open up the categories of refugees to include those fleeing poverty and starvation. This refusal is difficult to justify if one examines the question through an individual lens, since it is clear that many who are fleeing the Horn of Africa would otherwise die of deprivation in the same way that those fleeing war or persecution would die were they to stay in their own country. However, by casting these groups as 'economic migrants', international society has successfully refused to grant these people legitimacy in their calls for a right of Recourse.¹³⁹ As a result, a growing number and a diverse range of migrant populations 'languish in various states of limbo, informality and danger because the current system of migration governance simply has no place for them to go'.¹⁴⁰ These include irregular migrants not accorded refugee status but nonetheless desperate enough to take illegal and dangerous routes to exit their home country in

¹³⁷ UN High Commissioner for Refugees (UNHCR), Division of International Protection, 'Protecting Persons with Diverse Sexual Orientations: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees' (2015), p. 6.

¹³⁸ UNHCR, Division of International Protection, 'Protecting Persons with Diverse Sexual Orientations', p. 6.

¹³⁹ Alexander Betts, *Global Migration Governance* (Oxford: Oxford University Press, 2011), p. 2.

¹⁴⁰ Darshan Vigneswaran, *Territory, Migration and the Evolution of the International System* (London: Palgrave Macmillan, 2013), p. 2.

search of a better life, as well as ‘the several million people who now live illegally in the United States in defiance of immigration law; [and] the thousands who have died in the Mediterranean and Aegean seas en route to a better life in Europe’.¹⁴¹ Many would contend that as these numbers continue to increase, it is becoming increasingly difficult to view these displaced communities as evidence of mere ‘inefficiencies’ or ‘gaps’ in the system. As argued by UNHCR ‘[t]oday, more than ever, refugees are part of a complex migratory phenomenon, in which political, ethnic, economic, environmental and human rights factors combine and lead to population movements’.¹⁴² Despite significant efforts on the part of NGOs and activists, in practice international society has been unwilling to broaden definitions of what counts as a community for the purpose of access to secondary pluralist institutions.

Summary

The history of the development of the institutions of Shielding and Recourse lends weight to the critics of the new pluralist position in so far as it demonstrates the destruction wrought upon national and ethnic communities during both the emergence and expansion of international society. The vast majority of world states did not emerge from ethnically homogenous territories and, far from providing a safe haven to all communities within their bounds, states have historically engaged in homogenising projects which resulted in the oppression, displacement or even genocide of minority communities. Even at times of systemic change, when borders were collectively redrawn it was simply not possible – nor in the interests of powerful states – to provide a state for all peoples who qualified for self-determination.¹⁴³ The institutions of Shielding and Recourse were created and developed in response to the failure of the state-based international order to fully realise the principles upon which it was nominally based.

¹⁴¹ Vigneswaran, *Territory, Migration and the Evolution of the International System*, p. 2.

¹⁴² UN High Commissioner for Refugees (UNHCR), ‘Policy Challenges of the New Diasporas: Migrant Networks and their Impact on Asylum Flows and Regimes’, 30 May 1999, ISSN 1020-7473, available at: <https://www.refworld.org/docid/4ff5948e2.html>. Retrieved 30 August 2019, p. 3.

¹⁴³ UNHCR, ‘Policy Challenges of the New Diasporas’, p. vii.

Their ability to protect these communities was compromised from the outset. Both institutions were designed by European (or Western) order builders in such a way as facilitated their interests and reflected their values. In the Final Act of the Congress of Vienna, the Berlin Convention and the Paris Peace Conference, the victors imposed upon weaker or defeated states minorities clauses that they did not impose upon themselves with the aim of shoring up international stability. Even the post-1990 revival of minority rights has been predominantly led by Western states. Similarly, the creation of the institution of Recourse, although lauded as ‘a new level of world morality’ was, in reality, a measure limited to those refugee communities whose displacement impacted upon European order and with whom Western leaders felt some sense of commonality.¹⁴⁴

That said, it is important not to dismiss the role of normative change in the development of the institutions. The development of both Shielding and Recourse was heavily influenced by shifts in international ethics and a desire to learn from the lessons of history. While their design was dictated by the interests of powerful states, over time both institutions have proven to be a vehicle through which oppressed or marginalised groups can challenge prevailing hierarchies and seek recognition. The international organisations which were the primary conduit for the institutions have also proven important normative actors in their own right, often expanding the scope of both institutions over time.

¹⁴⁴ United Nations Department of Public Information, *Magna Carta for Refugees* (New York: 1951).

Chapter Four: Evaluating Pluralist Institutions in Contemporary International Society

The question of how we can measure the effectiveness of pluralist institutions in contemporary international society is a challenging one. What metrics should we use to evaluate such institutions? A pluralist conception of justice argues that ‘communities’ are the morally valuable units of international society and that concepts of justice derive from and are based within communities. There are three main arguments presented within the new pluralist literature as to why communities should be treated as proxy units of concern for individuals and as units of moral concern in themselves; an argument that moral duties are created through the pursuit of collective enterprise, an argument that communities provide cultural and social benefits to their members, and an argument that communities are the context in which individuals are able to obtain rights. Of all of these arguments, it is the observation that communities are required in order for individuals to have the ‘right to have rights’ that is most persuasive and provides the clearest metric to guide evaluation of the pluralist institutions of international society. From a community protection perspective, therefore, the key question that this chapter asks is to what extent does the institution provide members of a given community with the ‘right to have rights’. This is supplemented by a broader consideration of the extent to which institutions creates conditions in which communities can provide morally valuable benefits to their individual members in the form of collective welfare (measured through an analysis of standard indicators of community health – including population demographics, as well as health and socio-economic indicators) and notions of belonging.

The new pluralists also advance three main arguments for why tolerance of diversity should be the governing principle of international society; a functionalist argument based upon ‘mutual learning’; an argument from moral relativism, and an argument from moral pluralism. Having discarded the functionalist and relativist arguments, it is clearly the logic of moral pluralism that

should guide an evaluation of the pluralist institutions of international society. This chapter will therefore seek to evaluate the extent to which these institutions promote a genuinely pluralist ethos. This includes whether such institutions promote international and inter-communal diversity. Measuring international diversity is challenging as many of the factors – such as preservation of culture and autonomy – are diffuse, difficult to measure quantitatively, and not easily comparable across case studies. There are also no existing methods within the literature that address this question. One method proposed by this thesis is to take rates of language retention as a proxy for the preservation of diversity. This approach will necessarily miss many nuances of international diversity and does not account for many aspects of political communities which, although not language based, are morally valuable. However, rates of language retention provide a numerically useful and comparable measure of international diversity. It is also an important measure given the centrality of language to the development and preservation of political communities. Perhaps most importantly, it is not clear that any alternative metric is readily available. While not claiming to capture the full extent of patterns of international diversity, this chapter hopefully provides some initial insight into this question which may then spur further research on this topic.

Both of the sections for Recourse and Shielding begin with a general analysis of their contemporary functioning. This includes the extent to which both institutions are embedded within international law and general patterns of state compliance or deviance. Following this, the chapter then goes on to consider four detailed case studies of the operation of the institutions at a particular time and place. The first case study investigates existing protection mechanisms for Romani communities in Europe; the second examines the development of indigenous people's rights regimes at the UN; the third provides an analysis of the creation and development of the United Nations Relief and Works Agency for Palestine Refugees in the Near East; and the fourth details the international response to the Great Lakes refugee crisis. Each case study has been chosen on the basis that it highlights particular issues facing the institutions. This logic of case

study selection is probably best characterised as what Skocpol and Somers term a *contrast of contexts*. The purpose of these cases is to ‘bring out the unique features of each particular case included in their discussions, and to show how these unique features affect the working-out of putatively general social processes’.¹ The findings of the case studies are not therefore designed to be generalisable in themselves. Rather, they are designed to shed light on specific instances of what may be general challenges that they imperfectly represent and to extend the exploration of pluralist institutions beyond what could be achieved by descriptive history or macroanalysis.

Overview of the Efficacy of Shielding

As detailed in the preceding chapter, throughout most of history the institution of Shielding has been ineffective at protecting communities. Although Europe was the birthplace of minority rights regimes, the states of Europe today are far less internally diverse than they were at the turn of the twentieth century and even less diverse than they were at the turn of the nineteenth century – a direct result of ethnic cleansing and the massacre of minorities. However, recent decades have witnessed a resurgence in international focus on minority rights. Indeed, scholars such as Will Kymlicka have argued that there has been a revolution in relations between states and national minorities. These developments are reflected in the increasing acceptance of religious and cultural rights for immigrant groups, autonomy and language rights for national minorities and the recognition of land claims and self-determination rights for indigenous peoples. Many believe that these developments offer the promise of significantly improving global protection for vulnerable minorities and of rectifying the injustices that took place during the emergence and consolidation of the Westphalian system of sovereign nation-states.²

¹ Theda Skocpol and Margaret Somers, ‘The Uses of Comparative History in Macrosocial Inquiry’, *Comparative Studies in Society and History*, 22: 2 (1980), p. 178.

² Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), p. 5.

The United Nations has been the core forum in which this resurgence has occurred, although these developments have rippled out to other regional organisations. The Organisation for Security and Cooperation in Europe (OSCE) High Commissioner on National Minorities is a key normative actor in this field,³ as are EU organisations and the African Union. The contents of the international instruments and declarations since the end of the Cold War show a clear shift from an emphasis on non-discrimination and assimilation of minorities in the post-war period to a recognition of the importance of protecting the autonomy of minority communities and the internal diversity of states. The developments in minority rights in Europe produced results earlier and eventually went further than comparable processes at the UN, but these positive developments have not only been confined to Europe. Rather, there is strong evidence from Latin America that minority protection regimes developed there have ‘provided a foothold for indigenous peoples to demand and achieve substantive redistributions of powers and resources, not just symbolic recognition’.⁴ Particular advances have been made in the field of indigenous rights, despite opposition by the main European settler states. The United Nations Declaration on the Rights of Indigenous People, adopted in 2007, established a universal framework of minimum standards for the protection of indigenous peoples, elaborating on existing human rights standards and codifying a right of indigenous self-determination. Initially opposed by the U.S., Canada, Australia and New Zealand, all four states have now reversed their position and support the declaration.

However, the proliferation of international instruments and mechanisms to protect minority rights has not been uncontested and there remain significant impediments to the effective and equal implementation of the institution of Shielding. These include the issue of definitions – of deciding who does and does not qualify for protection. Many states have fiercely rejected claims by groups to be recognised as ‘minorities’, cognisant of the legal and normative burden that such recognition would confer upon the state. Indeed, some states – such as France and Greece – refuse

³ Jennifer Jackson Preece, ‘The High Commissioner on National Minorities as a Normative Actor’, *Ethnopolitics and Minority Issues in Europe*, 12: 3 (2013), pp. 77-82.

⁴ Kymlicka, *Multicultural Odysseys*, p. 250.

to recognise that they have national minorities at all.⁵ Resistance to minority recognition has also been a noticeable feature of postcolonial states. As argued by Jackson Preece, ‘the newly decolonised states of Africa and Asia were keen to recognise only the rights of peoples as defined by the prior colonial jurisdictions and not the many diverse ethnic, religious or linguistic communities within them that might otherwise usurp the authority and influence of emerging postcolonial elites’.⁶ When Article 27 (the ‘minorities clause’) of the International Covenant on Civil and Politics Rights (ICCPR) was being debated, many former colonial states insisted that the provision did not apply to them and instead it only applied to the historic minorities of Europe that had been created through shifting boundaries of population transfer. The representative from Brazil is quoted by Thornberry as saying at the time that Brazil ‘did not recognise the existence of minorities on the American continent (...) the mere coexistence of different groups in a territory under the jurisdiction of a single State did not make them minorities in the legal sense. A minority resulted from conflict of some length between nations, or from the transfer of a territory from the jurisdiction of one State to that of another’.⁷ Similarly, many African states involved in the drafting of Article 27 insisted that the provision didn’t apply to them either and that the concept of ‘minorities’ only applied to European-style ‘national minorities’.⁸ Many countries continue to explicitly exclude Roma and other nomadic communities from the category of national minority on the grounds that they are a non-territorial minority.⁹

There is also significant inconsistency in the rights that have been achieved for indigenous peoples and those that have been endorsed at the international level for national minorities. The below case study on the successes of the UN Working Group on Indigenous Populations demonstrates that international society has now recognised a right to internal self-determination

⁵ Jennifer Jackson Preece, ‘Democracy, Minority Rights and Plural Societies: Plus ça Change?’, *Sociology Compass*, 2: 2 (2008), p. 611.

⁶ Ibid., p. 614.

⁷ Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), p. 154. Although, as noted later, Brazil has in more recent years been much more forward-leaning on minority rights.

⁸ Kymlicka, *Multicultural Odysseys*, p 200.

⁹ Council of Europe, ‘Framework Convention for the Protection of National Minorities: Collected Texts’, 8th edition (2018), pp. 77-82.

for indigenous peoples and this has resulted in significant positive dividends for those groups. The UN's approach to what it deems non-indigenous minorities, by contrast, has been less successful. Its Working Group on Minorities 'has not become the locus of a global network in defence of minority rights [and] the UN's declaration on minority rights (...) has not had nearly the same public impact and is rarely invoked by minorities around the world'.¹⁰ Instead, the UN has drawn a sharp distinction between the rights that should be accorded to indigenous peoples and those that should be awarded to other national minorities. Specifically, it has adopted an integrationist approach to national minorities and an accommodation approach to indigenous peoples.

This bifurcation has been justified on the grounds that '(a) minorities seek institutional integration while indigenous peoples seek to preserve a degree of institutional separateness; (b) minorities seek to exercise individual rights while indigenous peoples seek to exercise collective rights; [and] (c) minorities seek non-discrimination while indigenous peoples seek self-government'.¹¹ In reality, the majority of national minorities also seek the same goals as those ascribed above to indigenous peoples, and the practice of Western states has often been to grant such rights to their national minorities. In the early 1990s, 'it was precisely the upsurge of ethnic conflicts involving autonomy-seeking sub-state nationalist minorities that led the UN to take an active interest in formulating standards regarding minorities'.¹² Reflecting this inconsistency, the UN has often recommended accommodationist approaches to non-indigenous national minorities in specific cases.

Rather than any principled difference that can be drawn between indigenous and national minorities, the cause of the difference is in reality the perceived relative urgency of the claims of indigenous peoples and national minorities in light of their particular histories. Unfortunately, this

¹⁰ Will Kymlicka, 'The Internationalization of Minority Rights', *International Journal of Constitutional Law*, 6: 1 (2007), p. 6.

¹¹ Summary of the positions of Asbjorn Eide and Erica-Irene Daes, the then chairpersons, respectively, of the UN's Working Group on Minorities and Working Group on Indigenous Populations in Kymlicka, 'Internationalization of Minority Rights', p. 4.

¹² *Ibid.*, p. 6.

has ‘paved the way for an almost total rupture between the two at the level of international law’.¹³ It is unsurprising, therefore, that challenges in securing state recognition have been compounded in the case of indigenous peoples outside the European settler state context. Even where states, such as India or China, have been willing to accept that certain groups within the state count as national minorities, they have resisted the self-identification of those communities as indigenous. There is a real problem of terminological appropriateness when transferring the indigenous/national minority distinction outside of the West. In the West, ‘there is a relatively clear distinction to be drawn between European “national minorities” and New World “indigenous peoples.” (...) It is far less clear how we can draw this distinction in Africa, Asia, or the Middle East, or whether the categories even make sense there’.¹⁴ So far, there is no international consensus on how such distinctions can be made in the non-Western context.¹⁵

Many states view international attempts to codify or enforce minority protections as international interference in what, under the traditional international law of coexistence, were treated purely as internal affairs and as a potential security risk. Even the comparatively advanced post-Cold War European experiment with developing standards for minority rights was hampered by a failure to convince newly emerging nations that their national minorities did not pose a security threat. During the early 1990s – and confronting the return into Europe of the post-Soviet states, among whom were many new entrants to international society with substantial national minorities – European policymakers initially attempted to influence their new neighbours to adopt expansive minority rights policies and protections in the aim of forestalling potential ethnic conflict in Europe. This was done through publicising best practice, formulating minimum standards, and case-specific interventions. The best practice they sought to export centred around some form of

¹³ Kymlicka, ‘Internationalization of Minority Rights’, p. 10.

¹⁴ Ibid., p. 12.

¹⁵ Various states and international organisations adopt different metrics for trying to adjudicate this question. As noted by Kymlicka, ‘[s]ome would limit it to those peoples who were especially isolated geographically, such as the hill tribes or forest peoples in southeast Asia or pastoralists in Africa. Others would limit it to groups that fall outside the market economy — that is, to groups living as hunter-gatherers or subsistence cultivators but not involved in trade or the labour market (...) These narrow definitions of indigenous people are clearly inconsistent with the way the term is used in the New World’. p. 14.

territorial independence, which had been adopted by Western European states for many of the most prominent national minorities;

‘including the Scots and Welsh in the United Kingdom; the Catalans and Basques in Spain; the Flemish in Belgium; the Québécois in Canada; the Puerto Ricans in the United States; the Corsicans in France; the German minority in South Tyrol in Italy; the Swedes in Finland; and the French and Italian minorities in Switzerland. In all of these countries, sub-state national groups have been offered a significant degree of territorial autonomy, usually through some form of federal or quasi-federal devolution of power, as well as some form of official language status’.¹⁶

Between 1990 and 1993, the three main European organisations all endorsed territorial autonomy, either as a best practice (OSCE in 1990), as a condition for recognising the independence of new states (European Commission in 1991), or as a proposed right under international law (Council of Europe Parliamentary Assembly in 1993). However, despite Western European efforts, there was no move in any post-communist country to seriously consider adopting territorial autonomy. Notions of territorial autonomy were also resisted in the vast majority of postcolonial states. As Ashis Nandy argues, ‘[a]ny proposal to decentralise or to reconceptualise the state as a truly federal polity goes against the grain of most postcolonial states’,¹⁷ although Latin America is an exception to this rule.

As a result, since the mid-1990s, European organisations have clearly shifted away from recommending territorial autonomy for national minorities both because of the evident failure of this approach and ‘in response to strong opposition to the idea of entrenching a right to territorial autonomy for national minorities in the West, and to the idea that there would be international monitoring of how Western states treated their minorities’.¹⁸ In recent years there even appears to have been regress in many areas of the world in terms of minority rights protection. In her final report to the Human Rights Commission, the former Special Rapporteur on Minority Issues concluded that ‘the progress achieved in the last decades in the field of minority rights protection

¹⁶ Kymlicka, *Multicultural Odysseys*, p. 177.

¹⁷ Ashis Nandy, ‘Federalism, the Ideology of the State and Cultural Pluralism’, in Nirmal Mukarji and Balveer Arora, *Federalism in India: Origins and Development* (Vikas Publishing House: 1992), p. 39.

¹⁸ Kymlicka, *Multicultural Odysseys*, p. 210. As noted above, the UN record on this is more complicated.

is under threat, and that there is a serious risk that guarantees that have been put in place could be reversed'.¹⁹ The reasons given by the Special Rapporteur for this concern are the growing number of displaced minority groups and increasing global populism which features hate speech and xenophobic rhetoric against minorities. She advanced particular concern about the deteriorating situation for religious minorities, noting that she had 'become increasingly alarmed by the situation of millions of persons belonging to religious minorities globally who frequently faced discrimination, social exclusion, marginalisation and, in many instances, harassment, persecution and violence'.²⁰ She also noted sustained gaps between 'the ambitious policies, legislation, action plans and programmes on minorities, on the one hand, and the lack of mechanisms in place to actually carry them out or monitor their implementation, on the other'.²¹ The current Rapporteur, meanwhile, has adopted the issue of increasing statelessness among minorities as a core aspect of his mandate, noting that more than 75 per cent of those who find themselves deprived of citizenship are persons belonging to national or ethnic, religious and linguistic minorities.²²

Concerns about minority rights are not evenly spread across the globe. Of the 51 urgent communications sent by the Special Rapporteur between January 2018 and January 2019, 21 were sent to states in the Asia-Pacific region, 19 to Europe and Central Asia, 4 to the MENA Region, 4 to Africa and 1 to the Americas.²³ The particular challenges currently encountered in the Asia-Pacific region are worth noting. Across that continent there has been a significant backslide in minority protections in recent years. Notable examples include the treatment of the Uighur minority in Xinjiang by the Chinese authorities where over one million individuals are currently interred in re-education camps and the persecution of the Rohingya in Myanmar which is being defended not only by the ruling military junta but also by the Nobel Prize-winning democratic

¹⁹ UNHRC, 'Report of the Special Rapporteur on Minority Issues, Rita Izsak-Ndiaye, Reflections on the Six-Year Tenure of the Special Rapporteur', A/HRC/34/53 (2017), p. 12.

²⁰ Ibid., p. 8.

²¹ Ibid., p. 15.

²² UNHRC, 'Report of the Special Rapporteur on Minority Issues, Dr Fernand de Varennes, Update on his Thematic Report on Statelessness as a Minority Issue and the Level of Awareness-Raising and Visibility of Minorities and their Human Rights', A/HRC/40/64 (2019), p. 12.

²³ Ibid., p. 8.

campaigner with whom they now share power, Aung San Suu Kyi. International responses to both of these crises in minority rights have been lacklustre. Where international condemnation has been forthcoming, it is predominantly from Western states. Muslim-majority states, which one might have expected to have voiced severe criticism of the treatment of two significant Muslim communities in East Asia, have been almost silent on the issue – particularly in regard to China’s treatment of the Uighur minority in Xinjiang. In the Middle East, meanwhile, chronic instability in recent years has had a disproportionate effect on minorities: formally diverse countries such as Syria and Iraq have seen an exodus of non-Muslim minorities. In the twentieth century, Christian communities constituted twenty per cent of the Middle East’s population. Today, they account for around five per cent.²⁴ The U.S. intervention in Iraq precipitated a chaos in which ‘the smaller communities increasingly found themselves caught in a maelstrom of violence that pit Iraqi nationalists, Sunni and Shi’i Islamists, and Kurds in a civil conflict over their shared territories’.²⁵ National minorities such as Kurds and other religious minorities including Shia and the Yazidi people have since been the targets of homogenising efforts by non-state actors in both Syria and Iraq in recent years.

Minority rights regimes have been a site of significant contestation and resistance by minority communities often seeking conflicting aims, with some seeking greater inclusion within state structures and others seeking greater autonomy. Some minority rights groups are among the most successful transnational advocacy groups, the indigenous people’s movement being one such example, as detailed in the subsequent case study. The ability of minority rights groups to effectively advocate for their cause depends in large part on their access to international and domestic institutions and the costs of such action. In cases, such as China, where the costs of

²⁴ Martin Banks, ‘Christianity in the Middle East Threatened with Extinction’, *New Europe* (2019) Available at <https://www.neweurope.eu/article/christianity-in-the-middle-east-threatened-with-extinction/> Retrieved 2 September 2019.

See also Roland Flamini, ‘Forced Exodus: Christians in the Middle East’, *World Affairs*, 176: 4 (2013), pp. 65-71.

²⁵ Paul Rowe, ‘Introduction’, in Paul Rowe, ed., *Routledge Handbook of Minorities in the Middle East* (London: Routledge, 2018), p. 1.

protesting against the state are extremely high, minority rights activism is almost totally confined to the diaspora. By contrast, minorities in liberal democratic states pay low costs for such activism and have good informal (and sometimes formal) access to international institutions to advance their claims.

A broad examination of the efficacy of the current operation of the institution of Shielding produces an uneven pattern. Developments in terms of international commitments, shifting norms and increased oversight mechanisms have been significant in recent decades. For national minorities in Europe and Latin America and indigenous peoples in European settler states, minority rights have improved considerably and there are now semi-robust mechanisms of international oversight in place. However, many states – particularly in Asia and Africa – remain resistant to recognising minorities at all within their borders, recognising claims to indigeneity, or recognising the legitimacy of international oversight of their internal practices. For many states within the international system, minority communities continue to pose a perceived internal security threat. Granting minorities greater autonomy is therefore seen as endangering internal stability and possibly even the territorial integrity of the State. International society has so far been unsuccessful in making the case that increased minority rights are likely to prevent the outbreak of internal conflict rather than increase it. These issues will be further explored in the case studies of minority protections for the Romani community and indigenous peoples below.

Case Study: Romani Communities in Europe

A particularly challenging issue for international society is the protection of nomadic communities who are often not settled members of any given state. Historically, international law has reflected suspicion and hostility towards nomadic peoples. The criminalisation of nomadic ways of life was prevalent during the colonial era when entire nomadic communities were

eliminated for the principle reason that they were nomadic.²⁶ In *Victims of Progress*, John Bodley estimates that from 1795 to 1945, European settlers may have killed more than 50 million indigenous peoples²⁷ and Jérémie Gilbert contends that most of these victims were nomadic peoples.²⁸ In Moretti's study of nomadism and statehood he notes that this drive to eradicate nomadism during the colonial period stems from the challenge posed by nomadism to the idea of the State: there can be no place for nomadic peoples in notions of statehood since they lack a defined territory over which they could potentially be sovereign.²⁹ It was also the nomadism of many indigenous peoples which contributed to the classification of their lands as *terra nullius* by European jurists and therefore open for conquest or colonisation.³⁰

Even within Europe, nomadic communities faced particular persecution during the emergence and consolidation of European international society. The most obvious example of this is the Romani peoples – Europe's largest minority group, with approximately 10-12 million currently living on the continent.³¹ Persecution of the Romani can be traced back to their arrival from India in the fifteenth century,³² yet Romani communities were never explicitly mentioned within any of the minority treaties agreed during the eighteenth, nineteenth and early twentieth centuries. As a result of their generally non-settled status, they were not considered national minorities for the purposes of such treaties as was then conventionally understood. They were, instead, conceived of as an ethnic minority and thus not deserving of minority protection status. Although there was never a formal distinction made between the legal definitions of national and

²⁶ Jérémie Gilbert, *Nomadic Peoples and Human Rights* (Abingdon, Oxon: Routledge, 2014), pp. 12–21.

²⁷ John H. Bodley, *Victims of Progress*, 6th edn. (Lanham, Maryland: Rowman & Littlefield, 2014) p. 19.

²⁸ Gilbert, *Nomadic Peoples and Human Rights*, p. 22.

²⁹ See Marco Moretti, *Le Droit International Public et les Peuples Nomades* (Paris: Publibook, 2006).

³⁰ Gilbert notes that the 1975 advisory opinion from the International Court of Justice (ICJ) regarding the status of the Western Sahara was one of the first instances where international law shifted its position on this. See Gilbert, *Nomadic Peoples and Human Rights*, p. 12.

³¹ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Framework for National Roma Integration Strategies up to 2020' (2011) Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0173&from=EN>. Retrieved 11 January 2019, p. 1.

³² See Ian Hancock, *The Pariah Syndrome: An Account of Gypsy Slavery* (Ann Arbor, Michigan: Karoma Publishers, 1987); Ian Hancock, *We are the Romani People* (Hatfield: University of Hertfordshire Press, 2002), and David Cowe, *A History of the Gypsies of Eastern Europe and Russia*, 2nd ed., (Basingstoke, Palgrave Macmillan, 2007).

ethnic minorities, in practice the terms connoted different meanings to European states and entailed different obligations and rights.³³

Persecution of the Romani in Europe culminated in policies aimed at the extermination, forced exploitation and coerced sterilisation of most Romani populations in the countries occupied by Nazi Germany during the Second World War.³⁴ Yet the crimes committed against Europe's Romani communities never gained the same recognition as those committed against the Jewish populations, despite the scale of the atrocity. According to Gilbert, '[w]hile exact numbers are still the subject of controversy, it is estimated that between a half and three quarters of the Gypsy population in Nazi-occupied Europe [totalling] half a million to one million' was killed.³⁵ Romani were not, however, included under the Compensation Laws of the German States in 1949-50 on the basis that they had been persecuted not for racial reasons but because of their antisocial behaviour.³⁶ It was only in 1979 that the West German Federal Parliament acknowledged that Nazi persecution of the Romani people was racially motivated.³⁷ To date, there still have been no convictions for crimes committed against the Romani people by the Nazi regime.

The European shift in approach to minority rights issues that took place during the 1990s did lead to significant change in policies towards Romani communities. Since that time there has been a gradual evolution in the policy of European organisations towards the Romani – moving from an open concern with the potentially destabilising effects of westward migration from accession states to an increasing rhetorical emphasis on ending discrimination and positive minority rights.³⁸ As such, European organisations began to prioritise the improvement of the

³³ Rachel Guglielmo and Timothy Waters, 'Migrating Towards Minority Status: Shifting European Policy Towards Roma', *Journal of Common Market Studies* 43: 4 (2005), p. 768.

³⁴ Sybil Milton, 'Holocaust: The Gypsies', in Samuel Totten and William Parsons, eds., 2nd ed., *A Century of Genocide: Critical Essays and Eyewitness Accounts*, (New York: Routledge, 2004) pp. 133-169.

³⁵ Gilbert, *Nomadic Peoples and Human Rights*, p. 33. See also Ian Hancock (2004) 'Romanis and the Holocaust: A Re-evaluation and Overview', in Dan Stone, ed., *The Historiography of the Holocaust* (Houndmills: Palgrave Macmillan, 2004), pp. 383-396.

³⁶ Margot Stern Strom and William Parsons, (1982) *Facing History and Ourselves: Holocaust and Human Behaviour* (Watertown, Massachusetts: Intentional Education, 1982), p. 221.

³⁷ Gilbert, *Nomadic Peoples and Human Rights*, p. 36.

³⁸ This is reflected in the report of the High Commissioner for National Minorities Report from 1993. See Organisation for Security and Cooperation in Europe (OSCE), 'Roma in the CSCE Region: Report of the High

situation for Romani in accession countries (and therein remove incentives for these communities to move westward). Reflecting this, the (then) European Community included ‘respect for and protection of minorities’ in the Copenhagen Criteria of standards that needed to be achieved by accession states prior to admission, adopted by the European Council in June 1993.³⁹ The OSCE has also, since the 1990s, been active in implementing and monitoring protective regimes for the Romani within Europe, through the High Commissioner for National Minorities (HCNM).

Another of the key milestones in the development of enhanced rights for Romani communities has been the European Convention on Human Rights (ECHR), which came into force in 2010. The ECHR does not mention minority rights as such, except for Article 14 which states that ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as (...) association with a national minority’.⁴⁰ Nevertheless, many of the rights set out in the Convention are of great significance for persons belonging to minorities; among others, the right to respect for private and family life (Article 8), freedom of thought, conscience and religion including the right to manifest one’s own religion (Article 9), freedom of expression (Article 10) which includes expression in one’s own language, freedom of assembly and association (Article 11), which includes the right of any minority to form their own associations, irrespective of whether the government has recognised them as a minority or not.⁴¹ Violations of these rights against minorities have often been found without reference to Article 14.⁴² Of considerable importance is the new Protocol 12, ‘under which the enjoyment of

Commissioner for National Minorities’, paper presented to the Meeting of the Committee of Senior Officials, 21–23 September 1993, pp. 2, 11. See also Guglielmo and Waters, ‘Migrating Towards Minority Status: Shifting European Policy Towards Roma’, *Journal of Common Market Studies*, 43: 4 (2005), p. 763.

³⁹ European Commission, ‘Copenhagen Criteria’, Sec 7.A.iii (1999), available at https://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en, retrieved 16 December 2018.

⁴⁰ Council of Europe, *European Convention on Human Rights*, Article 14: Prohibition of Discrimination, European Convention on Human Rights, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf, retrieved 16 December 2018, p. 13

⁴¹ *Ibid.*, pp. 10–11.

⁴² Asbjørn Eide, ‘Introduction: Mechanisms for Supervision and Remedial Action’, in Marc Weller, ed., *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford: Oxford University Press, 2007), p. 23.

any right set forth by law shall be secured without any discrimination on any ground such as (...) association with a national minority'.⁴³

These developments at a regional institutional level have also had an (admittedly uneven) impact on EU member states' policies towards Romani communities within their borders. Although the primary motivation of states remained the prevention of Romani migration, civil society groups seized on this new rhetorical commitment to pressure EU member states to adopt more coherent minority protection regimes for Romani communities inside the Union. EU states were therefore 'entrapped' through their rhetorical commitments to improving their own treatment of Romani.⁴⁴ Reflecting this, the draft Constitutional Treaty incorporated the Copenhagen minority protection criteria for all Member States.⁴⁵ According to the 2018 Commission Report on the Evaluation of the EU Framework for National Roma Integration Strategies, this change in policy has led to real improvements in the quality of life for Romani communities. In particular, the Commission found that significant improvements had been made in access to schooling and in the overall health of the population, particularly in key indicators such as life expectancy.⁴⁶

However, in practice Romani communities remain marginalised within Europe.⁴⁷ Some interventions designed to improve their integration, such as enforcing compulsory school attendance by Romani youth, have in fact alienated them further from their host societies. Many Romani families found themselves in breach of the law when they moved locations and needed to move their child from their original school and find another one to go to. This compounded their

⁴³ Council of Europe, *European Convention on Human Rights*, p. 23.

⁴⁴ Frank Schimmelfennig, 'The Community Trap: Liberal Norms, Rhetorical Action and the Eastern Enlargement of the European Union', *International Organization*, 55: 1 (2001), pp. 47–80.

⁴⁵ European Community, 'Treaty Establishing a Constitution for Europe', Art. I-2., Official Journal of the European Union 16 December 2004, C series, no 310, available at https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf, retrieved 17 December 2018, p. 17.

⁴⁶ European Commission, 'Communication from the Commission to the European Parliament and the Council: Report on the Evaluation of the EU Framework for National Roma Integration Strategies up to 2020', COM/2018/785 (4 December 2018), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0785&from=EN>, retrieved on 17 January 2019, p. 5.

⁴⁷ Ibid., p. 1.

isolation by leading to increased mistrust between national institutions and the Romani people.⁴⁸ Moreover, despite noting the increase in access to education, the most recent Commission report found that there had been no recent improvement in access to employment. Instead, the share of young Roma not in employment, education or training had increased since the previous report.⁴⁹ Ultimately, the populations of many European states remain hostile to Romani communities and their lifestyle, as demonstrated by the permanently contentious nature of discussions on the issue at the European Parliament.⁵⁰ As such, legal systems throughout Europe still fail to offer sufficient protection against violence and persecution at the grassroots level.⁵¹ In her report on the human rights situation of Roma people worldwide, the Special Rapporteur on Minority Issues noted in 2015 that ‘[t]he substandard living conditions of the Romani people in Europe are well-documented and between 70 and 90 per cent report living in conditions of severe material deprivation’.⁵² Exclusion from formal schooling remains widespread throughout Europe. Even in those countries where a majority of Romani children complete primary school, most do not obtain either a vocational certificate or a secondary qualification.⁵³ In South-Eastern Europe, the participation of Romani children in education beyond primary school is dramatically lower than that of the majority population, with only 18 per cent attending secondary school compared to 75

⁴⁸ European Commission, ‘Report on Discrimination of Roma Children in Education’ (2014), available at http://ec.europa.eu/justice/discrimination/files/roma_childdiscrimination_en.pdf, retrieved on 17 January 2019.

⁴⁹ European Commission, Report on the Evaluation of the EU Framework for National Roma Integration Strategies up to 2020, p. 5.

⁵⁰ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, ‘Report on Fundamental Rights Aspects in Roma Integration in the EU: Fighting Anti-Gypsyism’, Rapporteur: Soraya Post, 2017/2038(INI) (26 June 2017), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-606.242%2B02%2BDOC%2BPDF%2BV0%2F%2FEN>, retrieved 18 January 2019.

⁵¹ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (London: Routledge, 2016), p. 2.

⁵² UNHRC, ‘Report of the Special Rapporteur on Minority Issues, Rita Izsak-Ndiaye: Comprehensive Study of the Human Rights Situation of Roma Worldwide, with a Particular Focus on the Phenomenon of Anti-Gypsyism’, A/HRC/29/24 (2015), p. 9. See also European Union Agency for Fundamental Rights, ‘Housing Conditions of Roma and Travellers in the European Union: Comparative Report’ (October 2009), available at <http://fra.europa.eu/en/publication/2011/housing-conditions-roma-and-travellers-european-union-comparative-report>, retrieved 17 January 2019.

⁵³ European Union Agency for Fundamental Rights (FRA), ‘The Situation of Roma in 11 Member States: Survey Results at a Glance’ (2012), available at <http://fra.europa.eu/en/publication/2012/situation-roma-11-eu-member-states-survey-results-glance>, retrieved 17 January 2019, p. 12.

per cent of the majority community, and less than 1 per cent enrolled in university.⁵⁴ Regarding health, European Romani communities are disproportionately unvaccinated, have poorer than average nutrition and experience higher rates of infant mortality and tuberculosis. Life expectancy among European Romani communities is also significantly lower than among non-Romani communities.⁵⁵ Similar marginalisation exists with regard to employment. In 11 surveyed European Union countries, fewer than one out of three Roma were reported to be in paid employment.⁵⁶

Regarding the promotion of diversity, however, European Roma are faring somewhat better. Language use data from the Ethnologue shows that the majority of Romani languages and dialects are ‘developing’ rather than ‘threatened’ and that their usage rate and rates of literacy within the languages are increasing.⁵⁷ This could in part be a by-product of their exclusion from mainstream education. However, there are reasons to believe that it is also a result of recent policies to revive or develop the language in many member states. For the first time, Romani is an official language of one European state – the Republic of Kosovo. It is also increasingly recognised as a minority language in many countries. There are also projects seeking to codify the Romani language taking place in a number of countries with high Romani populations.⁵⁸ In Serbia’s autonomous province of Vojvodina, Romani is also an officially recognised language, and across Eastern Europe Romani language media is developing at pace.⁵⁹ Romania has launched a unified

⁵⁴ See UN Children’s Fund (UNICEF), ‘The Rights of Roma Children to Education: Position Paper’, Geneva: UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States (2011), available at www.unicef.org/ceecis/UNICEF_ROE_Roma_Position_Paper_Web.pdf, retrieved 17 January 2019, p. 16.

⁵⁵ See European Commission, ‘Roma Health Report: Health Status of the Roma Population’ (August 2014), available at http://ec.europa.eu/health/social_determinants/docs/2014_roma_health_report_en.pdf, retrieved on 17 January 2019, p. 31.

⁵⁶ See FRA, ‘The Situation of Roma in 11 Member States: Survey Results at a Glance’, p. 12.

⁵⁷ Ethnologue data available on; Romani Balkan, <https://www.ethnologue.com/language/rmn>; Romani Baltic <https://www.ethnologue.com/language/rml>; Romani Carpathian, <https://www.ethnologue.com/language/rmc>; Romani Kalo Finnish, <https://www.ethnologue.com/language/rmf>; Romani Sinte, <https://www.ethnologue.com/language/rmo>; and Romani Vlax, <https://www.ethnologue.com/language/rmy>

⁵⁸ See Yason Matras, ‘The Classification of Romani Dialects: A Geographic-Historic Perspective’ in Barbara Schrammel, Dieter W. Halwachs and Gerd Ambrosch, eds., *General and Applied Romani Linguistics: Proceedings from the 6th International Conference on Romani Linguistics* (München: Lincom Europa, 2005).

⁵⁹ Peter Gross, ‘A Prolegomena to the Study of Romani Media in Eastern Europe’, *European Journal of Communication*, 21: 4 (2006), pp. 477-497.

teaching system for the Romani language with Romani language textbooks now available – one of a number of countries in which Romani is now available as a medium of instruction. In countries such as the UK and Spain, where the language has fallen into disuse, there are now efforts being made to revive it. Moreover, in recent years there has been a noticeable trend within Europe of exploration and celebration of Romani culture. Films, exhibitions, awareness-raising campaigns and museums dedicated to showing Romani culture and combatting negative stereotypes have emerged across Europe in recent years.⁶⁰ The European Union has also recently ‘recognised that participation of Roma individuals and communities cannot be reduced to occasional discussions, but must promote the empowerment and active involvement of Roma, including through supporting Roma NGOs to be effective’.⁶¹ Recent efforts to publicise and celebrate Romani culture reflect this, with Romani communities and NGOs playing leading roles in such projects.

The case of Romani minorities in Europe is instructive of the challenges faced by international society in developing Shielding institutions to cater for nomadic communities who exist uneasily alongside territorially-based nation-state political structures. In these cases, recognition of the minority by states is often doubly contested because the minority does not conform to prevailing notions of national minorities who are historic residents of a particular territory. Nor are they eligible for the forms of territorial autonomy that characterises the majority of best practice minority protection for Western European countries. In the case of the Romani, therefore, the normative shift on the part of European organisations has been difficult to translate into tangible results both because of entrenched resistance on the part of the citizens of many European states and because it has been difficult to create institutional mechanisms to protect Romani communities that are able to operate effectively taking into account the Roma’s nomadic way of life. The marginalisation experienced by the Romani people is ‘interconnected with disadvantage in the area of economic and social rights, often stemming from, or leading to, further

⁶⁰ UNHRC, ‘Report of the Special Rapporteur on Minority Issues, Rita Izsak-Ndiaye: Comprehensive Study of the Human Rights Situation of Roma Worldwide’, p. 13.

⁶¹ *Ibid.*, p. 15.

impediments in civil and political rights and vice versa'.⁶² Their nomadic status has directly contributed to their economic and social disadvantage by placing them outside of the economic and social support structures of most European countries which operate on a fixed-residency basis. Nomadic communities such as the Roma are likely therefore to be more disadvantaged than non-nomadic national minorities and – as a result of this – to incur increased stigma from the majority population, compounding their isolation and frequently fuelling discrimination against them within political and judicial structures.

Despite these challenges, the case study of the Roma has a positive message to tell about the preservation of diversity. The increasing use or resurrection of Romani languages throughout Europe is indicative of a deepening, rather than an erosion, of the cultural autonomy of the Romani peoples. This is part of a wider pattern of linguistic diversity revival in Europe in recent years where national minority languages – long suppressed in processes of nation building – are now being revived by national minorities with the active support of states. For national minorities who are more integrated than the Romani community, language revival has often been less successful. For example, despite significant investment in Welsh language media and teaching in schools, rates of Welsh language retention have continued to slowly decline – at least according to recent censuses. It remains to be seen whether these gains in terms of diversity protection can be matched by a similar improvement in the health indicators of Romani communities. Finding ways to ensure their improved economic and social integration will remain challenging – combatting deep societal discrimination will be key, as will finding ways to ensure that a nomadic lifestyle does not continue to be a barrier to accessing mainstream education.

⁶² UNHRC, 'Report of the Special Rapporteur on Minority Issues, Rita Izsak-Ndiaye: Comprehensive Study of the Human Rights Situation of Roma Worldwide', p. 17.

Case Study: Indigenous Peoples and the United Nations

Having examined the challenges facing non-territorialised minorities, the case of indigenous peoples investigates the challenges of developing Shielding institutions for communities whose rights are intrinsically linked to territorial claims. As discussed in the broader section, the development of rights for indigenous peoples has been a recent success story for the institution of Shielding. This reverses a historical trend in which indigenous people were among the most disadvantaged within international law. Unlike the successor states to the Ottoman and East European Empires, no minority regimes were ever imposed upon the European settler states in exchange for recognition of their independence or accession to international society. Nor was any attempt made subsequently to impose such a regime by any other state within international society until the boycott of South Africa in the early 1960s and corresponding attempts by international organisations to coerce the apartheid government of South Africa to change its behaviour. There are two main reasons for this. The first is that the persecution, and in some cases genocide, of indigenous communities by European settlers did not present the same challenge to European international order as did the persecution of national minorities within the unfolding society of European states. It was, instead, an issue almost entirely confined to the periphery of international society. As such, European international society never experienced the kind of pressure to enact normative change in this case as it did in the case of European national minorities. Secondly, international society failed to recognise indigenous political communities – not only as members of international society – but as ‘peoples’ at all. By and large, instances of non-recognition in Europe were a question of practicality – it simply was not possible to make the boundaries of emerging states coterminous with the geographic distribution of polyglot national, religious and linguistic communities. By contrast, the failure of early modern states and jurists to recognise indigenous communities was based on a judgement that they were unworthy of such

recognition by virtue of their failure to attain either a sufficient standard of civilisation or to develop a morally meaningful relationship with the land they inhabited. The consequences for indigenous communities of this were severe. In the cases of the United States and Australia, the settler populations were responsible for a near-total genocide of the populations, through the ethnic cleansing of indigenous territory, warfare, and disease. In all cases, indigenous populations found themselves politically marginalised, deprived of their lands and unprotected from the violence of settler communities.

It was not until the late twentieth century that the international community provided an institutional response to the question of the protection of indigenous peoples. Although, as Kymlicka notes, even in the period of post-war opposition to the idea of group specific minority rights, there was still an acknowledgement of the special status of indigenous peoples – as reflected, for example, in the 1957 International Labour Organisation’s Convention 107 on the ‘Protection and Integration of Indigenous and Tribal Populations’.⁶³ Significant change began to emerge in the late 1980s. The Brazilian constitution of 1988 set a trend by recognising indigenous rights⁶⁴ and in 1989 the International Labour Organisation declared that indigenous peoples had a right to their land and to be consulted if it was to be developed.⁶⁵ From the 1990s, The UN was the primary forum in which this discussion took place and it mainly centred around the 1994 *Draft Declaration on the Rights of Indigenous Peoples* (hereafter referred to as the *Draft Declaration*). In March 1995 the UN Commission on Human Rights created an inter-sessional Working Group to review the *Draft*

⁶³ Kymlicka notes that ‘The convention endorsed certain special measures for indigenous people, but only as temporary paternalistic protections for a vulnerable population that was seen as unable to cope with the rigours of modern life, until such time as they were ready to stand on their own as equal and undifferentiated national citizens. For example, Article 3 of the Convention states: 1. So long as the social, economic and cultural conditions of the [indigenous and tribal] populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations. 2. Care shall be protection— taken to ensure that such special measures of (a) are not used as a means of creating or prolonging a state of segregation; and (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.’ Kymlicka, *Multicultural Odysseys*, p. 32.

⁶⁴ Constitution of Brazil (1988), available at <http://english.tse.jus.br/arquivos/federal-constitution>

⁶⁵ International Labour Organization, *Indigenous and Tribal Peoples Convention*, No. 169 (1989/1991), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169_ retrieved 7 February 2019.

Declaration (WGDD). The WGDD met for eleven years before they agreed on a final version. This discussion centred around the question of the entitlement of indigenous peoples to self-determination. The original *Draft Declaration on the Rights of Indigenous Peoples* included two articles that recognised the right of indigenous peoples to self-determination; including Article 3 which stated that ‘Indigenous Peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development’.⁶⁶ However, those states who had significant indigenous populations feared that recognising an unqualified indigenous right to self-determination in this manner could foster a wave of separatism and irredentism, or at least saddle them with unsupportable obligations.⁶⁷ The states most impacted by this prospect therefore sought to mitigate the risk entailed in any recognition of a right to self-determination by indigenous peoples by pushing for a broader understanding of the meaning of self-determination that encompassed considerable freedoms within a parent state.⁶⁸ Many states, including the U.S., supported a stance that would make the right to self-determination internal and ‘ultimately subordinate to the legal structure of states’.⁶⁹ However, some states that had significant indigenous populations, such as Australia and Canada, opposed this qualification, nominally on the grounds that qualifying the right in this way would ‘undermine the principle of equality of all people, and dissipate the credibility of the declaration among indigenous peoples’.⁷⁰

⁶⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

⁶⁷ Jonathan Havercroft, ‘Sovereignty, Recognition and Indigenous Peoples’, in Richard Price, *Moral Limit and Possibility in World Politics* (Cambridge: Cambridge University Press, 2008) pp. 112-137.

⁶⁸ For example, during the first session of the WGDD, Chile argued that the principle of self-determination should be rephrased to ‘internal self-determination. This would recognise a; ‘space within which indigenous peoples can freely determine their forms of development, [including] the preservation of their cultures, languages, customs and traditions, in the context and framework of the States in which indigenous people live.’. Cited in Russel Lawrence Barsh, ‘Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force’, *Human Rights Quarterly*, 18:4 (1996), p. 797.

⁶⁹ Working Group for the Draft Declaration, ‘Self-Determination Proposal of Australia, New Zealand and the United States of America’ (2005), available at <http://www.unpo.org/article.php?id=3367>, retrieved 3 November 2018.

⁷⁰ Statement by Bill Barker on Behalf of the Australian Delegation, quoted in Barsh, ‘Indigenous Peoples and the UN Commission on Human Rights’, p. 788.

The compromise eventually reached, and codified within the final United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in September 2007, was that Article 3 remained intact but another article, Article 4, was added as a qualification to the rights contained within Article 3:

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous functions.⁷¹

The passing of this declaration was a significant milestone. In recognising a limited right of self-determination, indigenous communities achieved recognition of their status as political communities that entitled them to Shielding mechanisms, to be instituted and regulated by the UN.⁷² Today, the UN remains the primary forum for the advancement of indigenous peoples. It is the multilateral treaties, such as UNDRIP as well as the Convention on the Protection and Promotion of the Diversity of Cultural Expression, which form the backbone of the ‘soft law’ approach which characterises today’s indigenous peoples’ rights regime. However, the extent of contestation that took place even to get to this point is instructive of the constraints of the Shielding institution when faced with opposition from powerful states. UNDRIP is the only UN human rights declaration to have faced formal opposition. The soft approach taken to these issues, as well as the fact that prominent ‘ethical players’ within international society such as New Zealand, Canada, Australia and the U.S. felt able to formally oppose these measures, demonstrates that the distinction the settler states were able to create between indigenous communities and other minority groups continues even today. Since that time, however, all four states have reversed their earlier positions and now support the declaration.

Recent data from European settler states with significant indigenous populations all show considerable improvement in key indicators for community health and wellbeing of their indigenous populations. In fact, census data from the U.S., Canada and Australia all show signs of

⁷¹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

⁷² Havercroft, ‘Sovereignty, Recognition and Indigenous Peoples’, pp. 112-137.

rebounding indigenous populations. In Canada, data from the 2016 Stats Can Census paints a picture of a young and growing indigenous population which is increasingly learning indigenous languages. Between 2006 and 2016, the indigenous population grew by 42 per cent — from 1,172,790 to 1,673, 785.⁷³ This represented a growth rate four times that of the rest of the population. The 2016 Stats Can Census also registered 70 indigenous languages spoken across the country. The data found that 260,550 people reported being able to speak an indigenous language, which was an increase of 3.1 per cent since 2006.⁷⁴ Census data from Australia also demonstrates that the population of indigenous peoples has grown rapidly in the past three decades. In 1986, the indigenous population estimate was 240,152 or 1.4 per cent of the population, which had risen to 786,689 (3.3 per cent of the population) by 2016.⁷⁵ Data from the Ethnologue shows that the vast majority of indigenous languages are now extinct or nearly extinct. However, of the few that still survive, most are in the ‘developing’ stage, suggesting that there may be a resurgence in usage for some of the remaining indigenous languages.⁷⁶ Establishing causality between developments at the UN and these improving community health and diversity indicators is challenging. What is clear, however, is that European settler states have changed their policies towards indigenous communities in such a way that has facilitated their economic, social and cultural revival in recent years.

At the time of writing it is clear that rights for indigenous peoples, as distinct from other national minorities, now have a firm footing in international law and that this is paying dividends for indigenous communities, at least within the major European settler states; although rights for

⁷³ Statistics Canada, ‘Aboriginal Peoples in Canada: Key Results from the 2016 Census’ (25 October 2017), available at <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm>, retrieved 14 February 2019.

⁷⁴ Ibid.

⁷⁵ Official population estimates (based on census data) are used here rather than raw census response data. Census response data records the 1986 population as 277, 645 (1.4 per cent) and the 2016 population as 649,171 (2.8 per cent). Population estimates correct for known types of census undercount including missed individuals, post survey interview correction data and skipped status questions. Markham, Francis & Biddle, Nicholas (2018) ‘Recent Changes to the Indigenous Population Geography of Australia: Evidence from the 2016 Census’ *Australian Population Studies* 2:1 p. 4.

⁷⁶ Classifications of all Australian languages available from the Ethnologue database here: <https://www.ethnologue.com/country/AU/languages>

indigenous peoples are now becoming institutionalised in many non-Western countries, too. For example, India's constitution now seeks to protect 'scheduled' tribes and similar laws have recently been enacted in the Philippines. African governments, long resistant to calls that hunter-gatherer groups such as the Pygmies and Sam should have rights stemming from their prior presence in parts of the continent, are increasingly finding themselves in court addressing the question of indigenous rights for these groups. Even in countries that have been unwilling to recognise minority rights or claims to indigeneity at the political level, developments in international law have provided means for these groups to pursue their claims through domestic courts. One example of this is the Ainu people of Japan. Japan is an example of a new entrant to international society which introduced similarly restrictive citizenship laws to Western nations in the late nineteenth century.⁷⁷ Japan, in its first periodic report to the UN Human Rights Committee, when questioned about the lack of minority rights for the Ainu, stated that the Japanese Constitution supports '[t]he right of any person to enjoy his own culture, to profess and practice his own religion or to use his own language (...). However, minorities of the kind mentioned in the Covenant do not exist in Japan'.⁷⁸ However, through 'various lawsuits, relying in part upon international legal instruments such as the ICCPR and the International Labour Organisation Convention on Indigenous People, Japanese courts have enforced recognition of the Ainu as a minority group and the states obligations to them therein'.⁷⁹ As a result, Japan has gradually conformed more to international, Western-led best practice in its treatment of the Ainu and has been compelled to revise significant aspects of legislation and policy towards minority groups. On 6 June 2008, the Japanese Diet passed a non-binding resolution calling on the government to recognise the Ainu as an indigenous community, and in February 2019 the government passed a bill which officially recognised the Ainu as an indigenous people of Japan.

⁷⁷ Timothy Webster, 'Insular Minorities: International Law's Challenge to Japan's Ethnic Homogeneity', *Faculty Publications*, 106 (2011), p. 561.

⁷⁸ UNHRC, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1980' (Japan), 12th Sess., (24 October 1980), art. 27, CCPRJC/10/Add. 1.

⁷⁹ Webster, 'Insular Minorities', p. 578.

However, the fact that self-government can be claimed legitimately only by indigenous peoples, not other minority groups, provides significant incentives both for states with resident minorities to refute this status and for minority communities to identify as indigenous peoples. Unsurprisingly, therefore, there is an increasing tendency for groups in Africa, Asia and the Middle East to adopt the label of indigenous peoples. For, 'if they present themselves to the international community as a national minority, they get nothing other than generic minority rights premised on the integration model; if they come, instead, as an indigenous people, they have the promise of rights to land, control over natural resources, political self-government, language rights, and legal pluralism'.⁸⁰ Many governments have strongly resisted these attempts and, as such, there remain significant inequalities in access to the Shielding mechanisms for indigenous peoples. In part, this is because outside of European settler states, claims to indigeneity are more difficult to verify. In reference to India, Kingsbury notes that 'centuries of migration, absorption, and differentiation [have made it] impossible to say who came first'.⁸¹ However, in large part, as argued by Keal, the vast majority of the world's states simply remain wary of the rights of self-determination granted in UNDRIP to indigenous people because it 'suggests state-breaking [and] for that reason some states continue to insist that they have indigenous populations rather than indigenous peoples within their borders'.⁸²

This case study also has a positive story to tell about minority rights protection: 'Out of the experience of sharing a common sense of frustration, of having been marginalised politically, legally and materially, indigenous peoples cohered into a global movement'.⁸³ Niezen refers to this

⁸⁰ Will Kymlicka, 'The Internationalization of Minority Rights', *International Journal of Constitutional Law*, 6: 1 (2007), p. 16.

⁸¹ Benedict Kingsbury, (1999) 'The applicability of the International Legal Concept of "Indigenous Peoples" in Asia', in Joanne Bauer and David Bell, eds., *The East Asia Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), p. 340.

⁸² Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, (Cambridge: Cambridge University Press, 2003), p. 152.

⁸³ Paul Keal, 'Indigenous Sovereignty', in Trudy Jacobsen, Charles Sampford, and Ramesh Thakur, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate Publishing, 2008), p. 317.

movement as ‘indigenism’.⁸⁴ Despite encountering significant resistance from powerful states in the international system, indigenous populations were able to use international organisations and mobilise changing international norms to secure for themselves greater autonomy and control of their own resources, as well as a commitment from their states to the preservation of their culture and heritage. The UN Working Group on Indigenous Populations has ‘served as the nerve centre for a vibrant transnational network of community activists, non-governmental organisations, academics, philanthropic foundations, and policy makers; with considerable success, this network has diffused the ideas and standards contained in the draft declaration on indigenous rights. It has been particularly effective in encouraging and legitimising the mobilisation of indigenous peoples in Latin America.’⁸⁵ This has paid dividends both in improved community health indicators and in the recovery of endangered languages. The indigenism movement has also sought to challenge prevailing conceptions of indivisible sovereignty and the legitimacy of the sovereignty of European settler states. This has included advancing their own claims to territorial sovereignty – entitlements which they say were abrogated by European settlers who broke treaties of mutual recognition of land ownership – and a ‘rejection of the language of sovereignty as something that ensnares indigenous peoples in structures of government inimical to indigenous ways of life and notions of power’.⁸⁶ So far, these claims have proven less damaging to notions of state sovereignty than previously feared by state elites. Instead, states have generally been able to develop structures which allow for divided sovereignty and increased internal autonomy. However, in spite of international recognition of the unique situation of indigenous peoples, one of the key challenges that plagues the development of indigenous peoples’ regimes is defining who counts as an

⁸⁴ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley, California: University of California Press, 2003), p. 3.

⁸⁵ Kymlicka, ‘Internationalization of Minority Rights’, p. 6.

⁸⁶ Keal, ‘Indigenous Sovereignty’, p. 318. The 1992 Mabo case was significant in this regard – although it established that the sovereignty of the Commonwealth of Australia could not be challenged it did not extinguish native title to unalienated Crown lands. Frank Brennan, *One Land One Nation: Mabo – Towards 2001* (Queensland: University of Queensland Press, 1995), p. 127.

indigenous people.⁸⁷ The preference of UN bodies for adopting self-definition as the primary mechanism for adjudicating indigenous status and the enhanced benefits that are seen to accrue to minorities who are able to successfully claim such status has led to a considerable expansion in the number of communities outside European settler states claiming indigenous status. This development has been strongly resisted by those states in which these communities are resident.

Overview of the Efficacy of Recourse

The term ‘refugee’ is a heavily contested concept – being both normatively and politically loaded. The classical understanding of refugees is ‘people who cross international borders in order to flee human rights abuses and conflict’.⁸⁸ Within the 1951 Refugee Convention, a refugee is ‘someone who is outside his or her country of origin as a result of a well-founded fear of persecution’.⁸⁹ However, many theorists and practitioners have sought to expand this definition in recent years. As detailed in the preceding chapters, implicit to the international society approach for understanding the normative basis of the state system is the notion that all people have a state that is responsible for ensuring their most basic rights and protection. As such, for Haddad, the key characteristic of a refugee is not therefore their geographical movement, it is the inability or unwillingness of the country of origin to provide this protection and the requirement of other states to stand in as the substitute provider of these rights – either temporarily or permanently. Her definition of a ‘refugee’ is ‘an individual who has been forced, in significant degree, outside the domestic political community indefinitely’.⁹⁰ While acknowledging that borders are

⁸⁷ Self-identification is widely regarded as the most acceptable means of defining indigenous peoples, particularly by UN bodies, and forms part of Cobo’s definition. The reasoning behind this is that states have too great an incentive to deny indigenous status for them to be given powers of arbitration over indigenous status.

⁸⁸ Alexander Betts and Gil Loescher, ‘Refugees in International Relations’, in Alexander Betts and Gil Loescher, eds., *Refugees in International Relations*, (Oxford: Oxford University Press, 2011), p. 1.

⁸⁹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, p. 137.

⁹⁰ Emma Haddad, *The Refugee in International Society: Between Sovereigns*, (Cambridge: Cambridge University Press, 2008), p. 24.

‘fundamental to both the theory and practice of sovereignty’ she argues that ‘attachment to the political community can be lost without physically crossing an international border (...) in practice the border becomes blurred when the state shows itself no longer to be a guarantor of the protection of its citizens, and the international community must step in to take responsibility’.⁹¹ Shacknove agrees with this approach, contending that ‘[w]hether a person travels ten miles across an international border or the same distance down the road into a neighbouring province may be crucial for determining logistical and diplomatic action [but] conceptually (...) refugeehood is unrelated to migration’.⁹²

This line of analysis is supported by moves of many practitioners in the field of refugee protection to grant internally displaced persons equivalent status as those who have crossed international borders. In practice, the Office of the United Nations High Commissioner for Refugees (UNHCR)’s mandate has expanded to address a broader range of ‘people of concern’ including those fleeing human rights violations not subsumed under persecution (notably survival migrants fleeing environmental disaster and state fragility) and internally displaced people who, like refugees, flee conflict and persecution, but remain in their country of origin.⁹³ However, the definition of ‘refugee’ adopted within this project (while it includes peoples fleeing their countries for reasons other than direct persecution), excludes internally displaced peoples.⁹⁴ The justification for this is that while in practice the primary international institutions responsible for upholding the

⁹¹ Haddad, *Refugee in International Society*, p. 44.

⁹² Andrew E. Shacknove, ‘Who Is a Refugee?’, *Ethics* 95: 2 (1985), pp. 275–277.

⁹³ In 1975 the UN added ‘displaced persons’ to the list of UNHCR’s responsibilities, although this was to be applied at the time to externally displaced persons who failed to qualify as Convention refugees. By 1996, ‘UNHCR claimed that the term “refugee” included: (i) those recognised as such by states party to the Convention and/or Protocol; (ii) those recognised as such under the OAU Convention and the Cartagena Declaration; (iii) those recognised by UNHCR as “mandate refugees”; (iv) those granted residence on humanitarian grounds; and (v) those granted temporary protection on a group basis’. Haddad, *Refugee in International Society*, p. 27.

⁹⁴ In accepting that refugees can be categorised as such in the absence of direct persecution, this thesis agrees with Betts and Loescher that ‘[w]hether the focus is on the narrow legal definition of a refugee or is broadened and deepened to include other categories of forced migration, the common conceptual feature that connects these areas remains the unwillingness or inability of the country of origin to ensure the protection of its own citizens, and hence the need for international protection’. Betts and Loescher, ‘Refugees in International Relations’, p. 3.

refugee-regime complex have expanded their mandate to also cover internally displaced peoples, I would characterise such protection as part of the institution of Shielding, not of Recourse.

Unlike the institution of Shielding, the institution of Recourse is designed as a temporary community protection mechanism – with an inbuilt assumption that eventually a ‘durable solution’ for refugee communities can be found. One clear measure of efficacy, therefore, is whether the institution is currently able to provide durable solutions for those communities under its protection within reasonable timescales. Indeed, the founding statute of UNHCR outlines two main roles: ‘to provide protection to refugees and to find long term solutions to their plight’.⁹⁵ On this measurement alone, the institution is clearly failing. Despite a longstanding recognition on the part of international society of the importance of ‘durable solutions’, finding solutions for the world’s refugee populations has become increasingly difficult. In 2015, fewer than 2 per cent of the world’s refugees received access to one of the three durable solutions of resettlement, repatriation or local integration.⁹⁶ As a result, refugees are spending longer and longer in exile, and the three solutions currently on offer to most of the world’s refugees are long-term encampment, urban destitution or perilous journeys. UNHCR estimated that the average duration of major refugee situations increased from nine years in 1993 to seventeen years at the end of 2003.⁹⁷ The inability to resolve these crises has given rise to the phenomenon of ‘protracted refugee situations’ – defined by the UNHCR as a situation where refugees are in exile ‘for five or more years after their initial displacement, without immediate prospects for implementation of durable solutions’.⁹⁸ In 2017, UNHCR noted that ‘[s]ome two out of three refugees under the UNHCR mandate (13.4 million) are in protracted situations, defined by UNHCR as when 25,000 or more refugees from the same

⁹⁵ Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (London: Penguin Books, 2018), p. 7.

⁹⁶ *Ibid.*, p. 8.

⁹⁷ UN High Commissioner for Refugees (UNHCR), ExCom, ‘Protracted Refugee Situations’, Standing Committee, 30th Meeting, EC/54/SC/CRP.14, (10 June 2004), p. 2.

⁹⁸ UNHCR, ExCom, ‘Conclusion on Protracted Refugee Situations’ Extraordinary Meeting, 61st Session, A/AC.96/1080, (29 December 2009).

nationality have been in exile for five or more years in a given asylum country’.⁹⁹ They also noted that ‘only 667,400 refugees returned to their home countries in 2017’.¹⁰⁰

UNHCR contend that ‘protracted refugee situations stem from political impasses. They are not inevitable, but are rather the result of political action and inaction, both in the country of origin (the persecution and violence that led to flight) and in the country of asylum’.¹⁰¹ However, many would argue that UNHCR itself has played a role in the creation of protracted refugee situations. In assuming a progressively wider range of long-term refugee responsibilities and functions, there is concern in many parts of the world that UNHCR is acting as a surrogate state and perpetuating refugee programmes by providing them with the care and maintenance they need to be sustained in their current condition.¹⁰² Milner finds that ‘the past twenty years have also witnessed a marked decline in the engagement of other actors within the UN system to the causes and consequences of refugee movements. In particular, a lack of engagement on the part of various peace and security actors to address conflict or human rights violations in the country of origin contributes to the prolongation of many refugee situations’.¹⁰³

The overall number of individuals globally who are deemed to meet the 1951 definition of a refugee has also steadily increased since that time. Refugee populations hit a high in the early 1990s, then declined, then have risen again since 2013 to reach the same level as the early 1990s today. It is also important to note that the numbers of internally displaced persons (IDPs) have risen consistently since the 1990s. By the end of 2017 there were almost twice as many recognised IDPs as recognised refugees – a sign that increasing numbers of displaced peoples are unable to access the Recourse mechanism at all as they are unable to cross the international border necessary

⁹⁹ UNHCR, ‘Global Trends: Forced Displacement in 2017’ (2018), available at <https://www.unhcr.org/5b27be547.pdf>, retrieved 7 May 2019, p. 22.

¹⁰⁰ Ibid., p. 8.

¹⁰¹ UNHCR, ‘Protracted Refugee Situations’, p. 1.

¹⁰² See Amy Slaughter and Jeff Crisp, ‘A Surrogate State? The Role of UNHCR in Protracted Refugee Situations’, in Gil Loescher, James Milner, Edward Newman and Gary Troeller, eds., *Protracted Refugee Situations: Political, Human Rights and Security Implications* (New York: United Nations University Press, 2008), p.128.

¹⁰³ James Milner, ‘Protracted Refugee Situations’, in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014), p. 154

to obtain refugee status.¹⁰⁴ As noted by Haddad, ‘since refugees must cross an international border, they cannot flee their country of origin unless accepted in another state. Quite literally, in a world made up of a set of mutually exclusive states or ‘membership communities’, people cannot leave their country if they have nowhere to go’.¹⁰⁵ The increasing number of refugees and the inability to find durable solutions for these communities all belie the assumption at the heart of the design of the institution of Recourse – that refugee flows are a temporary aberration that the international community is in the progress of solving.

The previous chapter noted that since the end of the Cold War, Western states have adopted a number of measures to obfuscate their responsibilities under the Convention Relating to the Status of Refugees. These include expanded visa requirements, fines for airlines that allowed asylum seekers to travel without correct documentation and expanded deportation mechanisms.¹⁰⁶ State variation in adoption of the policies is significant, meaning that refugee communities will encounter significantly different treatment depending upon the state from which they seek to claim refuge. This has led to a ‘race to the bottom’ with states keen to appear less inviting than their neighbours and thus deter refugee communities from seeking to access their territory in the first place. More recently, many states have even begun to ‘move’ their borders in order to be able to obfuscate the non-refoulement obligation – or have found ways to ensure the extra-territorial application of immigration laws.¹⁰⁷ This involves stationing immigration officers in the airports of

¹⁰⁴ UNHCR, ‘Population Statistics Database’, available at http://popstats.unhcr.org/en/overview#_ga=2.119253057.970971141.1560322359-1955061834.1560322359, retrieved 6 May 2019.

¹⁰⁵ Haddad, *Refugee in International Society*, p. 26.

¹⁰⁶ Randall Hansen, ‘State Controls: Borders, Refugees and Citizenship’, in Fiddian-Qasmiyeh, Loescher, Long and Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies*, p. 254. See also Bridget Anderson, Matthew Gibney, and Emanuela Paoletti, ‘Citizenship, Deportation and the Boundaries of Belonging’, *Citizenship Studies*, 15: 5 (2011), p. 550.

¹⁰⁷ One example of this practice is the agreement entered into in 2001 by the governments of the UK and the Czech Republic ‘permitting British immigration officers to grant or refuse passengers at Prague Airport leave to enter the UK before they boarded planes (...) In 2004 the House of Lords considered a challenge to these pre-clearance procedures by a number of Czech Roma who had been refused permission to leave Prague. Rejecting their claims under the Refugee Convention and the customary law principle of *non-refoulement*, Lord Bingham did not consider that they had presented themselves at the frontier of the UK ‘save in a highly metaphorical sense’ (*European Roma Rights Centre & Ors v Immigration Officer at Prague Airport & Anor* (UNHCR intervening) (2004) UKHL 55; (2005) 2 AC 1. Quoted in Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford: Oxford University Press, 2012), p. 34.

other countries who are able to turn away potential asylum seekers from boarding planes to the destination country. As this refusal is not taking place at the border, the argument is that no international obligations of *non-refoulement* have been broken. This is effectively a policy of enacting a ‘de facto shift in the border to prevent primary international obligations being triggered in the first place’.¹⁰⁸ Inbuilt discrimination in visa regimes and at borders means that those who possess the lowest grade citizenship rights (and therefore have a perceived highest likelihood of wishing to migrate) are those least permitted to do so.¹⁰⁹

As a result of the policies of Western obfuscation of responsibilities, the vast majority of refugees are now sheltered by the developing world – and a select few countries at that.¹¹⁰ There is also no legal obligation upon Western states to contribute to burden-sharing for the care of these populations. Where Western states have given support to developing countries, it is often a result of persuasion by UNHCR. As argued by Betts, ‘rather than contributing to refugee protection in the South for its own sake, Northern states’ willingness to contribute has depended upon a belief that there is a substantive causal relationship between refugees in the South and interests in other issue-areas affecting the North such as security, migration, and trade [and] UNHCR has played a significant role in influencing Northern states’ beliefs about the causal relationship between issue-areas through a combination of information provision, argumentation, institutional design, and playing an epistemic role’.¹¹¹

Prior to 2015, the strain upon the global refugee regime was not a priority for Western policy makers. That changed in 2015 when the Syrian Civil War – and the more generalised breakdown of order across the Middle East and North Africa – led to Europe’s first mass influx of refugees from outside Europe. In April 2015, 700 people drowned crossing to Lampedusa and

¹⁰⁸ Kesby, *Right to Have Rights*, p. 35.

¹⁰⁹ Audrey Macklin, ‘Who is the Citizen’s Other? Considering the Heft of Citizenship’, *Theoretical Inquiries in Law*, 8: 2 (2007), p. 334.

¹¹⁰ Betts and Collier, *Refugee*, p. 1.

¹¹¹ Alexander Betts, ‘International Cooperation in the Refugee Regime’, in Betts and Loescher, *Refugees in International Relations*, p. 53.

the Western media declared a global refugee crisis – although, in reality, this was a European crisis. This emergency reached its peak in the summer of 2015 when over one million asylum seekers crossed the Mediterranean into Europe. 2,300 more were to drown in various sea crossings over the course of that year. The response of European policy makers was incoherent and panicked. Greece became the primary reception country and its islands rapidly became overwhelmed. Many transit countries, such as Hungary, built physical structures to keep out the refugees. In an attempt to encourage European solidarity, Germany opened its borders – but when the hoped-for solidarity failed to materialise and hundreds of thousands entered Germany by foot in the summer of 2015, it was forced to backtrack on this commitment and returned thousands of people caught in transit to Turkey.

This refugee crisis has posed a number of challenges for Europe. To begin with, migration flows through the Mediterranean and via the EU's land border with Turkey are not purely made up of refugees. Rather, they are more accurately described as mixed migration flows. As noted by UNHCR, '[r]efugee and migratory movements now intersect in a number of different ways (...) Movements of people from one country and continent to another may include some who are in need of international protection and others who are not. This is likely to be the case when, as often happens, a country of origin is simultaneously affected by human rights violations, economic decline and an absence of livelihood opportunities'.¹¹² The term 'mixed movements' is reflective both of the reasons for movement and of the country of origin. Between January and June 2019, migrants arriving via the Mediterranean route included around equal numbers of Afghans, Syrians and Moroccans, as well as significant numbers from Guinea, Mali, Iraq, Palestine, DRC and Cote d'Ivoire. The convergence of economic and forced migration has caused significant issues for states attempting to separate 'real' refugees fleeing persecution and others seeking a better quality

¹¹² UNHCR, 'UNHCR, Refugee Protection and International Migration' (17 January 2007), available at <https://www.unhcr.org/uk/protection/migration/4a24ef0ca2/unhcr-refugee-protection-international-migration.html>, retrieved 7 May 2019. See also UNHCR, 'Refugee Protection and Mixed Migration: A 10-Point Plan of Action', January 2007, Rev.1, available at: <https://www.refworld.org/docid/45b0c09b2.html>, retrieved 4 May 2019.

of life.¹¹³ Moreover, the prospect of repatriation even for those genuine refugees entering Europe were perceived to be extremely low. This is demonstrated by the fact that, despite a significant reduction in hostilities, only 56,047 refugees returned to Syria in 2018.¹¹⁴ This is against a total number of 6.2 million internationally displaced Syrians.¹¹⁵ An acceptance of refugee communities was therefore perceived by European States as an acceptance that such communities would become permanently resident in their host states.

The primary response of the EU to this crisis has been to ‘externalise’ their refugee policy and focus on control and prevention. This has included ‘border control measures to try to combat illegal migration as well as smuggling and trafficking in human beings, capacity-building of immigration and asylum systems in transit countries, and readmission agreements to facilitate the return of asylum-seekers whose claims have failed (...) back to third countries’.¹¹⁶ In exchange for the cooperation of prospective host countries, the EU has agreed financial settlements, deepened cooperation and even advanced procedures for accession of candidate countries. Most notably, on 18 March 2016, the European Council and Turkey reached a comprehensive agreement on a plan to deal with the flow of irregular migration to Europe via Turkey. As part of this agreement, all new irregular migrants and asylum seekers arriving from Turkey to the Greek islands and whose applications had been declared inadmissible would be returned to Turkey, and that Turkey should take all necessary measures to prevent irregular migration from Turkey to the EU. In exchange, the EU agreed a resettlement package specifically for Syrian refugees, the acceleration of the EU-Turkey visa roadmap, a re-energising of Turkey’s EU accession process and a significant financial

¹¹³ Khalid Koser and Nicholas Van Hear (2003) ‘Asylum Migration and Implications for Countries of Origin’, World Institute for Development Economics Research Discussion Paper No. 2003/20, 4 (United Nations University, 2003).

¹¹⁴ UN High Commissioner for Refugees (UNHCR), ‘Syria Factsheet 2019’ (2019), available at <https://www.unhcr.org/sy/wp-content/uploads/sites/3/2019/07/UNHCR-Syria-Factsheet-May-2019.pdf>, retrieved 17 June 2019, p. 1

¹¹⁵ Ibid p. 2

¹¹⁶ Haddad, *Refugee in International Society*, p. 174.

settlement in the form of a fund for refugees in Turkey.¹¹⁷ In part as a result of this agreement, as of 2019, 64.2 per cent of the global Syrian refugee population resides in Turkey – over 3.6 million people. While it is clear that this policy is in the interests of the EU, whose member state populations are unwilling to host significant refugee populations, it is less clear that such a concentration of refugee populations in Turkey (and Lebanon) is in the interests of the Syrian refugee population. According to Betts and Collier, ‘for every \$135 spent on an asylum seeker in Europe, just \$1 is spent on a refugee in the developing world. Fewer than one in ten of the 4 million Syrian refugees in Turkey, Lebanon and Jordan receive any material support from the United Nations or its implementing partners’.¹¹⁸

Refugee communities across the globe have regularly protested against their treatment by international society. Refugee communities have taken varying approaches to ‘resistance’, with there often being a tension between requests for assistance and demand for rights. Their primary subject of protest is also often the international organisations under the auspices of institutions of the Recourse, primarily UNHCR, rather than their host states. Even then, they are often shut out of debates about their own circumstances: Although willing to meet and discuss with states and NGOs, UNHCR and other UN agencies have usually refused to engage with refugee protest movements.¹¹⁹ The practice of protest lip-sewing has become a visual representation of the manner in which refugee communities feel that they are excluded from debates over their own status. Viewed from a ‘subaltern’ perspective, the current refugee regime is arguably one of the most exclusionary institutions of contemporary international society. The origins of the practice of lip-sewing are uncertain, reflecting that subaltern voices struggle to be recorded but has ‘been a well-recognized mark of refugee protests, since it occurred on a massive scale in Australia’s Woomera

¹¹⁷ European Parliament, ‘EU-Turkey Statement and Action Plan’ (2016), available at <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>, retrieved 17 March 2019.

¹¹⁸ Betts and Collier, *Refugee*, p. 3.

¹¹⁹ Asli Ikizoglu Erensu, ‘Notes From a Refugee Protest: Ambivalences about Resisting and Desiring Citizenship’, *Citizenship Studies* 20: 5 (2016) pp. 664-677.

detention camp in 2002'.¹²⁰ The practice has also been seen in Calais, the Greek-Macedonian border, Turkey, Italy and should now be considered a coordinated practice of resistance. Practices of resistance and protest have sometimes been instrumental in ensuring better provision of services.¹²¹ However, it has rarely resulted in significant shifts in government policy of the kind that minority groups have been able to achieve. In the case of the Woomera camp, the international outcry following the lip-sewing protest resulted in the closure of that particular camp but not a fundamental rethink of Australian refugee policy.

The European refugee crisis is emblematic of the wider crisis in the institution of Recourse. An institution designed to deal with a European problem has been expanded globally – at least in principle. However, global circumstances do not match the earlier European circumstances for which the institution was originally designed. For the vast majority of the global refugee population, eventual repatriation is becoming increasingly unlikely. An institution designed to ensure temporary protection and shelter for displaced communities is therefore now predominantly a vehicle which facilitates permanent movement of vulnerable communities across borders. As such, it is unsurprising that Western states have increasingly tried to obfuscate their responsibilities under this institution – conscious that their populations would not be willing to accept the large-scale population transfers that would occur were they to abide by the spirit of the Convention. This has in turn placed unsupportable burdens on developing states who must abide by a Convention that was designed by Western leaders to solve a Western problem and has now been exported to the rest of the world, often with extremely limited support from wealthier countries.

¹²⁰ Asli Ikizoglu Erensu, 'Notes From a Refugee Protest: Ambivalences about Resisting and Desiring Citizenship', *Citizenship Studies* 20: 5 (2016), p. 670; Banu Bargu, 'The Silent Exception: Hunger Striking and Lip Sewing', *Law, Culture and the Humanities* (2017), pp. 1-28

¹²¹ Killian Clarke, 'When do the Dispossessed Protest? Informal Leadership and Mobilisation in Syrian Refugee Camps', *Perspectives on Politics* 16: 3 (2018) pp. 617-633.

Case Study: The United Nations Relief and Works Agency for Palestine Refugees

The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was created in 1949, two years prior to the 1951 Refugee Convention. Those who came under the auspices of UNRWA were then specifically excluded from the later 1951 Convention.¹²² UNRWA was established following the 1948 Arab–Israeli War by the United Nations General Assembly under Resolution 302(IV) of 8 December 1949. This resolution reaffirmed paragraph 11, concerning refugees, of UN General Assembly Resolution 194 (1948).¹²³ UNRWA’s five fields of operation are in the ‘Near East’: in Jordan, Lebanon, the Syrian Arab Republic, West Bank, and the Gaza Strip. Those who were eligible to receive the benefits of UNRWA were initially defined as ‘persons whose regular place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict’.¹²⁴ Eligibility for registration was also to be passed down through families; specifically the descendants of Palestinian refugee males, including adopted children, are eligible for registration as refugees under UNRWA.¹²⁵ As a result, the majority of current registered refugees gained their status through inheritance, not through their own experience of displacement. That the scope of beneficiaries is determined not only by the economic, social and political circumstance of the individual in question but also by their patrilineal ties to the Palestinian community is indicative of the focus of the organisation. Were UNRWA to have been designed as an organisation focused

¹²² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, p. 137.

¹²³ General Assembly Resolution 302, *Assistance to Palestine Refugees*, A/RES/302 (IV) (8 December 1949), available at <https://www.unrwa.org/content/general-assembly-resolution-302>, retrieved 18 December 2018.

¹²⁴ United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), ‘Consolidated Eligibility and Registration Instructions’, January 2009, available at <https://www.unrwa.org/sites/default/files/2010011995652.pdf>, retrieved 18 December 2018, p. 3.

¹²⁵ In 2006, the Consolidated Eligibility and Registration Instructions were revised to allow for the children of female registered refugees whose fathers are not registered refugees to be eligible for some UNRWA services. However, they are not eligible for registered refugee status and are unable to transfer this status or any beneficiary entitlement to their own families or children. See UNRWA, ‘Consolidated Eligibility and Registration Instructions’, June 2006, fn. 27.

solely on the security and needs of individuals, it would neither be necessary nor appropriate to allow refugee status to be inherited in this way. In reality, it is an organisation whose design and purpose has been the protection of the Palestinian community *as a people*.

UNRWA was not the first organisation to be founded in response to the displacement of Palestinians. Rather, the United Nations first created the Conciliation Commission on Palestine (UNCCP), whose explicit mandate was to provide diplomatic and legal protection to Palestinian refugees, including facilitating durable solutions on their behalf.¹²⁶ However, this agency was never successful in securing international support for its efforts and, as a result, the agency fell into abeyance by 1950.¹²⁷ UNRWA was not given an explicit mandate to provide diplomatic or legal protection to the Palestinian refugees in the manner that UNCCP had been, nor was it tasked with any political role in securing a settlement. Rather, its primary purpose was the provision of humanitarian, economic and social aid to the displaced. No agency was established to fill the protection gap left by the disbandment of UNCCP.

In addition to the UN framework for Palestinian refugees, refugee hosting states in the region have passed a number of resolutions through the Arab League in an attempt to build collective will to improve the situation for Palestinian refugee communities. For example, some MENA countries ratified the 1965 Protocol for the Treatment of Palestinians in Arab States (known as the ‘Casablanca Protocol’), giving Palestinian refugees the right to work and to own property in signatory states. Seven states (Jordan, Algeria, Sudan, Iraq, Syria, Egypt, and Yemen) ratified the Protocol with no reservations; Lebanon, Kuwait, and Libya ratified it with reservations (for instance excluding Palestinians from the right to work in certain sectors); while by 2013 Saudi Arabia, Morocco, and Tunisia had not yet ratified the Protocol.

¹²⁶ General Assembly Resolution 194 (III), *Palestine - Progress Report of the United Nations Mediator*, A/RES/194 (III) (11 December 1948), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A>, retrieved 18 December 2018.

¹²⁷ Noura Erakat, (2015) ‘Palestinian Refugees and the Syrian Uprising: Filling the Protection Gap during Secondary Forced Displacement’, *International Journal of Refugee Law*, 26: 4 (2015), p. 583.

UNRWA exemplifies many of the challenges and shortcomings of the institution of Recourse. Firstly, the benefits it provides to the Palestinian community fall short of those awarded either to recognised or shielded communities. Within the countries of UNRWA's sphere of operation – Jordan, Egypt and Lebanon – they still do not enjoy the same privileges as citizens of those countries nor comparable rights of self-determination or economic benefits. As a result, seventy years on from the foundation of UNRWA, the Palestinian refugee community continues to rely heavily upon the organisation – and the wider international community – for social welfare, education and employment. In part, this is because Palestinian political leaders have not pushed for their communities to gain citizenship or permanent residency rights in the countries which they are located fearing that, were they to do so, this would reduce pressure on Israel and the international community to eventually return the Palestinian refugees to their homeland. The situation of the Palestinians is not unique in MENA. Rather, since the consolidation of nation states in the region, the borders between Middle Eastern countries have remained porous, enabling refugee movements to take place with relative ease. Middle Eastern states have broadly tolerated the presence of refugee populations which now include 'c.800,000 Palestinians hosted across the region since the 1940s; an estimated two to four million Sudanese who have fled to Egypt since the 1980s; and one million Iraqis displaced in the 1990s and 2.4 million Iraqis since 2003'.¹²⁸ However, the majority of refugee populations, though tolerated, have been marginalised and excluded from citizenship rights. Indeed, 'the sub-region's nation states have developed policies which define who is inside or outside the nation, thereby producing a mass of non-citizens and stateless groups, such as c.150,000 Kurds in Syria and thousands of children born to Lebanese mothers and foreign fathers who are stateless due to Lebanon's nationality laws'.¹²⁹

¹²⁸ Sari Hanafi, 'Forced Migration in the Middle East and North Africa', in Fiddian-Qasmiyeh, Loescher, Long and Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies*, p. 585.

¹²⁹ Ibid., p. 586. Hanafi continues; '[i]n the Gulf area more specifically, the modern petro-monarchs defined nationality in a very narrow fashion, resulting in the exclusion of 'undesirable' tribes and undermining the long history of these tribes' habitual mobility across and beyond the Arabian Peninsula. This has generated a phenomenon of stateless Bedouins, referred to as the *bidoon*, in all the countries of this region but especially in Kuwait, where an estimated 100,000 *bidoon* are based'. Ibid., p. 586.

In many ways, UNRWA is a more positive example of the kind of burden-sharing that other countries hosting large refugee populations would like to see from the international community. However, this arrangement has still left Palestinian refugee populations comparably more vulnerable to violence than a Shielding institution may have done. The Sabra and Shatila massacre in Lebanon is instructive in this regard. As the institution of Recourse placed the Palestinian refugee populations under the protection of a non-state civilian actor, UNRWA, there was no national or military authority that was deemed directly responsible for their protection. As such, not only were they left vulnerable to violence within Lebanon, but there was no means by which the international community could hold any particular authority to account for the massacre, nor any realistic means by which punishment and redress could be enforced. Similarly, as demonstrated by the crises in Kuwait in 1991, Libya in 1996, and most recently in Iraq in 2003, this protection gap also left Palestinian refugees particularly vulnerable during secondary forced displacement in the Middle East.¹³⁰ In providing a mechanism of Recourse, international society relieved some of the pressure felt by the host states to provide them with the same kind of benefits that would have accrued under a Shielding institution – as it could be plausibly argued that the Palestinian community was able to survive outside of a recognised state structure and without obtaining access to citizenship benefits within their own state, even if in reality the security cost of lack of access to a Shielding institution was high.

This dilemma led to pressure to expand the remit and scope of UNRWA, which was duly attempted by the UN on a number of occasions in response to further conflict-related displacements within the region. In 1967, the General Assembly expanded UNRWA's mandate to include the '1967 displaced' and in 1982, following displacements after Israel's invasion of Lebanon on 6 June 1982, the General Assembly expanded the scope of UNRWA's mandate to persons displaced by all 'subsequent hostilities'.¹³¹ In 2006, UNRWA also provided emergency

¹³⁰ Erakat, 'Palestinian Refugees and the Syrian Uprising', p. 581.

¹³¹ General Assembly Resolution 2252 (ES-V), *Humanitarian Assistance*, A/RES/2252 (4 July 1967), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7575BE79BBC6930852560DF0056FC78>, retrieved 7 January

assistance to persons displaced by the hostilities in Lebanon and the Gaza Strip, many of whom were not Palestinian refugees. After the event, the General Assembly also included these classes of displaced persons within UNRWA's mandate. UNRWA's mandate therefore focuses on Palestinian refugees but also extends to persons displaced by 'the 1967 and subsequent hostilities' and, occasionally, to a broader cross-section of the local community. Moreover, over time, the UN has granted UNRWA a greater protection mandate. In particular, the United Nations General Assembly, in Resolution 63/93 of 5 December 2008 notes the role of UNRWA in providing 'protection' for the Palestinian community – language that was missing from the original mandate of the organisation but more familiar to the language of UNCCP.¹³² In response to emergencies, armed conflict, and humanitarian crises, therefore, the United Nations General Assembly has authorised UNRWA to provide incremental legal and diplomatic protection to Palestinian refugees in lieu of the UNCCP. Although significant, this authority has been insufficient to close the protection gap endured by Palestinian refugees. Not only does it function on an ad hoc basis, but even at its most robust, UNRWA lacks the authority to search for durable solutions on their behalf. Nor is it able to provide Palestinian refugees with the kind of legal or diplomatic benefits that would otherwise accrue from citizenship of the countries they live in.

While UNRWA today provides international protection to Palestinian refugees, that protection remains geographically truncated and insufficient. This is demonstrated by the disparity in community health indicators between the Palestinian refugee populations and the wider populations of their host countries. According to UNRWA's Annual Operational Report 2018,

2019; General Assembly Resolution 2341 B (XXII), *Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, A/RES/2341(XXII) (19 December 1967), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/4998F38BD72838F0852560DF004F6054>, retrieved 7 January 2019; General Assembly Resolution 37/120 I, *United Nations Relief and Works Agency for Palestine Refugees in the Near East*, A/RES/37/120(A-K) (16 December 1982), available at <https://unispal.un.org/UNISPAL.NSF/0/5833950B4BA618DF852560D90051E13A>, retrieved 7 January 2019.

¹³² The General Assembly restated that it was '[a]ware of the valuable work done by the Agency in providing protection to the Palestinian people, in particular, Palestine refugees'. General Assembly Resolution 63/93, *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, A/RES/63/93 (18 December 2008), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/1858ADD5BF5949E28525753C00581A0D>, retrieved 19 December 2018.

‘[w]ithin a context marked by high unemployment rates and intense competition for scarce job opportunities, Palestinian refugees are among the most vulnerable and marginalised populations in Lebanon. While [Palestinian refugees from Lebanon] remain barred from 39 professions and face discrimination in the labour market, the situation is further exacerbated for [Palestinian refugees from Syria] due to their vulnerable legal status. As a result, Palestine refugees struggle with high rates of poverty and food insecurity and face difficulties in securing their livelihoods’.¹³³ By contrast, although in Jordan 2,242,579 Palestine refugees are registered with UNRWA, the majority are understood to possess Jordanian citizenship, thereby allowing them to enjoy the same rights as other Jordanian nationals. Nevertheless, ‘approximately 158,000 Palestine refugees who fled Gaza in 1967 do not have Jordanian nationality and face restricted access to public services and other restrictions affecting public services and livelihood opportunities’.¹³⁴ For those Palestinian refugee communities in Gaza (1,421,282 registered in 2018) and the West Bank, UNRWA remains unable to offer any form of protection from Israeli violence – whether in the form of air raids, house demolition or land confiscation. In Gaza, the socioeconomic and humanitarian crisis ‘driven by the Israeli land, air and sea blockade (...) coupled with cycles of hostilities and violence, political instability and restricted entry and exit at Rafah border crossing with Egypt’ led to ‘deteriorating socioeconomic conditions in Gaza [which] have given rise to ever more despair across the population, especially among young people’.¹³⁵ According to the Palestinian Central Bureau of Statistics, unemployment in Gaza rose to 52 per cent in 2018 from 44 per cent in 2017.¹³⁶ Similarly, unemployment for Palestinian refugees in the West Bank was 18 per cent in 2018, contributing to high levels of poverty in Palestinian refugee households.¹³⁷

¹³³ United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), ‘Annual Operational Report 2018’, available at https://www.unrwa.org/sites/default/files/content/resources/unrwa_annual_operational_report_2018_final_3.pdf, retrieved 18 March 2019, p. 9.

¹³⁴ UNRWA, ‘Annual Operational Report 2018’, p. 9.

¹³⁵ *Ibid.*, p. 10.

¹³⁶ Palestinian Central Bureau of Statistics, ‘Press Release on the Results of the Labour Force Survey 2018’, available at <http://www.pcbs.gov.ps/post.aspx?lang=en&ItemID=3383>, retrieved 19 December 2018.

¹³⁷ UNRWA, ‘Annual Operational Report 2018’, p. 11.

UNRWA also suffers from vulnerability to changes in international politics surrounding the Arab-Israeli conflict. In 2018, the Agency was ‘confronted with an existential financial crisis, following the abrupt loss of U.S.\$300m – around a quarter of total essential funding requirements for the year – in planned funding from its largest donor who advised that the intention was to force the Palestinian Authority / Palestine Liberation Organisation back to the negotiating table with Israel’.¹³⁸ Palestinian refugee populations have also been particularly vulnerable during periods of conflict in the host states within which they are located. Most recently, the civil war in Syria has pushed the Palestinian population there into economic crisis and has severely impacted the ability of UNRWA to access the communities for which they are responsible:

‘The Agency estimates that (...) [a]lmost 60 per cent of Palestine refugees have been displaced at least once since the beginning of the conflict and (...) more than 180,000 have seen their homes either destroyed or severely damaged. Yarmouk, Dera’a, and Ein El-Tal (Aleppo) camps, previously home to more than 30 per cent of the Palestine refugee population in Syria, have been almost completely destroyed. A 2018 UNRWA vulnerability assessment estimated that 90 per cent of Palestine refugees in Syria lived on less than two United States Dollars (U.S.\$) per person, per day and rely on humanitarian assistance to meet their most basic needs. Since the beginning of the conflict, UNHCR has lost 18 personnel. A further 28 personnel are detained, presumed detained or missing as at 31 December 2018’.¹³⁹

Those who travelled to Lebanon and Jordan from Syria remained at greater vulnerability than the longstanding Palestinian refugee populations due to their more uncertain legal status in both countries, despite being registered with UNRWA.¹⁴⁰

Ultimately, UNRWA has been unable, despite an increasing mandate and significant budget, to provide Palestinian communities with the kind of protection necessary to achieve community health outcomes on a par with their host communities and – in many cases – barely above absolute poverty levels. The reasons behind this failure ultimately lie in the inability to find a permanent solution of either resettlement or repatriation for the Palestinian refugee community. As argued by Romirowsky and Joffe, the decision of the international community to give up on

¹³⁸ UNRWA, ‘Annual Operational Report 2018’, p. 6.

¹³⁹ Ibid., p. 9.

¹⁴⁰ Ibid., pp. 9-10.

resettlement and repatriation and accept 'the roles of providing refugee housing, education, and health, and more recently as legal protector and advocate, UNRWA has, in reality, perpetuated the refugee problem'.¹⁴¹ In terms of providing an environment conducive to the preservation of diversity, since all of the Palestinian refugees under the protection of UNRWA are housed within Arabic speaking countries, language retention for Palestinian refugee communities has not been an issue. More challenging for UNRWA has been the preservation of Palestinian culture in exile and in conditions of poverty. That said, of all long-term refugee populations, the Palestinian refugee community have arguably been one of the most successful in preserving their unique cultural identity and community narrative.

Although usually perceived as an anomalous case, the increasing average duration of displacement for refugee communities means that the case of UNRWA is becoming more relevant and representative of global displaced communities over time. It is a case that particularly highlights the tensions between the imperatives of providing means of integration for refugee communities within host states, the desire to preserve cultural autonomy, and the presumption that such communities will eventually return home. As noted by Zetter, refugees hoping to repatriate will often strive to keep their differentiation as 'refugees' and so avoid complete integration in the host society: 'were assimilation to be successfully achieved, a label would be blurred and pressure for repatriation would thus be lost'.¹⁴² The case of Palestinian refugees highlights the costs of this approach – more than seventy years later the Palestinian community in exile remains without access to the benefits of citizenship in their host states and dependent upon a fickle international community for their protection and wellbeing. In the meantime, eventual repatriation has only become more unlikely.

¹⁴¹ Asaf Romirowsky and Alexander Joffe, *Religion, Politics and the Origins of Palestinian Refugee Relief* (New York: Palgrave Macmillan, 2013), p. 6.

¹⁴² Roger Zetter, 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity', *Journal of Refugee Studies*, 4: 1 (1991), pp. 53, 55.

Case Study: The Refugee Crisis in the Great Lakes Region

The refugee crisis in the Great Lakes region of central Africa took place in the aftermath of the Rwandan genocide. In the six months following the Rwandan Patriotic Front (RPF)'s invasion of Rwanda, nearly 2 million Hutu Rwandans crossed the border into what was then Zaire, fearing retribution for the genocide inflicted on the Tutsi people.¹⁴³ The refugees came to be dispersed along the border with Rwanda in 35 refugee camps. The lack of infrastructure and aid in these camps created a humanitarian crisis, including a cholera epidemic and spiralling mortality rates. Responsibility for providing aid to this community fell primarily to UNHCR who were supported in their relief efforts by a host of NGOs, including Médecins sans Frontières and Oxfam, with some limited assistance from states such as the U.S., France, Israel and the Netherlands.¹⁴⁴ This intervention led to a rapid drop in the mortality rate in the autumn of 1994.¹⁴⁵ From the beginning, however, UNHCR faced challenges in establishing order in the camps. This work began in the context of both increasing hostility on the part of international society to refugees generally, and rising xenophobia to African refugee communities in particular.¹⁴⁶ In this particular case, however, there were severe concerns both about the potential negative consequences of assisting a community who had been actively involved in the perpetration of genocide – many of whom were still armed – and a deep moral discomfort with doing so. The RPF stoked these concerns by accusing the aid organisations operating in the camps of 'feeding the killers'. The mass participation of Hutu Rwandans within the genocide allowed the RPF to characterise the refugees as collectively responsible, rather than victims of a violent regime in their own right.

¹⁴³ UNHCR, Inspection and Evaluation Service, 'Refugee Camp Security in the Great Lakes Region' (1997) Available at <http://www.unhcr.org/3ae6bcfd0.pdf>, retrieved 8 February 2019.

¹⁴⁴ New York Times, 'Lifesaving Aid for Rwanda', 30 July 1994. ISSN 0362-4331, retrieved 7 January 2019.

¹⁴⁵ Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009), p. 25.

¹⁴⁶ Patricia Daley, 'Refugees, IDPs and Citizenships Rights: The Perils of Humanitarianism in the African Great Lakes Region', *Third World Quarterly* 34: 5 (2013), p. 893.

There was some basis to these concerns. The UN Secretary General reported in November 1994 that approximately 230 Rwandan political leaders were in the camps and they were maintaining control through violence and intimidation. When their power was threatened in any way, this violence would turn against the aid workers.¹⁴⁷ Eventually, the increasing militarisation of the camps and pressure from Rwanda led to the departure of most aid agencies. Médecins Sans Frontières were the first to leave, stating that the humanitarian operation was a total ethical disaster.¹⁴⁸ This was followed by the departure of the International Rescue Committee, an implementation partner of UNHCR, with most others following shortly after. One of the main causes of the decision of the aid agencies to abandon the camps was the insecurity to their own staff and threat posed to other refugees by the violent actions of the militia embedded within the camps who had not been disarmed. Many expressed hopes that by taking the drastic step of leaving, this would force the international community to take more active steps to disarm the militias.¹⁴⁹ UNHCR, however, remained.

In October 1994 it became clear that the international community had to take urgent action to restore security to the camps. Firstly, a joint United Nations Assistance Mission for Rwanda/UNHCR mission was sent, unsuccessfully, to examine the area and devise potential solutions. Then, on 30 November, the UN Secretary General, Boutros-Boutros Ghali consulted 60 member states to request that they be willing to send UN peace keepers. Only one responded positively and so the initiative was abandoned.¹⁵⁰ Eventually UNHCR accepted security forces from the government of Zaire to provide aid to the camps – a situation that was clear to all parties involved that was far from ideal.¹⁵¹ Over the following 18 months, the security situation in Eastern Zaire worsened as the camp militia grew in strength and deepened their control over the camp's

¹⁴⁷ Ian Martin, 'Hard Choices after Genocide: Human Rights and Political Failures in Rwanda' in Jonathan Moore, ed., *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Oxford: Rowman & Littlefield, 1998), p. 160.

¹⁴⁸ Sreeram Chaulia, 'UNHCR's Relief, Rehabilitation and Repatriation of Rwandan Refugees in Zaire 1994-1997', *Journal of Humanitarian Assistance*, 8 April 2002.

¹⁴⁹ Daley, 'Refugees, IDPs and Citizenships Rights', p. 895.

¹⁵⁰ UNHCR, 'Refugee Camp Security in the Great Lakes Region', p. 11.

¹⁵¹ Ibid., p. 11.

residents in the absence of a significant NGO or governmental presence. In order to maintain food supplies the militia conducted border raids into Rwanda and attacks on the Banyamulenge tribes (ethnic kinspeople of the Tutsi). The government of Rwanda responded by aiding and abetting the creation of the Alliance of Democratic Forces for the Liberation of Congo (AFDL) under Laurent Kabila composed of Banyamulenge, sympathetic militias, and Rwandan troops. Slowly, UNHCR, which had always encouraged the voluntary return of the refugees in line with the UN Security Council's call for all parties to facilitate their rapid repatriation,¹⁵² began to slowly accept the Rwandan government's efforts to forcibly repatriate the refugees.¹⁵³ The AFDL dismantled the refugee camps and expelled their inhabitants, who either spread to neighbouring countries or returned to Rwanda. Eventually, the AFDL rebellion led to the overthrow of Mobutu and his replacement with Kabila, precipitating a prolonged and costly civil war.¹⁵⁴ 'Between 1998 and 2003, 3.3 million people died and tens of thousands fled the country. As of December 2010, there were 1.68 million IDPs in DRC, primarily in DRC's eastern provinces. Between May 2012 and early 2013, the ongoing fighting between the M23 militia and government forces also displaced about 800,000 people'.¹⁵⁵ Today, many Rwandan refugees remain in DRC, with 70 per cent of registered refugees having been born there. Voluntary repatriation continues to take place and in 2017, 18,000 Rwandan refugees were repatriated from DRC. At the request of the DRC Government, in 2018 UNHCR began a large-scale verification and biometric registration of

¹⁵² Médecins sans Frontières, 'Rwandan Refugee Camps in Zaïre and Tanzania 1994-1994' (2014), available at <https://www.msf.org/sites/msf.org/files/2019-04/MSF%20Speaking%20Out%20Rwandan%20Refugee%20camps%201995-1995.pdf>, retrieved 8 March 2019, p. 36.

¹⁵³ UNHCR, 'Lessons Learned from the Rwanda and Burundi Emergencies', EVAL/04/96/Rev.1, (1996), available at <http://www.unhcr.org/uk/research/evalreports/3ae6bcfc4/lessons-learned-rwanda-burundi-emergencies.html>, retrieved 8 March 2019.

¹⁵⁴ Mel McNulty, 'The Collapse of Zaïre: Implosion, Revolution or External Sabotage?', *The Journal of Modern African Studies*, 37: 1 (1999), pp. 53-82. See also William Cyrus Reed, 'Protracted Patronage, Truncated Armed Struggle, and Political Consolidation in the Democratic Republic of the Congo', *Issue: A Journal of Opinion*, 26: 1 (1998), pp. 18-21.

¹⁵⁵ Gaim Kibreab, 'Forced Migration in the Great Lakes and Horn of Africa', in Fiddian-Qasmiyeh, Loescher, Long, and Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies*, p. 575.

Rwandan refugees in North and South Kivu in an effort to pave the way towards the cessation clause and eventual full repatriation.

Given the very limited international access to the Rwandan refugee populations in the DRC, it is difficult to reach any useful conclusions regarding the preservation of Rwandan culture in exile.¹⁵⁶ However, writing about refugee populations in the Great Lakes and Horn of Africa generally, Gaim Kibreab notes that governments in the countries hosting large protracted refugee populations are clear that refugees should be given a place to live in order to continue their own community, not to forget their countries and integrate into the local community.¹⁵⁷ According to Kibreab, 'most governments in the region have also declared war on self-settlement of refugees which has hitherto been working by enabling hundreds of thousands, if not millions, of asylum seekers, refugees, and mixed migrants to be integrated into host societies informally'.¹⁵⁸

International society's response to the Great Lakes' refugee crisis sheds light on the role of concepts of legitimacy in determining a community's access to the institution of Recourse. In this case, despite the humanitarian crisis that was unfolding within the refugee camps, many within international society did not believe that the Hutu refugees were worthy of protection; in part because of their presumed collective responsibility for the genocide and in part because their presence in Zaire had such a negative impact upon the local populations. It demonstrates, therefore, the limitations of the institution of Recourse in that it remains at the discretion of international society to invoke and support this institution. In cases where communities are not deemed worthy or legitimate, even this last form of protection can be withheld. Moreover, it highlights the tension felt by international society between providing refugees with means of Recourse and the security risks posed by those communities to the host state. In this instance, the refugee Hutu Rwandan community clearly did pose a security threat to its host nation, both directly

¹⁵⁶ This observation also holds for almost all refugee populations. During the course of research for this project, no data could be found on native language retention for any refugee communities in exile. Writings on broader preservation of culture are restricted to unique cases, such as the Palestinian refugee community.

¹⁵⁷ Kibreab, 'Forced Migration in the Great Lakes and Horn of Africa', p. 581.

¹⁵⁸ Ibid., 583.

in terms of the violence perpetrated by the militia against the Banyamulenge of the region and indirectly by provoking Rwandan support for a rebellion that eventually overthrew the government. Rarely do other refugee populations pose such a direct and considerable threat, yet in general there is a presumption of state governments that refugee flows do pose an inherent security risk, in part because of the fear of such a threat among the population of the area host to refugees.¹⁵⁹

Summary

The above analysis demonstrates that, after a decidedly mixed record during the twentieth century, the Shielding mechanism is now gaining ground in international society – both in international law and norms and in the practices many states. There now exists a relatively strong network of international declarations, norms and organisations working to improve minority rights globally and there have been a number of notable success stories for particular communities. These include indigenous communities in European settler states, national and ethnic minorities in Europe – including some improvement in protection for Romani communities – and national minorities in Latin America. Particularly noteworthy is the resurgence in use of many minority languages after a long period of linguistic diversity loss.

However, this progress is not universal. Many states – particularly postcolonial states and Asia-Pacific states – continue to view national, ethnic and religious minorities within their territories as threats to internal security rather than as vulnerable communities in need of additional protection or unique cultures worthy of preservation. Across the Middle East and Asia, the situation for minorities has declined rapidly in recent years. Examples such as the treatment of the Uighur minority in Xinjiang demonstrate that significant threats to minority groups persist and international society is limited in its ability to counter the violent or homogenising policies of

¹⁵⁹ Robert Mandel, 'Perceived Security Threat and the Global Refugee Crisis', *Armed Forces and Society*, 24: 1 (1997), pp. 77-103.

powerful states. International society has been similarly unable or unwilling to stem the purge of minority communities currently underway in the Middle East. Lastly, the resurgence of populism in the West threatens the substantial progress made even in the countries that currently offer the most robust protection to minority communities within their borders. Communities which challenge territorially-based conceptions of what counts as a community continue to face additional hurdles to access minority rights protections and those communities whose rights claims challenge the territorial sovereignty of states continue to face resistance to the recognition of their claims to indigeneity.

The institution of Recourse, meanwhile, is at breaking point. Across much of the developed world, there has been a collapse in public support for asylum. Nor is this unique to the developed world; ‘many host states in the developing world are finding it hard to sustain domestic political support for large scale hosting’.¹⁶⁰ As such, for those communities who are forced to turn to the institution of Recourse for protection, a bleak future of prolonged and impoverished exile awaits. The majority of the burden for the implementation of this institution now falls upon the global South.¹⁶¹ A regime designed to fix a European problem is therefore now being imposed upon those states in the international system least able to bear the burden, while the majority of developed states develop creative means to obfuscate their responsibilities.

The growing difficulty of finding durable solutions for the global refugee population means that the institution is increasingly failing at its core task and is in many ways actively facilitating the exclusion of refugee communities from more expansive protective institutions. The case of displaced Palestinian communities is instructive in this regard. By providing a non-governmental protective infrastructure for the displaced communities, UNRWA mitigated pressure upon host states to offer citizenship for the refugee communities within their territory and shifted the burden for their welfare onto the international community. Again, in this instance there are competing

¹⁶⁰ Betts and Collier, *Refugee*, pp. 9-10.

¹⁶¹ Alexander Betts, *International Cooperation between North and South to Enhance Refugee Protection in Countries of Origin* (Oxford: Refugee Studies Centre, 2005).

imperatives for the community in question. In allowing refugee status to be inherited by the descendants of Palestinian refugees, this allows for a continuity of community identity and cohesion to be maintained, even in exile, thus protecting the integrity of the community. However, this has also prevented the descendants of Palestinian refugees from being able to make a legitimate claim to citizenship and its accompanying benefits of their host communities – thereby maintaining their marginalisation. The case study of the Great Lakes refugee crisis meanwhile demonstrates the very practical limitations on the international community's ability to provide protection to the most vulnerable refugee communities in the developing world – and their reluctance to protect communities deemed 'unworthy'.

From the above analysis, it is clear that neither the institutions of Shielding nor Recourse are currently able to compensate sufficiently for the failings of the State as an institution of community protection. Importantly, neither institution can provide real alternatives to the 'right to have rights' that accompanies national citizenship (at least in a functioning state). The institution of Shielding is reliant upon state compliance with international society; remaining powerless to prevent oppression, displacement or even genocide of many communities across the globe.

Rather than compensating for the unequal access to meaningful citizenship experienced by political communities, the institutions of Shielding and Recourse in many ways exacerbate them. Minority rights protections are strongest in those states that already provide meaningful citizenship and least present in those that do not. The institution of Recourse, meanwhile, is most accessible to those from countries whose citizens have easy access to Western countries. For those communities most in need of access to the institution, international society has created almost insuperable barriers to travel as a means of preventing them from accessing the institution and becoming a burden on other states. Rather than providing a means of levelling the hierarchy in which political communities are structured by the international states system, the two secondary pluralist institutions have in many ways exacerbated it.

Chapter Five: Hierarchy and Homogeneity in the ‘New Pluralism’

‘At every turn, then, global law is a negotiation among the competing claims of hegemony, sovereignty, and institutionalism within an international society at once both universalist in tone, ambition, and sometimes institutional design, and exclusionary and anti-pluralist in some of its most deeply ingrained practices’.¹

Within this thesis, I have argued that – in addition to the primary pluralist institution of the sovereign territorial State – international society has developed two secondary pluralist institutions; Shielding and Recourse. The moral purpose of these institutions is to protect vulnerable communities within the international states system and defend international diversity. In analysing the operation of these institutions, this thesis has found that their practical limitations, alongside the unequal access enjoyed by different political communities, present challenges for the new pluralist’s aspiration that international society is capable of delivering pluralist justice. The international state system provides the global population with fundamentally unequal access to the benefits of citizenship and community membership and, therein, the ‘right to have rights’. Although Shielding and Recourse provide remedial access to community protection mechanisms for some vulnerable communities in the international system, in many ways they reinforce existing hierarchies. There is also clear tension between the notional aim of promotion of diversity and underlying homogenising dynamics within the pluralist institutions: While the moral objective of the institutions of Shielding and Recourse are to create the conditions conducive to the flourishing of international diversity, in reality both encourage states to adopt forms of liberal multiculturalism based around standardised international (Western) best practice. Rather than facilitating true diversity, therefore, contemporary pluralist institutions have in some ways contributed to the homogenisation of international society. This chapter will further explore the dynamics of

¹ Gerry Simpson, ‘The Globalization of International Law’, in Dunne, Tim & Reus-Smit, Christian, *The Globalization of International Society* (2017), p. 283.

hierarchy and homogeneity within the pluralist institutions, drawing on insight from wider English School theory.

The Power in Institutional Design

In his recent work, both in *On Cultural Diversity* and *Culture and Order in World Politics*, Christian Reus Smit argues that the history of international orders show that governance of diversity is one of the key imperatives of order building and that ‘at key moments of conscious construction, order builders create diversity regimes in response to particular configurations of unequally distributed material capabilities and articulations of cultural difference’.² He posits both the Treaties of Westphalia and the nineteenth-century ‘standard of civilisation’ as grand attempts to organise extant cultural diversity at times of shifting material capabilities. The Treaties of Westphalia codified the limits of religious toleration and difference in Europe and provided a set of rules for how acceptable religious difference was to be managed. They also privileged religion as the dominant cultural category and circumscribed the ability of European monarchs to enforce religious homogeneity in their territories. The core of the nineteenth century diversity regime, meanwhile, was the construction of civilisation and race as the principle axes of cultural difference and a hierarchical ordering of these concepts.³ This project has found that the core axis of difference in the modern diversity regime is membership of a given nation or peoples. Rather than religion or civilisation, nation is now defining cultural category of international diversity. Within the contemporary diversity regime, some nations have been given the privilege of statehood and others denied. The secondary institutions of Shielding and Recourse were developed in response

² Christian Reus-Smit, *On Cultural Diversity: International Theory in a World of Difference* (Cambridge: Cambridge University Press, 2018), p. 215. Reus-Smit and Andrew Phillips, *Culture and Order in World Politics* (Cambridge: Cambridge University Press, 2020).

³ Ibid., p. 210. See also Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002); Brett Boden, *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago: University of Chicago Press, 2009) and Gerrit Gong, *The Standard of Civilization in International Society* (Oxford, Clarendon Press, 1984).

to the urgent need to protect those communities denied statehood and left vulnerable in a world run by states.

Reus-Smit's work is useful in providing an analytic structure by which to understand the motivations of the order builders who created this diversity regime. He argues that three imperatives drive order builders to organise diversity and turn extant cultural heterogeneity into authorised forms and expressions of difference. These are a) control of populations through institutionalising preferred meanings and identities, engineering consent for institutions, and limiting the scope for innovation; b) self-location of the order builder within the cultural terrain – usually at the apex of the cultural hierarchy; and c) social and political coordination – including the avoidance of conflict and resolution of disputes through building collective knowledge and agreed practices.⁴ Applying this logic to the construction of the secondary pluralist institutions of Shielding and Recourse, a few things are evident:

First, an analysis of the historic development of the institutions of both Shielding and Recourse demonstrates that the primary objective of both was a desire to ensure the maintenance of order within Europe, prevent the outbreak of conflict in states with minority populations, and avert the generation of refugee flows. The overview presented in chapter three of the grand attempts to govern diversity within Europe demonstrate a much greater desire on the part of European order builders to limit, control and order diversity than a desire to expand it. The minorities regimes developed in Europe during the eighteenth, nineteenth and twentieth centuries both attempted to assuage demands for self-determination from minority communities for independent statehood and prevent the new elites of emerging states from engaging policies of homogenisation that would prove destabilising to European order. The early institution of Shielding further institutionalised the preferred meanings and identities of European order builders – specifically the elevation nationalism as the ordering principle of Europe – by providing

⁴ Reus-Smit, *On Cultural Diversity*, pp. 13, 209.

mechanisms whose underlying premise was both compatible with this principle and mitigated against its most destructive consequences. European order builders were also able to limit the scope for innovation in how nationalism should be interpreted by deciding themselves which communities qualified for nation states and then specifying that the communities that did not qualify must content themselves with minority protection regimes.

The institution of Recourse emerged in the early twentieth century in response to the evident failure of the Shielding institution and the resultant creation of mass refugee flows within Europe. The post-1919 refugee regime was designed to ensure that European states shared the burden of refugee populations – thus preventing these populations from destabilising particular states – and provide a means for eventual repatriation of refugee communities to their home states. Again, this was a solution ultimately compatible with the prevailing principle of nationalism. Consent for the new diversity regime was established through the strategic use of emerging norms – such as self-determination – and the development of principles of modern constitutionalism. A key consequence, therefore, of the establishment of the institutions of Shielding and Recourse was, even as they undercut the sovereignty of emerging states, to reaffirm nationalism as the underlying principle of international order. In so doing, this engineered consent among European populations for the emerging order built around sovereign nation states, delegitimising alternative diversity regimes.

Second, there are two ways in which the institutions of Shielding and Recourse helped order builders to self-locate within the cultural terrain. First, by legitimising nationalism as the principle on which international order should be based, they legitimised themselves as nation state actors and established a hierarchy of national political communities in which they were at the apex. Second, through moulding international society in their own image, they positioned themselves as both the international standards of best practice and the only legitimate enforcers of those standards. At the great moments of order-building, powerful European states were therefore able

to organise culture in Europe so that their own cultural identities were centrally and indispensably placed.

Post-1945, this project was then expanded globally. The process of decolonisation resulted in the ‘nationalisation’ of the globe and the sovereign state became the only form of legitimate political authority. This attempt by Western Great Powers to remake the world in their own image contained within it the seeds of problems to come. In principle, the package that constituted the territorialised nation state – sovereignty, territory and nationalism – could produce a coherent entity. However, in practice the disparity between the number of ethnic nations and the number of states has generated major global problems of secessionism and irredentism. This process was therefore accompanied by the establishment of international best practice in citizenship rights and minority and refugee protection – standards and practices that emerged in a European context but were then expanded globally.⁵ When these best practices came to impinge upon the interests of Western states, however, most notably when non-Western refugee communities sought access to Western institutions of Recourse, the response was one of obfuscation of responsibilities. As a result, the burden of this Western-designed institution now falls almost entirely to the developing world, whose members had little to no say in the design of the institution.

Third, in designing the institutions of Shielding and Recourse, order builders hoped to set up specific mechanisms for the prevention of conflict and the management of its consequences. Both institutions were designed to fulfil a purpose of social and political coordination, facilitating the avoidance of conflict and resolution of disputes through building collective knowledge and agreed practices. In reality, the success of order builders in generating legitimacy for these mechanisms has been uneven throughout history. The European order created after 1919 is usually

⁵ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), p. 205. Examples of ‘best practices’ drawn from the experience of Western democracies include the Annan Plan for Cyprus, which ‘explicitly drew on strategies used in Switzerland and Belgium to accommodate their substate national groups’ and ‘the EU’s proposals for the former Yugoslavia [which] were based on the model of autonomy for the German national minority in Italy’. Will Kymlicka, ‘The Internationalization of Minority Rights’, *International Journal of Constitutional Law*, 6: 1 (2007), p. 19

the most cited example of the construction of an ‘illegitimate’ European order and it is often to the perceived ‘illegitimacy’ of the minority regimes enforced at Versailles that their downfall is attributed. While the post-1945 diversity regime has proven considerably more durable, both institutions have been put under considerable (and increasing) strain as states have contested their obligations and non-state communities have contested their limited rights. The success of both regimes in resolving these conflicts has been – and remains – imperfect.

Hierarchy and Pluralism

As noted by Williams, an error that some pluralists have made when advancing the case that pluralism should be the governing value of international society is in failing to factor inequalities of power into the construction of diversity regimes. Pluralists ‘need to look at social orders from the perspective of those at the bottom in order to challenge those at the top and to ensure that the voices of the weak, silenced, and marginalized can be heard, valued, and respected’.⁶ The effect of power on both the constitution and the operations of international order therefore is an area in which new pluralism would stand to benefit from a more sustained engagement with the classic texts.⁷ For classical pluralists such as Bull, hierarchy was a core component of the primary institutions of international society – Great Power Management was one of the five institutions of international society detailed in *Anarchical Society*. Indeed, for the members of the British Committee, ‘institutionalised forms of hierarchy were central to pluralist understandings of how international order might be nurtured and sustained’.⁸

Recent years have also seen a resurgence of interest in the concept of hierarchy among English School scholars. This has included work by Tim Dunne on the external imposition of

⁶ Williams, *Ethics, Diversity and World Politics*, p. 127.

⁷ See, for example, Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977).

⁸ Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007), p. 34.

hierarchy on international society engendered by U.S. hegemony⁹ as well as work by William Clapton which reconsiders the presumed theoretical incompatibility of hierarchy with the concept of an anarchical international society of sovereign states.¹⁰ The concept of hierarchy has also featured heavily in the work of the new historians of international society. Most notably, Keene has sought to re-centre Empire as a defining characteristic of international society and argued that the international political and legal order has always been dedicated to two distinct goals: toleration and civilisation. Of all the new pluralists, it is Bain's work that deals most explicitly with the concept of hierarchy in international affairs. For Bain, hierarchy is a natural function of international society which generates relationships of obligation in international life.

English School theorising about international hierarchy has always been distinct from the approach of critical, Marxist or postcolonial theory. However, some English School scholars – such as Gerry Simpson – have recently begun to integrate insights from this more critical literature into their own work.¹¹ Simpson's work focuses on the codification of hierarchy into international law, which he argues 'continues to be grounded in the sorts of exclusions, distinction, and racially inflected stratifications that were the mark of the nineteenth-century globalization of international society'.¹² Simpson contends that states within international society remain 'differentiated in law according to their moral nature, material and intellectual power, ideological disposition or cultural attributes'.¹³ He refers to condition as juridical sovereignty – by which he means the preponderant duality of sovereign equality and legalised hegemony. According to Simpson, this international

⁹ Tim Dunne, 'Society and Hierarchy in International Relations', *International Relations*, 17: 3 (2003), pp. 303-320.

¹⁰ William Clapton, *Risk and Hierarchy in International Society: Liberal Interventionism in the Post-Cold War Era* (London: Palgrave Macmillan, 2014), p. 3. Clapton's work builds on scholars such as Lake who contend that hierarchy in international relations are built from social contracts between states. See David Lake, *Hierarchy in International Relations* (Ithaca, New York: Cornell University Press, 2009).

¹¹ For critical scholars, the key to understanding international hierarchy is the legacy of empire. In one of the strongest forms of this argument, Antony Anghie famously argued that empire made international law and that it was very difficult to identify an international legal technique uncontaminated (or not rendered necessary) by the colonial experience. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2009). A similar argument is made in Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010), pp. 222-278.

¹² Simpson, 'The Globalization of International Law', p. 275-276.

¹³ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), p. 6.

hierarchy was codified at key moments within history. Specifically, the Congress of Vienna established a system of real and permanent Balance of Power in Europe based upon a European hierarchy of nations and this system was gradually globalised at Berlin, Versailles, and San Francisco.¹⁴ Simpson contends that legalised hegemony continues to characterise the post-1945 international order and the great powers have been able to justify hierarchy even in an international context of juridical equality of states by appeal to the principle of ‘responsibility’ which was ‘presented as the counterpart of special rights’.¹⁵

Simpson cautions that international hierarchies are not immune from contestation. Rather, he argues that they are ‘subject to both *fracture and defection* (the official legalised hegemonies of any period are challenged by looser confederations of great power action) and *stratification* (the great powers arrange themselves in ways that implicate a fresh relationship between equality and hierarchy)’.¹⁶ He notes that,

‘[t]he stability of legalised hegemony has been challenged at virtually every step by the threat and experience of extra-curricular action. In 1815, the ink was barely dry on the Treaty of Paris before the coalition of Eastern powers was defecting from the system and establishing hierarchy within hierarchy. (...) This pattern was repeated in Berlin, (...) in Geneva (with the defection of the soon-to-be axis powers from the League system of security), in New York, where the Security apparatus established under Chapter VII of the UN Charter was abandoned in favour of the creation of security zones and accompanying multilateral security organisations (NATO, the Warsaw Pact)’.¹⁷

The hierarchies codified at the great order building moments of history were therefore far from immutable. Instead they were subject to considerable challenge.

It is notable but unsurprising that Simpson’s key moments for the institutionalisation of hierarchy are also those identified by both Reus-Smit and this thesis as the key moments for the development of the global diversity regime and the secondary pluralist institutions of international society. It is to be expected therefore, that the secondary pluralist institutions should be the

¹⁴ Simpson, ‘The Globalization of International Law’, p. 277.

¹⁵ Ian Clark, ‘Hierarchy, Hegemony and the Norms of International Society’, in Tim Dunne and Christian Reus-Smit, *The Globalization of International Society* (Oxford: Oxford University Press 2017), p. 249.

¹⁶ Simpson, ‘The Globalization of International Law’, p. 277.

¹⁷ Ibid., pp. 178-179.

hallmarks of the international hierarchies that were codified within the same treaties and agreements which created or developed aspects of the institutions. Contestation of the secondary pluralist institutions was, and remains, intrinsically related to contestation of international society's overarching hierarchy, as will be explored later in this chapter. Simpson's work will therefore play a key part in guiding the subsequent discussion on hierarchy. However, it should be noted that Simpson – like most English School scholars – has focused his work on hierarchy amongst states. This project is interested in exploring hierarchy between peoples, of which a privileged few happen to be sovereign territorial states – an altogether more rigid hierarchy in global order.

Inequality in Access to Political Community Membership

The contemporary international diversity order is one in which access to meaningful community membership is highly stratified. The State, as the foundational pluralist institution of international society, remains the only political structure within international society that can provide individuals with meaningful citizenship or the 'right to have rights'. As argued by Hansen, '[d]espite tireless and somewhat tiresome efforts to find an alternate basis for citizenship, the status has no logic, power, or moral force outside a nation state'.¹⁸ This is codified within international law: 'At the moment of the declaration of universal rights, membership of a national community was asserted as the site of the realization of human rights'.¹⁹ As argued by Haro van Panhuys, the right to a nationality is '*testimonium pauperitas*' in that it concedes that a nationality provides a protection which international law by itself cannot confer on a person.²⁰ Arendt, writing in the aftermath of the Second World War, was clear about the consequences of locating the right to have rights within citizenship. For Arendt, the conjunction of human rights with citizenship

¹⁸ Randall Hansen, 'State Controls: Borders, Refugees and Citizenship', in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014), p. 253.

¹⁹ Kesby, *Right to Have Rights*, p. 55.

²⁰ Haro Van Panhuys, *The Role of Nationality in International Law: An Outline* (Leyden : A. W. Sythoff, 1959), pp. 220-221.

contained ‘a contradiction which ensured that human rights were protected and enforced only as national rights (...) the rights of man therefore became dependent upon, rather than independent of governments’.²¹ As a result of this linkage, when individuals are excluded from a political community they are also excluded from the sphere of rights, becoming ‘an “anomaly” for which the law does not provide’.²²

The current international order endows some peoples with the privilege of statehood and denies it to others. This distribution of sovereignty has therefore inscribed some particularly resilient hierarchies into global society: Some nations have acquired sovereignty while many others have not.²³ It is clear from the preceding chapters that members of communities who have not achieved statehood have access to less meaningful community membership. The extent of their disenfranchisement varies considerably – from being a member of a national community whose culture or language they do not share but in which their rights are protected – to being resident in a state determined upon their extermination. In between lie all forms of exclusion, persecution, marginalisation and discrimination. Moreover, denial of statehood denies that community the right to have rights vis a vis other communities in the international system. Without recognition as a sovereign state, that community is permanently locked out of participation in the international organisations and regimes through which it could advance its interests or seek protection from other communities.

This inequality in access to meaningful community membership is the legacy of the process of the consolidation of the international states system and the logics of legitimacy operating behind historical practices of recognition. The decision of which communities were to be awarded sovereignty was largely in the hands of Western order builders who recognised some polities as legitimate and others as illegitimate. Throughout history, recognition was systematically denied to communities on the periphery of international society; both historically through colonialism and

²¹ Kesby, *Right to Have Rights*, p. 3.

²² *Ibid.*, p. 5.

²³ Simpson, ‘The Globalization of International Law’, p. 280.

contemporaneously through the refusal of international society to countenance revisions to the postcolonial political order or to recognise those communities denied recognition. These decisions were usually based on substantive political, social, or cultural criteria.²⁴ As noted by Keene, ‘whether or not a community was perceived as ‘civilised’ was very often vital in making decisions about whether or not that community should be recognised as a sovereign state’.²⁵ The communities arguably subject to the greatest dispossession during the emergence of international society were the indigenous peoples of European settler states. In the words of Paul Keal, ‘[t]he expansion of international society cannot be separated from dispossession, genocide and the destruction of cultural identity’ of indigenous peoples.²⁶ Postcolonial communities, meanwhile, were given little chance to determine the borders and constitution of their own nations during decolonisation: Instead, the borders of postcolonial states were largely those of the colonial administrations which usually bore little or no resemblance to prior patterns of habitation or political association.

Lack of access to meaningful citizenship is not a problem confined to stateless communities. As argued by Alison Kesby, ‘the value of the right to enter and remain in the state of nationality differs among states and even between nationals. Not every state is a refuge. A national may possess the right to enter and reside in a state but be unwilling to avail himself of that state’s protection for fear of persecution, as is the premise of international refugee law.’²⁷ Today, many states in the international system have failed to develop meaningful national political communities or to provide adequate protections for the varying political communities that inhabit them. States regularly pose a threat to their own people, current borders are not contiguous with political communities, and many states are not legitimate representations of the political communities resident within their borders. The situation is also not improving. It is for this reason

²⁴ Reus-Smit, *On Cultural Diversity*, p. 115.

²⁵ Edward Keene, *International Political Thought: A Historical Introduction* (Cambridge: Polity Press, 2005), p. 11.

²⁶ Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, (Cambridge: Cambridge University Press, 2003), p. 35.

²⁷ Kesby, *Right to Have Rights*, p. 21.

that some scholars, such as Macklin, extend statelessness to include nominal citizenship in a failed state.²⁸ The entrenched inequality in resource allocation – one of the criticisms made by solidarist scholars of the pluralist position noted in chapter one – is also relevant. Current territorial borders allocate some polities significantly more resources than others. Given the increasing role of environmental disaster and dire poverty in creating irregular migration flows, the issue of unequal resource allocation is something the pluralist institutions will have to contend with to a much greater extent in coming years.

In summary, the post-1945 diversity regime is premised on a juridical inequality between political communities in which some have achieved recognition as nation states while others have not. With few exceptions, international society remains unwilling to countenance revisions to the existing patterns of recognition. Access to membership of a community which both meaningfully represents an individual's identity and provides them with citizenship-like rights is therefore institutionally unequal. Moreover, in locating the 'right to have rights' in the institution of citizenship, international society invested the trust of global individual rights to states whose ability and willingness – whether for political, social or economic reasons – to fulfil these rights was fundamentally unequal. Access to meaningful community membership remains highly variegated. In reality, only a privileged few are accorded the kind of community membership upon which the ethics of new pluralism is based. As such, it can only be argued that the sovereign State, as it manifests today, is insufficient to ensure the achievement of global pluralist justice.

Inequality in Access to the Secondary Pluralist Institutions

As detailed in previous chapters, in an attempt to protect the communities who 'lost out' in the global apportioning of sovereignty, international society has developed two secondary pluralist institutions – Shielding and Recourse. These institutions have gone some way to

²⁸ Audrey Macklin, 'Who is the Citizen's Other? Considering the Heft of Citizenship', *Theoretical Inquiries in Law*, 8: 2 (2007), p. 353.

compensate those communities denied recognition as nation-states and recent decades have witnessed a resurgence in international focus on minority rights. Some believe these institutions now offer the promise of significantly improving global protection for vulnerable minorities and of rectifying the injustices that took place during the emergence and consolidation of international society.²⁹ However, the findings of this work are that, where remedy has been provided, it is insufficient to compensate for the wider patterns of inclusion and exclusion and, in many ways, the secondary pluralist institutions have reinforced rather than undermined existing hierarchies.

Despite efforts by the United Nations and other bodies to institute and implement universal standards for minority rights protection, international society still has little coercive capacity to ensure that the states who offer the least meaningful community membership abide by minority protection standards. The minorities most in need of protection from their states are usually least able to benefit from these regimes – as the examples of international failure to prevent the persecution of the Uighur minority in Xinjiang or the obliteration of minority religious communities in the Middle East demonstrate. In relying upon state compliance, the institution of Shielding creates inequalities in access to this supplementary mechanism – minorities in rights-respecting democratic states are most able to benefit while those most in need are left vulnerable. Moreover, many states in the international system continue to contest the legitimacy of minority protection instruments on the basis that they are an unjustified interference in the internal affairs of sovereign states and they represent an attempt by the West to enforce their standards upon countries whose internal make up is fundamentally different. Resistance to minority recognition has been a noticeable feature of postcolonial states who often reject the concept of minority entirely.³⁰ This means that many of these communities have been doubly denied recognition – both during colonisation and at the point of nominal independence. It could be argued that many

²⁹ Kymlicka, *Multicultural Odysseys*, p. 5.

³⁰ UN Human Rights Council (UNHRC), 'Report of the Special Rapporteur on Minority Issues, Rita Izsak-Ndiaye – Reflections on the Six-Year Tenure of the Special Rapporteur', A/HRC/34/53 (2017), p. 13. See also Jennifer Jackson Preece, 'Democracy, Minority Rights and Plural Societies: Plus ça Change?', *Sociology Compass*, 2: 2 (2008), p. 614.

communities in postcolonial states were never truly decolonised – they simply swapped one imposed administration for another.

Following from this point, another axis of inequality that has emerged from this investigation is that between the rights granted to indigenous peoples over other national minorities. International law has ‘sharply divorced questions of indigenous rights from the rights of other national minorities’.³¹ While a right to self-determination has been codified for indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples, no such right has been recognised for other national minorities. The right to internal self-determination has been limited by what is called the ‘salt-water thesis’: peoples who are subject to colonisation by European powers have the right to some form of internal self-determination, but national minorities who were conquered by a territorially contiguous people do not, even if they have been subject to similar processes of colonisation.³² For national minorities denied recognition as indigenous peoples, the primary international instrument within international law codifying their rights as a community is Article 27 of International Covenant on Civil and Political Rights. This guarantees only the right to freedom of cultural expression and association, not a right to self-determination. Again, this compounds the previously noted inequality in access to the institution of shielding for minority communities in postcolonial states as well as those resident in states whose current boundaries are the result of historical empire, such as China and Russia. This bifurcation in international law between the rights of indigenous peoples and other national minorities has spurred global claims to indigeneity. However, these claims have been strongly resisted by the majority of states in which these communities are resident and – so far – international organisations such as the UN have been unable to develop a coherent mechanism for adjudicating these disputes. In summary, the institution of Shielding currently ‘operates in a

³¹ Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), p. 120.

³² *Ibid.*, p. 123.

group-differentiated way: immigrants, national minorities, and indigenous peoples have all been moving along different paths in terms of their minority rights'.³³

The case study of the Romani community demonstrates the ongoing challenge of protecting communities whose nomadic lifestyles do not conform to territorial conceptions of community membership. It also highlights the tension between preserving community diversity and improving integration for minority communities in host states. It is worth noting that – as in the case of the Roma – individual members of such communities often advocate for different policy priorities, with some advocating greater isolation in the hopes of preserving culture and independence while others seeking greater integration in host states. Historic failures to involve such communities in the construction of policies and organisations that concern them have meant such nuances have often been overlooked, although in this case EU organisations have recently shown much greater willingness to involve Romani NGOs and advocates in policy discussions.

At the time of its formal institution in 1951, the institution of Recourse was lauded as a new level of global morality which had transformed the nature of international obligations to individuals. Yasemin Soysal is one theorist who argued that universal personhood was replacing nationality as the locator of a 'place in the world'.³⁴ However, the findings of this thesis are that the institution of Recourse is fundamentally unable to substitute for meaningful citizenship. Despite a longstanding recognition on the part of international society of the importance of 'durable solutions', currently fewer than two per cent of the world's refugees receive access to resettlement, repatriation or local integration.³⁵ Instead, the average duration a refugee may now expect to spend in institutional limbo is over twenty years. It therefore unfortunately remains the case that to be expelled from one state without having the right to enter another is to be 'thrown out of the family of nations altogether'.³⁶ At best, the institution of Recourse 'can be seen as an

³³ Kymlicka, *Politics in the Vernacular*, p. 202-203.

³⁴ See Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994), chapter 8.

³⁵ Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (London: Penguin Books, 2018), p. 8.

³⁶ Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken Books, 2004), p. 293.

attempt to make refugees into ‘quasi-citizens’, connected to the international states system and a particular territory but without the full rights possessed by citizens of states’.³⁷

This situation is largely the result of increasing obfuscation by states of their responsibilities to non-citizens through the institution of highly restrictive migration laws. Variation in state compliance with international law in this area is high, meaning that refugee communities will encounter significantly different treatment depending upon the state from which they seek to claim refuge. This has led to a ‘race to the bottom’ with states keen to appear less inviting than their neighbours and therein deter refugee communities from seeking to access their territory in the first place. Importantly, inbuilt discrimination in visa regimes and at borders means that those who possess the lowest grade citizenship rights (and therefore have a perceived highest likelihood of wishing to migrate) are those least permitted to do so.³⁸

Like the institution of Shielding, the institution of Recourse is most available to those from countries whose citizens have easy access to Western countries. For those communities most in need of access to the institution, international society has created almost insuperable barriers to travel as a means of preventing them from accessing the institution and becoming a burden on other states. International society has also proven unwilling to broaden the definition of a vulnerable community to include those fleeing dire poverty and has strongly contested or sought to undermine many other efforts to expand the scope of the 1951 convention. The extent of the obligations international society has been willing to shoulder for different communities has also varied considerably; with some refugee communities, such as the displaced Palestinians, benefiting from an expansive understanding of the institution while others, such as the Hutu refugees in Eastern DRC, benefitting from only the most basic international support.

There is also reason to believe that the current design of the institution of Recourse has – in many cases – led to greater difficulties for certain communities in accessing citizenship-like

³⁷ Emma Haddad, *The Refugee in International Society: Between Sovereigns*, (Cambridge: Cambridge University Press, 2008), p. 88.

³⁸ Macklin, ‘Who is the Citizen’s Other?’, p. 334.

benefits. The case of the Palestinian community in exile is the most obvious example of this but this case is becoming less of an outlier as the average time refugees spend in limbo increases. In these cases, the existence of alternative institutions reduces pressure on the host states to provide citizenship-like benefits to long term resident communities.

In general, international society's approach to the use of the institution remains guided by the norms and values of the most powerful states and the communities who benefit most are those who are closest to the values or interests of those states. There are also significant inequalities in the burden that countries within the international system are expected to bear under the institution of Recourse.³⁹ There is also no legal obligation upon Western states to contribute to burden-sharing for the care of these populations. Rather than providing a means of levelling the hierarchy in which political communities are structured by the international states system, the two secondary pluralist institutions have in many ways exacerbated it.

Many of those within the new pluralist tradition argue that it is essential that international society move beyond a focus on ethno-national communities to a recognition of the importance of other forms of community membership and the possibility of multiple community membership. However, within all pluralist institutions, it remains the case that international society protects ethno-national communities above all others. Evidence for this includes both the manner in which asylum and refugee claims are assessed and the predominant use of Shielding mechanisms for ethno-national communities but not for religious or linguistic communities. International society has also prioritised those communities which 'look like' ideal-type ethno-national communities, such as indigenous peoples. For those, such as Williams, who seek to move pluralism beyond its historic focus on ethno-national communities, there is little in the institutional reality of international society to make this possible. This is highlighted by the failure to extend the institution of Recourse to non-traditional communities, such as LGBT peoples.

³⁹ Betts and Collier, *Refuge*, p. 1.

The presumed distinctiveness of ethno-national communities is ‘based on a seemingly unproblematic division of space, on the fact that they occupy “naturally” discontinuous spaces’.⁴⁰ However, in reality, ‘cultures are not homogenous or unified entities, tightly integrated, neatly bounded, or coherently constitutive (...) culture is highly variegated, often contradictory, only loosely integrated, and fluidly and porously bounded’.⁴¹ Most individuals are members of multiple communities – ethnic, linguistic, political, religious, or based on gender or sexual orientation. Nevertheless, social institutions give form to culture and work to organise cultural diversity. In prioritising membership of ethno-national communities above all others, international order builders have succeeded in reifying those communities and cementing nationalism as the most meaningful identity generating principle. The prioritisation of ethno-national communities above all others not only means that other types of community are granted unequal access to the pluralist institutions of international society, it also means that there are many occasions when these communities’ rights are overlooked in preference to those of the ethno-national community.⁴²

As noted by Williams, this inequality is entrenched through the way in which debates about international ethics are constructed: the experience of subaltern communities must be parsed through the language of the Western liberal order – ‘international law’ and ‘human rights’ before it can become intelligible, meaningful, or significant (...) Even the normative visions of the weak and dispossessed are limited and channelled by the need to be comprehensible within terms of discourse set by the strong’.⁴³ Phillips and Reus-Smit likewise find that ‘when contestation surfaces, diversity regimes provide incentives for actors to mobilise around authorized forms of cultural

⁴⁰ Akhil Gupta and James Ferguson, ‘Beyond “Culture”: Space, Identity, and the Politics of Difference’, *Cultural Anthropology*, 7: 1 (1992), p. 6

⁴¹ Reus-Smit, *On Cultural Diversity*, p. 7.

⁴² Jackson Preece, ‘Democracy, Minority Rights and Plural Societies’, p. 621 According to Jackson Preece, ‘[t]he potential tensions and antimonies between a respect for minority cultures and a belief in gender equality typify such scenarios. For example, is it reasonable for indigenous and minority groups to set their own criteria for membership according to traditional beliefs and practices even if these are gender biased? Or should the democratic state intervene to ensure gender equality within minority communities? (...) there is a real risk that the new pluralists, in their prioritising of diversity, may choose to ignore or forget the many virtues of equality.’ *Ibid.*, p. 621.

⁴³ Williams, *Ethics, Diversity and World Politics*, p. 160.

identification, to frame claims with reference to accepted discourse and narratives, and to exploit established ritual practices'.⁴⁴

Homogenising Dynamics of Pluralist Institutions

The homogenising effects of state-building (the primary pluralist institution) has been discussed in earlier chapters. Blaney and Inayatullah's argument about the 'Westphalian deferral' of international difference is perhaps the well-known exposition of the homogenising effects of the emergence of international society and the spread of Empire. It is their contention that the legacy of both the Wars of Religion and the challenges of incorporating the peoples of the Americas into European empires 'reinforced, rather than challenged, the interpretation of difference as a dangerous aberration from the norms of stability, safety, and order'.⁴⁵ As such, they argue that the Westphalian order builders did not seek to allow difference to flourish but to contain, domesticate or destroy it. Rather than the institution of a system of sovereign states paving the way to a more tolerant world, they argue that 'differences in culture remain[ed] less of a problem in an age of (premodern) empire, when the principle of hierarchy reign[ed] supreme'.⁴⁶ The Westphalian deferral referred to by Inayatullah and Blaney is the process in which 'the differences constituting and complicating each state as a particular political community [were] kept separate and managed within the territorial boundaries of the state'.⁴⁷ From this point on, established religion became a constitutional element of the majority of states.⁴⁸ Religious tolerance

⁴⁴ Andrew Phillips and Christian Reus-Smit, *Culture and Order in World Politics* (Cambridge: Cambridge University Press, p. 30.

⁴⁵ Naeem Inayatullah and David Blaney, *International Relations and the Problem of Difference* (New York: Routledge, 2004), p. 2

⁴⁶ Ibid., p 19. They continue, "preserving the peace of the empire entails merely enforcing peaceful coexistence among the "authority structures and customary practices" of the various conquered groups. And, though tolerance is extended primarily to groups rather than to individuals (this is not a liberal world), individuals may escape some of the pressures for communal conformity in the more cosmopolitan cities of the empire'. Ibid., p. 19. Original in Michael Walzer, *On Toleration* (London: Yale University Press, 1995), p. 15.

⁴⁷ Inayatullah and Blaney, *International Relations and the Problem of Difference*, p. 6.

⁴⁸ Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (New York: Free Press, 1990), p. 91

among sovereigns was made, in effect, a function of the balance of power between them.⁴⁹ The consequences of this for the minorities in disparate European states was far from uniform but the overwhelming consequence of the emergence of nation states within Europe was the homogenisation (whether rapid or gradual) of their populations.⁵⁰

James Tully makes similar observations in regard to the expansion of international society beyond Europe – what he calls the emergence of the ‘empire of uniformity’ – a project which entailed the ‘nationalisation’ of the globe. Prior to the universalisation of the system of sovereign states, the extra-European world was governed by numerous diversity regimes – including the Ottoman and Qing Empires. The globalisation of the system of sovereign states led to the emergence of an international order comprised of like – not diverse – units which then homogenised the once diverse populations within them through processes of state-building. Inayatullah and Blaney argue that the received view of Westphalia has a tendency to blind scholars to the creative responses to difference that were lost during the globalisation of the system of sovereign states.⁵¹ Operationalising Reus-Smit’s work on order builders once again, it is evident that the order builders of the contemporary diversity regime also bequeathed a key legacy within the primary pluralist institution of international society: By institutionalising the territorially sovereign state as the principle unit of political authority and nationalism as the ordering principle of the globe, they replaced a previously diversely ordered world with one of like political units modelled on their own image, abolishing alternative diversity regimes in the process.

The analysis of the most recent chapter has a positive story to tell about recent attempts to preserve international diversity or revive that which was lost during the globalisation of the system of sovereign states. The past two decades have witnessed serious attempts on the part of

⁴⁹ Inayatullah and Blaney, *International Relations and the Problem of Difference*, p. 28. Original reference Edward Keene, *International Theory and Practice in the 17th Century: A New Interpretation of the Significance of the Peace of Westphalia*, manuscript, University of London (1998), p. 21.

⁵⁰ Inayatullah and Blaney note that noting that while English papists were targets of discrimination, ‘heretics’ in France were subject to far worse abuses. *Ibid.*, p. 29.

⁵¹ *Ibid.*, p. 28.

international society to preserve cultural and linguistic diversity, or restore that which was destroyed, at the sub-state level. The success in reviving indigenous and Romani languages demonstrated in the case studies of the previous chapter are just two examples of this. However, it is unlikely that such attempts will ever be able to restore the extent of global linguistic and cultural diversity present before the emergence of international society and the globalisation of the system of sovereign states. Many peoples that existed before the advance of European empires were eradicated entirely. Others were so thoroughly subsumed into majority cultures – or their own cultures so thoroughly oppressed – that there is now no basis from which language or culture can truly be resurrected. More broadly, linguistic resurgence is not a uniform global pattern: of the 7,111 known living languages in the world, 986 of these are deemed to be dying by the Ethnologue database. Globalisation also plays a role in naturally undermining the languages of smaller communities. As young people marry out of minority communities at greater rates, language retention to the next generation drops; and the economic and social advantage of communication in the majority language often means that – over time – generations express increasing preference for use of the majority language.

The secondary institutions of Shielding and Recourse were – in part – designed to mitigate and compensate for the homogenising impacts of state-building. However, a key consequence of the establishment of these institutions, even as they undercut the sovereignty of emerging states, was to reaffirm nationalism as the underlying principle of international order. This was done through their focus on national communities above all others and by providing a means to reconcile non-recognised communities to the new international order. Moreover, both of these institutions (but primarily Shielding) have also been forces for homogenisation in so far as they prescribe a specific form of domestic constitution that states should uphold – namely liberal multiculturalism.

Fred Halliday is foremost among International Relations scholars who have explored the tendency of international society to homogenise the internal make-up of states.⁵² He argues that ‘as a result of international pressures, states are compelled more and more to conform to each other in their internal arrangements’.⁵³ In fact, he argues it was international pressure for homogeneity which destroyed the Soviet Union. According to Halliday, the Cold War was ‘ultimately about two varying concepts of international society (...) through international social rather than inter-state reasons, one side prevailed over the other’.⁵⁴ He even contends that international society can be defined by the existence ‘inter-societal and inter-state homology (...) a similarity of domestic values and organisation (...) in the way societies are organised’.⁵⁵ Halliday’s discussion of the homogenising effects of international socialisation is reminiscent of the much older debate within the English School on whether a shared culture is necessary for an international society to come into being. However, unlike the English School debate, Halliday discusses the practical mechanisms which can lead to international homogenisation over time.

Some members of the English School, such as Ian Clark, have already identified an increasing invocation of liberalism and democracy by Western societies as the new standard that states are expected to achieve in order to qualify for full membership within international society.⁵⁶ An analysis of the historic development of the institutions of both Shielding and Recourse

⁵² Fred Halliday, ‘International Society as Homogeneity: Burke, Marx, Fukuyama’, *Millennium: Journal of International Studies* 21: 3 (1992), pp. 435-461.

⁵³ *Ibid.*, p. 435.

⁵⁴ Fred Halliday, *Rethinking International Relations* (Basingstoke: Macmillan, 1994), p. 94-97.

⁵⁵ *Ibid.*, p. 94. Buzan terms this kind of international society ‘convergence interstate society’ which he argues is ‘based on the development of a substantial enough range of shared values within a set of states to make them adopt similar political, legal and economic forms. This implies not only a thick development of institutions across all the functions, but also extremely exacting conditions for membership’. Barry Buzan, *From International to World Society: English School Theory and the Social Structure of Globalization*, (Cambridge: Cambridge University Press, 2004), p. 194.

⁵⁶ See Ian Clark, *Hegemony in International Society* (Oxford: Oxford University Press, 2011); Ian Clark, ‘How Hierarchical Can International Society Be?’, *International Relations* 23: 3 (2009), pp. 464-480; Ian Clark, ‘Towards an English School Theory of Hegemony’, *European Journal of International Relations*, 15: 2 (2009), pp. 203-228. An example of the conjoined relationship between social recognition and compliance with Western standards can be seen in the declaration by the European Community (now known as the European Union) in December 1991 on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union: ‘Among five general conditions required for new states, the first is respect for the United Nations (UN) Charter, the Helsinki Final Acts, and the Charter of Paris, ‘especially with regard to the rule of law, democracy, and human rights’ and the second is the guarantee of rights for ethnic and national groups and minorities. Both the United States and European countries have been using these principles to recognize statehood’. Hun Joon Kim, ‘Universal Human Rights’, in Dunne and Reus-Smit, *The Globalization of International Society*, p. 304.

demonstrates that, by moulding international society around their own image, European order builders positioned themselves as representative of international best practice and the legitimate enforcers thereof. There is clear evidence from this study of the pressures upon states to adopt specific forms of liberal multiculturalism in response to developments in international law and norms as well as pressure from international organisations, other states, and their own minority populations. As noted by Kymlicka, while in the past decisions on whether to integrate or enhance the independence of minorities were ‘left largely to the discretion of individual countries’, today, ‘the international community plays an increasingly important role in shaping policy in this area, endorsing some models of integration and accommodation while discouraging others’.⁵⁷ In an international order of sovereign nation states, with notionally distinct international and domestic realms, the current international diversity regime therefore mandates a particular kind of domestic constitution. What is now understood as international best practice in citizenship rights and minority protection are the standards and practices that emerged in a European context but have since been exported globally.⁵⁸

In many ways the homogenising impulse of the pluralist institutions is self-defeating. In trying to specify best practice for all communities in all states, this removes agency from those communities and the states in which they live to develop diversity regimes which best fit with their own particular situation. Moreover, it also renders the institutions more vulnerable to contestation by states who can rightly claim they had little role in deciding the terms. It is worth noting that this preference for liberal multiculturalism within the pluralist institutions of international society also runs against the moral pluralism advocated by the new pluralists. While it conform with some of the arguments made by political and international theorists who take a Rawlsian approach to the benefits of international toleration, it fails the test of true moral pluralism.⁵⁹ The flip side to this

⁵⁷ Will Kymlicka, ‘The Internationalization of Minority Rights’, *International Journal of Constitutional Law*, 6: 1 (2008), p. 2.

⁵⁸ Kymlicka, *Multicultural Odysseys*, p. 205.

⁵⁹ As noted in chapter one, of all the new pluralists, this argument is most clearly alluded to by Williams. See John Williams, ‘Territorial Borders, Toleration and the English School’, *Review of International Studies*, 28: 4 (2002), p. 746.

observation is that – without global enforcement – it is likely that the benefits that have accrued to many communities from both institutions would likely not have come to pass. The historical analysis of chapter three demonstrates that, without any form of institutional constraint, states often engage in much more aggressive policies of domestic homogenisation.

For some scholars, the homogenising and hierarchical aspects of the contemporary global diversity order are intrinsically linked. John Ikenberry, in his contribution to Phillips and Reus Smit's *Culture and Order in World*, argues that liberal internationalists have made four 'moves' in the last two centuries to deal with cultural diversity; embracing the Westphalian state system, 'pushing' cultural difference into civil society, patiently waiting for processes of modernization and globalization to erode cultural difference and lead to the gradual universal embrace of shared ideas and values and, finally, adopting a strategy of exclusion in the event the inclusive and evolutionary response fails to materialise.⁶⁰ Communities who maintain cultural differences at odds with the project of liberal internationalism are 'excluded' or rendered subordinate within the hierarchy of sovereign states. This project shows that this dynamic is not confined to the state level. Non-state or non-national communities are also excluded for failures to conform to the shared values of liberal internationalism. In effect, 'Western states have dealt with cultural diversity – manifest in relationships with weak, non-Western societies – by placing these societies outside the boundaries of the nascent liberal international order'.⁶¹

Role of Pluralist Institutions in Changing Norms and Subaltern

Contestation

Scholars from disciplines outside of International Relations have noted the role of institutions in organising cultural meanings and practices. It is clear from this study that the

⁶⁰ John Ikenberry, 'Liberal Internationalism and Cultural Diversity', in Andrew Phillips and Christian Reus-Smit (eds.) *Cultural and Order in World Politics* (2020) pp. 144-145.

⁶¹ Ibid., p. 152.

organisations that are the main channels for the institutions of Shielding and Recourse have profoundly impacted upon the way in which diversity is managed in international society. As explained by Reus-Smit, once established, 'diversity regimes have a structured quality, confronting actors as social facts that constitute political and cultural subjectivities and define the parameters of legitimate action'.⁶² In particular, international organisations and social institutions 'can seek to construct authorized forms of diversity out of extant cultural heterogeneity'.⁶³

International organisations, once set up, are endowed with the platform and legitimacy to change the normative agenda and contest prevailing hierarchies. The institutions set up under the global refugee regime complex are instructive in this regard. From the pioneering work of Friedrich Nansen to the work that United Nations High Commissioner for Refugees (UNHCR) does today in convincing powerful states to contribute to burden-sharing, the organisations set up to implement the institution of Recourse have been instrumental in contesting both the imperfect scope of the institution and the limits to the protection it offers. So far, these efforts have been unable to compensate for the overwhelming interests of powerful states but there are signs that this may change in coming years as Europe, in particular, is less able to isolate itself from global refugee flows. As the organisational architecture for both Shielding and Recourse continue to grow, they will become more effective advocates for these institutions.

These institutions have also provided many communities with a forum in which to contest their unrecognised or marginalised status. Most noteworthy in this regard are the advances made by indigenous peoples against Western settler states. Despite encountering significant resistance from powerful states in the international system, indigenous peoples were able to utilise international institutions and mobilise changing international norms to secure for themselves greater autonomy and control of their own resources, as well as commitments from the international community and (eventually) their own states to internal self-determination. The

⁶² Reus-Smit, *On Cultural Diversity*, p. 215

⁶³ *Ibid.*, p. 207.

indigenism movement has also sought to challenge prevailing conceptions of indivisible sovereignty and the legitimacy of the sovereignty of European settler states. This has included advancing their own claims to territorial sovereignty – entitlements which they say were abrogated by European settlers who broke treaties of mutual recognition of land ownership – and a ‘rejection of the language of sovereignty as something that ensnares indigenous peoples in structures of government inimical to indigenous ways of life and notions of power’.⁶⁴ So far, these claims have proven less damaging to notions of state sovereignty than previously feared by state elites. Instead, states have generally been able to develop structures which permit for divided sovereignty and increased internal autonomy. Despite the significant inequalities that operate within the pluralist institutions of international society, therefore, they have frequently proven fora in which vulnerable communities can challenge the interests of even powerful states.

However, both institutions are now facing contestation that existing international organisations are finding increasingly difficult to manage. This contestation comes in two forms: subaltern communities questioning their marginalised status and states unwilling to accommodate international interference or shoulder the burdens of institutions of recourse. As noted by Reus-Smit, ‘[i]nternational orders (...) are systemic configurations of political authority (...) their efficacy and stability depend, in significant measure, on the cultivation and maintenance of legitimacy’.⁶⁵ Because of their legitimation role, diversity regimes help stabilise international orders but because they also create social and political hierarchies, this can ‘fuel struggles for recognition as material and cultural conditions change’.⁶⁶ Williams notes in his work the transformative impact of the practice of ‘resistance’ by subaltern groups within international society. Williams’ institution

⁶⁴ Paul Keal, ‘Indigenous Sovereignty’, in Trudy Jacobsen, Charles Sampford, and Ramesh Thakur, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate Publishing, 2008), p. 318. The 1992 Mabo case was significant in this regard – although it established that the sovereignty of the Commonwealth of Australia could not be challenged it did not extinguish native title to unalienated Crown lands. See Frank Brennan, *One Land One Nation: Mabo – Towards 2001* (Queensland: University of Queensland Press, 1995), p. 127.

⁶⁵ Reus-Smit, *On Cultural Diversity*, p. 208.

⁶⁶ Ibid., p. 189. According to Reus-Smit, ‘[d]iversity regimes are thus Janus-faced. Because they are institutionalized forms of recognition, they help legitimate rule under conditions of cultural heterogeneity. But because they produce social and political hierarchies, they all have the hard-wired potential for alienation, humiliation, stigmatization, and, in turn, political resistance and mobilization’. Ibid., p. 218.

of Resistance incorporates all ‘political activity by the weak that seeks to overturn, subvert, sidestep, and bypass the established institutions of world politics in pursuit of the empowerment of the weak and the creation of alternative political orders’.⁶⁷ Drawing upon Nancy Fraser he argues that it is important to recognise excluded groups as ‘subaltern counterpublics’, where ‘counterdiscourse’ can take place against homogenizing, dominating discourse’.⁶⁸ These insights are useful to understand the agency of minority, indigenous and refugee communities in shaping the pluralist institutions of society. Minority, indigenous and refugee communities – as well as subaltern states – have all developed into a multiplicity of subaltern counterpublics which have variously engaged with, sought to develop, or resisted the institutions of Shielding and Recourse. Reus-Smit and Phillips term this activity ‘counter-interpellation’, wherein dissident cultural identities, values and practices are constructed in opposition to prevailing diversity regimes.⁶⁹

The resistance and activism of indigenous communities are a notable example of practices of counter-interpellation. In resisting the imposition of settler-state sovereignty, indigenous communities have constructed alternative narratives of sovereignty which emphasize its divisibility. The self-determination claims made by indigenous peoples do not presently constitute an immediate crisis of political legitimacy for either the institution of the State or the governments exercising authority within particular states that have indigenous populations. However, access to these rights remain deeply unequal across the globe as a result of state resistance to recognising claims of indigeneity; fuelling struggles for recognition by communities who consider themselves to be indigenous but are yet to be recognised as such. The international community’s approach to minority rights is now at an impasse. International organisations are operating in a framework that mandates an integrationist approach to minorities and an accommodationist approach to indigenous peoples. This framework is being increasingly contested by national minorities around the world. In order to manage these real-world conflicts, ‘intergovernmental organisations

⁶⁷ Williams, *Ethics, Diversity and World Politics*, pp. 132-133.

⁶⁸ Ibid., p. 23.

⁶⁹ Phillips and Reus-Smit, *Culture and Order in World Politics*, pp. 30–31.

supplement their legal norms with case-specific interventions that are more accommodationist. However, these case-specific interventions in support of autonomy are often arbitrary and ad hoc'.⁷⁰ In coming years, it can be expected that more and more national minorities will seek to advance their claims for greater rights and protections through international organisations, international and domestic courts, and in the court of international opinion. The question of who counts as indigenous will be a key issue area but so will a broader contestation of the prevailing 'salt water test' for internal self-determination.

More broadly, as the majority of states have still been unable to satisfactorily resolve the self-determination claims of peoples within their borders, this will also continue to fuel struggle for recognition within the international system.⁷¹ Simpson notes that '[t]he existence of a body like the Unrepresented Nations and Peoples Organisation in The Hague, most of whose members seek to move from one category into the other, suggests that sovereignty continues to enchant non-state peoples'.⁷² The peoples without states are likely to be one of the most vocal in resisting the prevailing diversity regime in coming years. Those communities unfortunate enough to be under the protection of the institution of Recourse will also present increasing challenges for international society. The numbers of overall global refugees show little sign of decreasing while those in exile have ever diminished chances of returning home. For the time being, Western states have been able to develop ad hoc solutions to prevent the majority of global refugees from leaving the developing world but it is not clear that this policy is sustainable in the long term as those states shouldering the majority of the burden become increasingly resentful of the disproportionate impact on them of an institution they had little role in creating.

At the same time, shifting configurations in power at the state level render the wider international hierarchy (and with it the prevailing diversity regime) vulnerable to defection and

⁷⁰ Kymlicka, 'Internationalization of Minority Rights', p. 31.

⁷¹ Paul Keal, 'Indigenous Self-Determination and the Legitimacy of Sovereign States', *International Politics*, 44: 2-3 (2007), p. 288.

⁷² Simpson, 'The Globalization of International Law', p. 280.

stratification in coming years. Many non-Western states have challenged the current manifestations of the institutions of Shielding and Recourse. As power shifts from the West, it is likely that the diversity structures designed European order builders in their image will be increasingly contested by ascendant states in the system. This kind of state-based resistance is referred to by Halliday as 'patterns of semi-peripheral escape' which operate alongside an overall pattern of homogeneity.⁷³

This all suggests that contestation of the prevailing diversity regime is likely to increase in coming years. Christian Reus-Smit argues that that diversity regimes face two pressures for change: 'shifts in the underlying distribution of material capabilities and new cultural claims, often animated by grievances against the hierarchies and exclusions of prevailing and past regimes'.⁷⁴ This analysis shows that shifts in the underlying distribution of material capabilities are likely to lead to greater rejection of the liberal multicultural 'standard of civilisation' while grievances against existing hierarchies and exclusions will lead to pressure for strengthened pluralist institutions. The two forces mitigating for change are therefore pulling in opposite directions. In *Individual Rights and the Making of the International System*, Reus Smit argues that 'struggles for the recognition and protection of individual rights (...) have played a significant role in the historical development of the international system'.⁷⁵ This project would suggest that the historical development of the international system was as much defined by struggles over community rights and would argue that the coming period of international history is likely to be increasingly dominated by the struggles for recognition and protection of community rights, what counts as a community in the modern era, and what (or who) should determine the future hierarchy of pluralist institutions.

Resistance to the current global diversity regime does not only emerge from subaltern communities. As noted by Ellen Berry, the cultural transformations happening in the heartland of

⁷³ Halliday, *Rethinking International Relations*, p. 120.

⁷⁴ Reus-Smit, *On Cultural Diversity*, p. 215. He continues that '[t]o the extent that humans have any basic interests, social recognition is fundamental (...) This need for recognition is a potent source for political struggle'. Ibid., p. 217.

⁷⁵ Christian Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge: Cambridge University Press, 2013), p. 1-2.

multiculturalism have led to the emergence of right wing groups with broad-based support who seek to resist the power of global institutions and norms of global cooperation, such as the Tea Party in the U.S.; or indeed the Brexit party in the UK.⁷⁶ While some have characterized these movements as examples of subaltern white communities within these states, in reality they are led by, and enjoy broad-based support among, middle class white voters.⁷⁷ The current diversity regime of multiculturalism predicated on cosmopolitan internationalism therefore faces a bottom up challenge from the worlds' most privileged communities, not just the subaltern.⁷⁸ Phillips and Reus-Smit characterise both subaltern and privileged forms of resistance to the prevailing diversity regime as practices of 'counter-interpellation'.⁷⁹ This concept of counter-interpellation is useful in understanding the diverse forms of contestation of the global diversity regime. While Williams' institution of Resistance focuses on the practices of subaltern groups,⁸⁰ the concept of interpellation captures resistance by both subaltern and privileged groups. This is important because it is this resistance by privileged groups that appears to have greater capacity to engender substantive shifts in the global diversity regime over shorter time periods. The interaction between the resistance between subaltern and privileged groups is also an underexplored area for new pluralism, worthy of further research.

Summary

The above analysis has demonstrated that access to the primary pluralist institution of international society – and thereby to the 'right to have rights' – remains fundamentally unequal for both individuals and communities. This inequality is the legacy of decisions made by European order builders at the time of the emergence of international society and the globalisation of the

⁷⁶ Ellen Berry, 'When Liberal States Bite Back', in Andrew Phillips and Christian Reus-Smit (eds.) *Culture and Order in World Politics* (2000), pp. 159-181.

⁷⁷ Theda Skocpol and Vanessa Williams, *The Tea Part and the Remaking of Republican Conservatism* (Oxford: Oxford University Press 2012).

⁷⁸ Berry, 'When Liberal States Bite Back', p. 160.

⁷⁹ Phillips and Reus-Smit, *Culture and Order in World Politics*, p. 10.

⁸⁰ Williams, *Ethics, Diversity and World Politics*, p. 133.

system of sovereign states. The nationalisation of the world, far from facilitating true diversity, instituted a diversity regime constituted of selected, hierarchically ordered, like-units which then undertook to homogenise the populations resident within them. While the secondary pluralist institutions have gone some way to remedy these inequalities, for the most part they were designed to both mitigate for and reinforce existing inequalities. Where the institutions have been most successful in improving rights for subaltern communities, it has been primarily a result of the activism of those subaltern communities and the international organisations set up to implement the institutions of Shielding and Recourse. The success of both institutions has likewise been equivocal in terms of diversity protection. While there are notable successes in the preservation or resurrection of cultural diversity, both of the institutions of Shielding and Recourse mandate that states within international society adopt specific forms of liberal multiculturalism in respect to their minority groups, thereby undermining the pursuit of pluralism. In summary, international society has so far failed to develop a truly pluralist way to protect international diversity and its existing institutions are likely to come under ever increasing pressure in years to come.

Conclusion

As stated in the introduction, a diminished pluralist wing of the English School has recently sought to reinvigorate pluralist thought through the development of a new pluralism predicated on the ethical desirability of diversity in international society. Through offering an account of the ethical significance of diversity and community in international society, new pluralism posits a core normative claim that the ethical diversity of human communities is to be valued and championed and seeks to embed a concept of pluralist justice within the English School. The three core claims of new pluralism are that communities are the units of moral concern in international society, tolerance of diversity should be the primary governing principle of international order, and the sovereign territorial state provides the best means through which the world's communities can enjoy pluralist forms of justice.

This thesis has sought to bridge the gap between new pluralism and the new history of international society through an examination of the historical development and contemporary functioning of the institutions which work towards the achievement of pluralist justice. The conclusions of this investigation are that pluralist justice is a long way from being achieved. The current state system is the product of a history of dispossession, persecution and eradication of most of the world's historic communities. By constructing diversity regimes in particular ways, 'authorizing certain forms of difference, ordering them hierarchically, and relating them to units of political authority' the order builders of the contemporary diversity regime have institutionalised restricted forms of recognition from which many of the world's peoples have been excluded.¹

In the case of the diversity regimes constructed at Vienna, Berlin and Versailles, European order builders were able to decide the principle that divided communities from one another within Europe. They also determined which communities would be given nation states, and which would

¹ Reus-Smit, *On Cultural Diversity*, p. 218.

not. A similar story can be told about the process of decolonisation. The borders of the new states were drawn by the departing colonial powers and the political structure inherited by the new polities – the territorially sovereign state – was modelled on that of the European order builders. This observation is important because the concept of a pluralist international order, despite recent efforts to ‘move beyond’ the state, still overwhelmingly relies upon states to be the primary providers of the moral benefits of community membership to individuals via the institution of citizenship. What the findings of this thesis reveal are that the political communities that pluralist institutions seek to protect have – in large part – been created by those very institutions. The observation that most communities are the product of the conscious design of European order builders brings into question the first of the core tenets of new pluralism – that such communities should be the moral units of concern in international society. It does not nullify the claim that existing national communities are morally valuable – simply because a community has been externally constructed does not preclude it from being of moral value to its members. However, it should encourage greater scepticism on the part of new pluralists when considering the moral value of currently recognised national communities against the value of unrecognised or differently ordered communities.

In order to mitigate the negative impacts upon those communities denied statehood during the emergence and expansion of international society, Western order builders designed two secondary pluralist institutions: Shielding and Recourse. The assumption in the vast majority of English School writing is that the existence of international institutions is indicative of greater solidarism within international society.² However, new pluralism involves a recognition of the existence of both pluralist and solidarist secondary institutions within international society and an acceptance that ‘international society is not philosophically consistent’.³ An ideal-type new pluralist international society is not a Nardin-like practical association: It is a purposive association, dictated

² See Tim Dunne, ‘Society and Hierarchy in International Relations’, *International Relations*, 17: 3 (2003), p. 306.

³ Williams, *Ethics, Diversity and World Politics*, p. 121.

by pluralist goals. Unfortunately, these two secondary pluralist institutions of international society have been unable to compensate for the myriad failings of the State. Instead, they have often served to reinforce existing hierarchies. This is noted by Williams when he argues that '[t]he role of institutions in perpetuating injustice through the silencing of critical perspectives and voices in the name of 'order' is seriously neglected within a great deal of English school theory'.⁴ A focus on these institutions and the communities they seek to protect has uncovered a much more rigid hierarchy than that discussed in current English School scholarship – characterised by an international order of communities in which many are permanently locked out of statehood. It has also exposed homogenising dynamics anathema to the pluralist ethos: In seeking to preserve international diversity, both institutions have in reality propagated specific Western-derived forms of liberal multiculturalism as standardised best practice. Rather than enhancing global diversity, they have often contributed to the homogenising tendencies of international society.

Acknowledging these challenges to the achievement of pluralist justice in international society, the question then is how can access to pluralist justice be improved? One possible method is through strengthening the secondary pluralist institutions and tackling inequalities in access to them. Practical means for how to achieve this could involve granting non-recognised communities greater access to international organisations. International mechanisms of Shielding and Recourse have proven most effective when subaltern groups have been able to utilise these institutions as fora in which to contest their subaltern status and demand greater recognition and rights from international society. The increased rights of indigenous people which resulted from the activism of these communities within the UN and other international organisations is a notable success story. One means by which inequality in access to the pluralist institutions of international society may be combatted, therefore, is by providing greater opportunity for subaltern groups to utilise them as settings for challenge and contestation. A greater voice for non-indigenous national minorities

⁴ Williams, *Ethics, Diversity and World Politics*, p. 145-6.

in particular would be helpful to the development of a more consistent and principled approach to national minorities that does not bifurcate as sharply between the rights granted to indigenous and non-indigenous peoples. This would also relieve growing pressure on the present policy track for indigenous peoples, stemming from increasing numbers of groups seeking to claim indigenous status and the resistance of states in which these groups reside to recognition of these claims.

This project has demonstrated that, to truly understand the pluralist institutions of international society, it is essential that future researchers pay closer attention to the activities and agency of international organisations. As noted by Knudsen, international organisations 'have the capacity to shape and even change the constitutive principles and reproducing practices of fundamental institutions and thus the basic social structure of international society'.⁵ It is often through international organisations that the members of international society seek to influence its normative constitution. Such organisations also often become key normative actors in their own right, as demonstrated by the role played by the various organisations of the international refugee regime complex in expanding refugee protections and encouraging state compliance. As international organisations become increasingly influential in shaping domestic choices concerning the rights of minorities, there are deep and unresolved questions about how this influence should be exercised.⁶ These are questions on which new pluralists should have a view.

The new pluralists should also consider coherent ways in which pluralist institutions may be reformed to take into account the increasing prevalence of multiple community membership. This is necessary to respond both to changing patterns of community membership through globalisation and to the needs of the numerous communities, such as the Roma, whose nomadic lifestyles fit uneasily within pluralist institutions designed primarily for territorially-based peoples. More importantly, as neither Shielding nor Recourse are able to effectively compensate for the

⁵ Tonny Brems Knudsen, 'Fundamental Institutions and International Organizations: Solidarist Architecture', in Knudsen and Cornelia Navari, *International Organization in the Anarchical Society: The Institutional Structure of World Order* (Basingstoke: Palgrave Macmillan, 2018), p. 176.

⁶ Will Kymlicka, 'Internationalization of Minority Rights', *International Journal of Constitutional Law*, 6: 1 (2007), p. 32.

loss of an individual's 'right to have rights', international society would be advised to look to find ways in which individuals may access citizenship-like benefits from bodies other than their state of nationality. Related to this point, the systemic failure of the institution of Recourse requires new pluralism to re-examine how it considers the ethics of bordering in international society. The one mechanism that we have as international society to protect those communities who cannot be protected within their state of citizenship is currently failing because of the increasing reification of borders and stricter controls on human movement. Any form of pluralist justice must revolt at the situation in which the world's exiled communities currently find themselves. It is clear that to resolve this crisis, the world must look again at practices of bordering and exclusion.

Some might question what the implications for sovereignty might be in a world with strengthened secondary pluralist institutions, a stronger voice for non-recognised communities, greater acceptance of multiple community membership, and revised practices of bordering. Indeed, sovereignty has already been challenged in principle by both institutions of Shielding and Recourse. However, as argued by Krasner, breaches of sovereignty have been an enduring characteristic of international relations – through conventions, contracting, coercion, and imposition. Rather than being an unimpeachable concept, sovereignty has always been a 'compromise' with other important principles such as human rights – a 'cognitive script characterized by organized hypocrisy'.⁷

There are some forms of secondary pluralist institutions that would challenge sovereignty more than others. In particular, strong versions of indigenous sovereignty assert the inherent divisibility of sovereignty and aspire to a world of multiple and overlapping sovereignties.⁸ However, the vast majority of non-recognised communities adopt a more modest interpretation of the right to self-determination, one that is consistent with the territorial integrity of states. This

⁷ Stephen Krasner, 'Rethinking the Sovereign State Model', *Review of International Studies* 27: 5 (2001), pp. 17-42, p 17.

⁸ Paul Keal, 'Indigenous Sovereignty', in Trudy Jacobsen, Charles Sampford, and Ramesh Thakur, *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate Publishing, 2008), p. 316.

is generally the goal of various models of ‘internal self-determination’.⁹ A strengthened institution of Recourse would likely challenge fundamental aspects of state sovereignty. However, the primary goal should be to restructure the current impact upon the sovereignty of states more evenly across international society. At present, states in the developing world are seeing a much greater impact upon their sovereignty from the refugee regime complex than are developed states, in large part because developed states have found sophisticated ways to obfuscate their obligations.

The question of how to tackle the homogenising impact of the pluralist institutions of international society is more complex. Historically, state contestation of Shielding and Recourse has been driven overwhelmingly by a desire to homogenise minority groups or to obfuscate their obligations under the refugee regime complex. Allowing greater ability for states to contest the operations of these institutions is therefore likely to be unhelpful towards the overall goal of improved community and diversity protection. However, as noted in the previous chapter, the overwhelming dominance of ideologies of liberal multiculturalism within the pluralist institutions of international society contradicts the moral pluralism advocated by the new pluralists. Taking the philosophy of Isaiah Berlin as the model for moral pluralism, it is clear that it explicitly does not advocate a preference for any particular philosophy of government or community. Berlin’s moral pluralism contends that diversity is an inherent good in the world and conveys a belief ‘not so much in the inevitability, as in the value and importance, of the singular and the unique, of variety as such; and the corresponding conviction that there is something repressive and deeply unattractive in uniformity’.¹⁰ This criteria is ultimately much more subjective and intangible than anything presented within the existing new pluralist literature. However, in adopting a truly pluralist approach to the design of international institutions, it may be possible to gradually erode the inequalities that currently characterise access to community and diversity protection regimes. Again, improved access for subaltern communities to decision making fora should hopefully

⁹ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), p. 206.

¹⁰ Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, 2nd ed., (London: Pimlico, 2013), p. 58.

permit for currently excluded voices to be part of the development of a more truly pluralist diversity regime.

New pluralism has sought to recast the solidarist-pluralist debate from one focused on the tension between order and justice to one between solidarist and pluralist forms of justice. It is clear that pluralist justice is a long way from being achieved within contemporary international society and that the present pluralist international institutions are insufficient. However, they do offer valuable avenues for contestation and many are beginning to show dividends in terms of increased rights for subaltern communities and a slow repairing of some forms of international diversity lost during the globalisation of the system of sovereign states. This project has also highlighted practical ways in which these institutions could be strengthened. New pluralism has some way to go before it is able to establish a robust concept of pluralist justice to rival that posed by the solidarists but the normative project is a valuable one and essential in order to respond to contemporary developments in world affairs in which contestation over community membership and practices of inclusion and exclusion are centrally placed. Indeed, it is precisely these contemporary real-world developments that invalidate Hurrell's claim that a pluralist ethic is no longer normatively viable in international society.

A final observation relates to the likely impact of shifting patterns of global power on the possibilities for pluralist justice. Existing debates on the likely impact of the shift in power to non-Western states are generally divided between culturists who worry that the rise of China could fracture international society's cultural foundations and institutionalists who believe that existing institutions have an unprecedented ability to accommodate cultural diversity. The clear patterns shown within this thesis of contestation and non-compliance with existing pluralist institutions on the part of China and other rising powers should lead to considerable concern over the fate of these institutions in a re-ordered world. I strongly concur with Reus-Smit when he argues that 'we should be probing the nature of the prevailing diversity regime, and asking whether it can

accommodate new conjunctions of power and articulations of difference.’¹¹ Indeed, the question today is ‘not whether a Western order can survive sudden-onset diversity, or whether pluralist or liberal institutions can neutralise such diversity; it is whether the global diversity regimes instituted after decolonisation can accommodate new conjunctions of power and articulations of cultural difference.’¹² Judging by existing patterns of state behaviour as described within this thesis, it is not clear that they can. How new pluralists seek to advance the pluralist agenda in coming years is therefore likely to be significantly impacted by these shifting power considerations and may lead to a much more radical reformulation of the concept of pluralist justice than can presently be foreseen.

¹¹ Christian Reus-Smit, *On Cultural Diversity: International Theory in a World of Difference*, (Cambridge: Cambridge University Press, 2018), p. 226.

¹² *Ibid.*, p.230.

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