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# Hospitality and Sovereignty: What Can We Learn From the Canadian Private Sponsorship of Refugees Program?

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## Abstract

This article addresses the tension between state sovereignty and refugee protection. The application of refugee law is often harshly criticized with such modern tendencies as increased border controls and visa regimes, and growing security and identity concerns creating impediments for persons requesting protection. Consequently, a common concern is how to improve refugee protection to make it independent from states' evolving political interests and changing preferences. In order to explore international law – specifically, refugee protection – beyond state sovereignty, this article draws from Derrida's notions of unconditional hospitality and sovereignty. To envisage the practical application of these philosophical ideas, the article considers the operation of the Canadian private sponsorship of refugees program. The article argues that individuals can be the bearers of an other sovereignty, distinct from that of states, and can implement international obligations in the area of refugee and human rights law more efficiently. The application of this distinct sovereignty also extends a type of unconditional hospitality, as defined by Derrida. The article concludes that the private sponsorship of refugees program should be regarded as more than just an interesting way to implement states' obligations. It should be seen as an example of, and opportunity for, innovative development in international law, which could provide a more human dimension, enabling more persons to get the protection to which they are entitled.

*'The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective.'* (H Arendt, *The Origins of Totalitarianism*, 296)

## 1. Introduction

For anyone interested in human rights issues, refugees remain emblematic figures for at least two reasons. First, since by definition a refugee is a person who cannot rely on the protection of his state of nationality, he or she embodies 'the abstract nakedness of being human',<sup>1</sup> for which the concept of human rights promises respect and protection. Current international law regards human rights and refugee protection as interrelated and complementary, in the sense that obligations undertaken by states in

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<sup>1</sup> H Arendt, *The Origins of Totalitarianism* (Meridian Books, World Publishing Company, 1958) 299.

the field of refugee law are, at least theoretically, a way to ensure human rights protection to individuals suffering from most severe forms of human rights violations:

The international community created two regimes to address human rights abuses: one, the human rights regime, to monitor and deter abuse, and the other, the refugee regime, to provide surrogate state protection to some of those who are able to cross borders.<sup>2</sup>

On the other hand, the application of refugee law is often harshly criticized with such modern tendencies as increased border controls and visa regimes, and growing security and identity concerns creating impediments for persons suffering from the worst forms of human rights violations who request the protection to which they are, in principle, entitled. As a consequence, a frequent question for persons working in the field is how to construct refugee protection to make it independent from states' evolving political interests and changing preferences.

Despite the fact that states continue to play a primary role as protection providers supporting the traditional view of the relationship between sovereignty and human rights, this article will demonstrate that new actors are able to intervene under various existing schemes to change the traditional structure and to open new avenues to those looking for protection. More than that, these new practices should be regarded as precursors to a different vision of human rights that departs from the state-centered perspective and reviews sovereignty, in a similar way to suggestions made by Derrida in his essay 'On Cosmopolitanism'.<sup>3</sup> This article takes up the proposal made in this essay to imagine international law beyond states and state-centered territorial sovereignty. In order to translate this proposal into the practical sphere, the article draws insights from the operation of the private sponsorship of refugees program in Canada.

The article will first describe in detail the tension existing between refugee protection and state sovereignty. Derrida's vision of unconditional hospitality and sovereignty will then be analysed to clarify the theoretical basis for the final proposal. The Canadian private sponsorship scheme will be used to establish a practical basis for the proposal. Finally, possible future directions for refugee protection that would avoid, to some extent, the conundrums of state sovereignty will be presented.

From a methodological point of view, it should be mentioned that in the same way as the article attempts to transcend the limits of territorial sovereignty, it also transcends disciplinary boundaries, at times blurring the distinction and transition between legal and philosophical or political analysis.

<sup>2</sup> D Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133–54, at 135.

<sup>3</sup> J Derrida, *On Cosmopolitanism and Forgiveness* (Routledge, 2001), 20–1.

## 2. A refugee in international law: between human rights and sovereignty

The status of a refugee in modern international law can be analysed from various perspectives. This part describes refugee protection in a rather unconventional manner, combining legal and political approaches. This is necessary to demonstrate the contradictions and paradoxes of traditional notions of state sovereignty and territorial integrity, as well as of the separation between legal and political analyses.

The best starting point for understanding the contradictions of refugee protection in modern international law is a comparison of the legal definition of a refugee and the common understanding of refugee protection, as promoted by UNHCR. According to the definition formulated in the 1951 Geneva Convention Relating to the Status of Refugees, a refugee is any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>4</sup>

UNHCR gives the following explanation of what this definition and the whole international refugee protection system means:

It is the responsibility of States to protect their citizens. When governments are unwilling or unable to protect their citizens, individuals may suffer such serious violations of their rights that they are forced to leave their homes, and often even their families, to seek safety in another country. Since, by definition, the governments of their home countries no longer protect the basic rights of refugees, the international community then steps in to ensure that those basic rights are respected.<sup>5</sup>

The first point to which we should pay attention is the fact that protection of citizens is the responsibility of states. This well-established principle of international law reflects the overriding nature of state sovereignty in international law, which becomes even more visible if we remember that the other side of this principle, as confirmed in the jurisprudence of the ICJ (International Court of Justice), is the prerogative of the state of nationality to exercise protection of its citizens.<sup>6</sup> In other words, traditionally and with very few exceptions, which still occupy an extremely

<sup>4</sup> Convention Relating to the Status of Refugees (Geneva Convention), 28 July 1951, United Nations, Treaty Series, vol 189, 137, art 1, A(2).

<sup>5</sup> UNHCR, 'Refugee Protection: A Guide to International Refugee Law', 1 Dec 2001, 8, available at: <<http://www.unhcr.org/refworld/docid/3cd6a8444.html>>, accessed 13 May 2011.

<sup>6</sup> See, *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, 3; and, most importantly, *Nottebohm Case (second phase)*, Judgment, ICJ Reports 1955, 4.

uncertain place in international law,<sup>7</sup> if the state of nationality chooses not to exercise protection, no other state can step in and supplement this lack of protection by the state of nationality.

As a consequence, in order to establish a certain kind of protection for persons whom their own governments are no longer willing or able to protect, international law should determine what kind of entity could step in and provide this substitute protection. According to the UNHCR statement above, if the basic rights of refugees are not protected by states of their nationality, the onus does not fall on other states to grant them protection, but on the international community. Who is this international community and how does it grant protection in practice? The response is given by the Geneva Convention in a rather indirect way.<sup>8</sup> Although the definition of a refugee does not respond to this question, the Convention, as with any other international treaty, imposes obligations on states as the main subjects of international law. Therefore, the obligation to grant substitute protection to victims of the most severe violations of human rights is not imposed on the international community, whatever shape it takes, but on each and every individual state party to the Geneva Convention and its Protocol.<sup>9</sup> This point is made abundantly clear in the UNHCR Handbook:

The assessment as to who is a refugee, i.e. the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status.<sup>10</sup>

The recourse to the notion of international community is symptomatic of difficulties that arise in terms of international law theory and practice when it is asserted that states other than the state of nationality are entitled to exercise international protection. The fundamental principles of sovereign equality and non-interference into internal affairs are put into question by this possibility. For this reason, UNHCR, on various occasions, has found it necessary to reaffirm that ‘(i)t is a universally recognised principle that the grant of asylum and the recognition of refugee status is a peaceful, non-political and humanitarian act’.<sup>11</sup>

<sup>7</sup> The most notable notion developed in modern international law in order to enable other states to protect non citizens is the so-called ‘responsibility to protect’. See, eg, United Nations Secretary General Report, ‘Implementing the Responsibility to Protect’, UN doc A/63/677, 12 Jan 2009; and, for a critical analysis, A Orford, *International Authority and the Responsibility to Protect* (CUP, 2011).

<sup>8</sup> The Convention constantly refers to contracting state parties and never mentions the international community.

<sup>9</sup> Protocol Relating to the Status of Refugees (Protocol), 31 Jan 1967, United Nations, Treaty Series, vol 606, 267.

<sup>10</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, Jan 1992, HCR/1P/4/Eng/Rev.2, 1, para II, available at: <<http://www.unhcr.org/refworld/docid/3ae6b3314.html>>, accessed 13 May 2011.

<sup>11</sup> UNHCR, ‘Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum’, Sept 2006, at 9.

In order to avoid tensions that could arise if several sovereign states claim the right to grant protection to the same individual simultaneously, the definition of a refugee formulated in the Geneva Convention contains another important element: a person cannot become a refugee unless he or she has managed to cross an international border and thus, to a certain extent, escape the overriding sovereign power exercised by his/her state of nationality. This aspect of refugee law reinstates the fundamental international law principle of territoriality. The state is thus reaffirmed as an independent sovereign entity with exclusive competence upon its population and territory.

The second aspect of refugee status in modern international law is the possibility of being recognized as a refugee and thus to be able to receive substitute protection based upon the gravity and intensity of human rights violations to which the potential refugee is subjected. The Geneva Convention's definition does not state this aspect clearly. It rather speaks of the well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. However, the interpretation provided by UNHCR, as well as by the doctrine, constantly suggests the necessity to consider the gravity of the human rights violations. The description of refugee protection given in the UNHCR Guide above stresses this aspect by emphasizing the serious nature of the violations as well as the basic character of the rights violated. The very similar terminology referring to '*fundamental* human rights', '*grave* violations of human rights', or even 'a sustained or systemic violation of core, internationally recognized human rights'<sup>12</sup> is used not only by UNHCR but also by the doctrine.<sup>13</sup>

The major difficulty inherent in this reasoning relates to the necessity of establishing a hierarchy between various human rights. This hierarchization of rights contradicts the very foundation of the idea of human rights protection: to recognize that some rights are so fundamental to human existence and human dignity that they should be enjoyed by any human being irrespective of citizenship. The theory of human rights law as a branch of international law clearly states the absence of any hierarchy of rights:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.<sup>14</sup>

<sup>12</sup> J Hathaway, *The Law of Refugee Status* (Butterworths, 1991).

<sup>13</sup> G Goodwin-Gill, J McAdam, *The Refugee in International Law* (OUP, 3rd edn, 2007), 49; UNHCR, Handbook, above n 10, para 51; MR Von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff, 2002), reference to 'serious harm' throughout the study.

<sup>14</sup> Vienna Declaration and Program of Action, 12 July 1993, UN doc A/CONF 157/23, para 5. For the doctrinal assertion of the same principle, see, eg, T Van Boven, 'Distinguishing Criteria of Human Rights' in K Vasak, P Alston (eds), *The International Dimension of Human Rights* (Greenwood Press, vol 1, 1982), 43–57; K Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 EJIL 917–41, at 918–19.

This theoretical stance is comprehensible because introducing even minimal hierarchy raises questions, such as what is more important to human dignity, being able to feed oneself and one's own family or being able to express freely personal political opinions? This reveals cultural and political differences about what it means to have a dignified human life and how to define a human. However, the history and development of human rights shows the gradual establishment of a complex system of categorization of rights that serves as a basis for valuing some rights over the others.<sup>15</sup> This is particularly well-illustrated by the division between civil and political as opposed to economic, social and cultural rights. The latter are usually viewed as less important or less basic belonging to the so-called private sphere, as has been pointed out by numerous feminist authors.<sup>16</sup> While some other authors would argue that the different implementation measures or the non-derogable character of some rights do not automatically create a hierarchy,<sup>17</sup> it is still necessary to consider the argument of feminist scholars, according to whom the various categories of rights imply a value judgement and thus hierarchization.<sup>18</sup>

Not surprisingly, this categorization and, as a consequence, the hierarchy of human rights found its way into refugee law from the outset. At a purely theoretical level, authors who argued for the establishment of the link between human rights and refugee protection did not have in mind any hierarchy of rights.<sup>19</sup> However, in practice, the purely mechanical application of their ideas resulted in a rigid categorization and hierarchization of refugees' experiences according to the right deemed to be violated by the decision maker. Despite the fact that UNHCR, doctrine and part of jurisprudence constantly reaffirms the necessity to adopt a holistic approach to refugee experience,<sup>20</sup> these categories of rights still give governments a useful legal tool for the creation of hierarchies and thus the exclusion of many persons from protection. As one scholar noticed, governments are not concerned with the hierarchy of human rights, but with the gravity of human rights violations.<sup>21</sup>

<sup>15</sup> T Meron, 'On a Hierarchy of International Human Rights' (1986) 80 AmJIL 1–23.

<sup>16</sup> See, eg. C Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 Harvard Human Rights Journal 87–125; G Binion, 'Human Rights: A Feminist Perspective' (1995) 17 Human Rights Quarterly 509–26; H Charlesworth, C Chinkin, *The Boundaries of International Law* (Manchester University Press, 2000), 56–9, 201–49.

<sup>17</sup> T Van Boven, above n 14, 48–53.

<sup>18</sup> Charlesworth, Chinkin, above n 16, 206.

<sup>19</sup> See, eg. the link established between human rights and refugee status determination in Hathaway, above n 12.

<sup>20</sup> See, eg. UNHCR, 'Guidelines on International Protection No. 2: Membership of a Particular Social Group Within the Context of Art 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', 7 May 2002, HCR/GIP/02/02, para 2, 14, available at: <<http://www.unhcr.org/refworld/docid/3d36f23f4.html>>, accessed 20 Dec 2011.

<sup>21</sup> T Meron, 'State Responsibility for Violations of Human Rights' (1989) 83 Am Soc'y Int'l L 384.



The analysis above reveals a discrepancy between the theory and the language of international instruments and practice. It is dangerous for the doctrine to maintain a theoretical stance without taking into account the practical implications of the theories developed. Such an attitude leads to regression and lack of protection, as the example of Canadian private sponsorship will demonstrate.

The analysis has also demonstrated two important aspects of refugee protection: recourse to substitute state protection with the requirement to cross an international border, and the hierarchization of human rights. These two aspects highlight the fundamental difficulty of affirming the human dignity of any human being while at the same time respecting state sovereignty and the prerogatives attached to it. If, theoretically, human rights should protect any person just because he/she is a human being, why should state sovereignty and the place where the person is located matter? How can violations of some human rights be categorized as more important or more significant than violations of other human rights? The continuing operation of international law generally and refugee law particularly, without adequately addressing these questions, transforms persons who 'have become human beings and nothing else'<sup>22</sup> (persons who have lost the protection of their state of nationality) into objects of law, into 'animal species'.<sup>23</sup> Law protects animals to a certain affordable extent without giving them any voice. Similarly, states decide on the granting of refugee protection according to their ability and generosity at the time, making the suffering of refugees less important than that of their citizens. This difficulty can be addressed from various disciplinary perspectives. The proposal formulated at the end of this article proceeds from the combination of two approaches: philosophical and legal. The philosophical perspective provides a theoretical basis and guidance for a concrete legal reform proposal. In the next part of the article this philosophical basis is discussed.

### 3. Towards cosmopolitanism: displacement and sharing of sovereignty

As mentioned above, despite some modern developments relating in particular to the definition and expansion of human rights, international law is still largely dominated by states as its principal subjects. Sovereignty remains the main characteristic of these subjects. Therefore, any discussion of reforms and new approaches to refugee protection as an integral part of international law has to address the issue of sovereignty.

<sup>22</sup> H Arendt, above n 1, at 302.

<sup>23</sup> *ibid.*



It has long been recognized, by international lawyers as well as by specialists in other fields, that sovereignty is an ambiguous concept that is difficult to define.<sup>24</sup> However, some authors, especially philosophers, offer many valuable analyses of this concept that clarify certain aspects and help to further a deeper understanding of its underlying logic. As far as the status of refugees and its relation to sovereignty in international law is concerned, the work of Derrida is illuminating. First, he engages directly with the question of the relationship between state sovereignty and human rights. Secondly, he offers some thoughts on the status of refugees and the inadequacy of the existing framework of protection.

A brief introduction of the notion of unconditional hospitality developed by Derrida is important for further reflection. Unconditional hospitality in Derrida's works is viewed, in opposition to the law of hospitality, as any attempt to regulate conditions and rights linked to the possibility of a foreigner being admitted to a territory that is not his own.<sup>25</sup> The basic idea behind unconditional hospitality is best reflected in the following statement made by Derrida during an interview:

I have to – and that's an unconditional injunction – I have to welcome the Other whoever he or she is unconditionally, without asking for a document, a name, a context, or a passport. That is the very first opening of my relation to the Other: to open my space, my home – my house, my language, my culture, my nation, my state, and myself. I don't have to open it, because it is open, it is open before I make a decision about it: then I have to keep it open or try to keep it open unconditionally. But of course this unconditionality is a frightening thing.<sup>26</sup>

Obviously, it is difficult to imagine how unconditional hospitality could become a part of the existing international legal system, which regulates movement of persons across borders and inside states with significant rigour. More than that, one can hardly imagine unconditional hospitality representing an orientation, or goal, towards which international refugee law, and, more generally, international regulation of migration, will strive to move. This is particularly true if one takes into account that, according to the Derridian notion of unconditional hospitality, this opening of space in order to keep its unconditional character should occur without or before any decision, and without placing any conditions on the entry of the foreigner. Therefore, all existing forms of regional cooperation that facilitate the free movement of people, including in its most advanced form within

<sup>24</sup> Consider, eg, the following statement by LFL Oppenheim: 'It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority'. LFL Oppenheim, *International Law: A Treatise* (Longmans, Green & Co, vol 1: Peace, 1905), 108.

<sup>25</sup> J Derrida, *On Hospitality*, *Anne Dufourmantelle invites Jacques Derrida to Respond* (Stanford University Press, 2000) at 23.

<sup>26</sup> J Derrida, 'Politics and Friendship: a Discussion with Jacques Derrida', Centre for Modern French Thought, University of Sussex, 1 Dec 1997, available at: <<http://hydra.humanities.uci.edu/derrida/pol+fr.html>>, accessed 3 June 2011.

the European Union, cannot be taken as an example of unconditional hospitality. In order to benefit from this free movement, people have first to be accepted as members of the community, or to get an authorization to enter the European Union's space, which contradicts the requirement of unconditionality as defined by Derrida.

In order to make the unconditional movement and its realization possible, Derrida's 'On Cosmopolitanism' is examined. This short essay was written by Derrida in response to an invitation to address the International Parliament of Writers (IPW) in relation to its initiative to create a network of cities of asylum for threatened and persecuted writers.

Derrida develops, in the final part of this essay, a critique of Kantian cosmopolitanism, which, although recognizing the significant importance of universal hospitality, places on it two limits. Before engaging with these two limits, Derrida emphasizes an essential idea, on which Kantian cosmopolitanism and universal hospitality are based. Although Kant admits that the earth itself is a common possession of all human beings, he carefully distinguishes from it everything that is constructed on that soil: home, culture, institutions and, most importantly, states.<sup>27</sup> Based on this fundamental distinction Kant recognizes that states are able to limit, and thus to exclude from hospitality, the right of residence. In this Kantian vision, hospitality is limited only to the right of visitation.<sup>28</sup> As a consequence, since Kant makes hospitality dependent on the state and its sovereignty, he has no difficulty in recognizing that the state can legitimately impose limits on this universal hospitality and thus prevent access to certain parts of this earth, which initially is described as the common possession of all humans.<sup>29</sup> This philosophical construction fits perfectly with the current state of refugee protection as articulated in public international law. Derrida is critical of this Kantian construction, which stands in complete contradiction to unconditional hospitality, but he also recognizes the difficulty of dealing with this contradiction.<sup>30</sup> However, he takes one important step further in formulating the possibility of the transformation and the progressive development of law as we have it, under the conditions we have today. His response is very simple and linked to the IPW initiative, on which he comments. However, he adds one dimension that deserves further development: he imagines the cities of refuge (*ville-refuge*) not only as an urgent response in a situation of necessity, but also as an experiment with law, place for reflection and 'for a new order of law and a democracy to come to be put to the test (*experimentation*)'.<sup>31</sup>

<sup>27</sup> Derrida, above n 3.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*, 22.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*, 23.

More concretely, in responding to the initiative of making some cities open to potential refugees (in this particular case, writers persecuted for their ideas and works), Derrida asks whether this proposal could be seen as a response to the crisis of refugee law as implemented exclusively by states. Finally, he even suggests regarding this experiment as a step towards developing future solutions to international problems of modernity beyond states. Going to the extreme, this proposal could be seen as an opportunity for international law and international constitutionalism, including human rights protection, without state sovereignty. The philosophical work by another French philosopher, Emmanuel Levinas, can be related to this proposal. Levinas insisted on the inherently violent character of any institutional structure and stressed the importance of extraordinary moral individuals, who he believes are the only actors able to do justice to the suffering of the Other.<sup>32</sup> The Derridian proposal is also the idea of implementation of international legal obligations not by states who are unwilling to do so, but by other actors who are less institutionalized, more sensitive and thus willing to use their resources to the benefit of the suffering Other. What can this mean more concretely in terms of refugee and human rights protection?

To fully understand this proposal and to make an adequate attempt at applying it in practical terms, the Derridian vision of sovereignty also needs to be clarified. As explained above, in 'On Cosmopolitanism' Derrida moves away from states and state sovereignty to other forms of authority able to grant protection to refugees. In his works he often condemned sovereignty:

As soon as there is sovereignty, there is abuse of power and a rogue state. Abuse is the law of use; it is the law itself the 'logic' of a sovereignty that can reign only by not sharing. More precisely, since it never succeeds in doing this except in a critical, precarious, and unstable fashion, sovereignty can only *tend*, for a limited time, to reign without sharing.... There are thus only rogue states. Potentially or actually.<sup>33</sup>

As a consequence, Derrida calls nation state sovereignty into question.<sup>34</sup> However, that does not mean unconditional opposition to and suppression of sovereignty, because 'one cannot combat, *head-on*, all sovereignty *in general*, without threatening at the same time, beyond the nation-state figure of sovereignty, the classical principles of freedom and self-determination'.<sup>35</sup>

<sup>32</sup> For an analysis of this aspect of Levinas' work, see, eg, R Burggraeve, *The Wisdom of Love in the Service of Love: Emmanuel Levinas on Justice, Peace, and Human Rights* (Marquette University Press, 2002).

<sup>33</sup> J Derrida, *Rogues: Two Essays on Reason* (Stanford University Press, 2004), 102.

<sup>34</sup> *ibid*, 157.

<sup>35</sup> *ibid*, 158.

Therefore, the *ville-refuge* proposal intends to displace sovereignty or its parts from nation states to other entities, in this case cities. In this sense, we can talk about sharing and displacement of sovereignty. Who else could share this sovereignty with nation states? Can sovereignty be displaced elsewhere? Derrida does not provide clear answers to these questions. However, he clarifies the following point while addressing the relationship between human rights and state sovereignty:

The attempt to impose limits to the sovereignty of nation states is often done, and mostly in vain, by referring democratically to the Universal Declaration of Human Rights. ... But the Declaration of Human Rights does not constitute a principle of sovereignty that would limit the sovereignty of nation states understood as a principle of non-sovereignty. No, it is sovereignty against sovereignty. Human rights establish and presuppose man (equal, free, self-determined) as sovereign. The declaration of Human Rights declares an *other* sovereignty and, consequently, reveals the auto-immunity of sovereignty in general.<sup>36</sup>

This statement can be interpreted as an affirmation that individuals can also take up a share of this or an *other* sovereignty and that sovereignty can be displaced towards individuals. The possibility for individuals to share sovereignty with states, or to create new forms of sovereignty, as a way of limiting and opposing the sovereign nation states and their unwillingness to fulfill their obligation of protection towards refugees, forms the core of this proposal.

Since the purpose of this article is not the discussion of Derrida's works, as such, but rather their contribution to the future development of human rights and refugee protection, based on the analysis of a concrete program, it will highlight only the two most relevant interpretations of Derrida's work on sovereignty. For some authors Derrida's relationship to sovereignty is ambiguous and contradictory,<sup>37</sup> constituting 'a strange mixture of condemnation of sovereign politics ... with a kind of reluctant acquiescence or at least accommodation'.<sup>38</sup> However, this description of Derrida's thoughts on sovereignty fails to grasp a more fundamental and paradoxical aspect of his analysis of this notion, which is made clear by Mansfield.<sup>39</sup> The ambiguity and contradiction which some authors see in Derrida's works on sovereignty is not his personal hesitation or ambivalence but, rather, the very nature of sovereignty itself. Sovereignty is, at the same time, an unconditional power and a logic of selfsameness and therefore

<sup>36</sup> Derrida, above n 33, 127–8.

<sup>37</sup> See, eg, W Brown, 'Sovereign Hesitations' in P Cheah, S Guerlac (eds), *Derrida and the Time of the Political* (Duke University Press, 2009) 114–33; or JR Martel, 'Can There Be Politics Without Sovereignty? Arendt, Derrida and the Question of Sovereign Inevitability' (2010) 6 *Law, Culture and the Humanities* 153–66.

<sup>38</sup> Martel, *ibid*, 160.

<sup>39</sup> N Mansfield, *The God Who Deconstructs Himself: Sovereignty and Subjectivity Between Freud, Bataille, and Derrida* (Fordham University Press, 2010).

includes ‘that which goes beyond it and thus turns against it’.<sup>40</sup> Therefore, as Mansfield argues convincingly:

This means that sovereignty will always contain within it that which can be made to critique if not ruin it. But more important is the inverse of this insight: that which counters sovereignty – by excess, subversion or disruption – must itself be sovereign. It is not possible to shelter in a kind of political Manicheism, in which power is to be anathematized as always and everywhere a disgrace and a degradation, something to be critiqued but not assumed. Power can only be critiqued from power, and this power is never not being exercised.<sup>41</sup>

This vision of Derrida’s analysis of sovereignty puts his previously mentioned affirmation that human rights establish and presuppose man as a sovereign in a new light. An individual who emerges through the development of human rights law brings with him or her this *other* sovereignty that can counter the nation state and its sovereignty. The sovereignty of individuals is also radically different from redistribution or decentralization of sovereignty, which is a commonly acknowledged phenomenon in modern public international law in that it detaches sovereignty from territory, thus disrupting another traditional principle of public international law, namely, the principle of territoriality. Therefore, it is not sufficient to imagine cities or other places of refuge as Derrida does in his essay ‘On Cosmopolitanism’. A radical turn would necessitate further detachment from territorial sovereignty, which is only imaginable if individuals become the bearers of sovereignty, individuals who will be able to counter the violence of institutional structures and do justice to the suffering of the Other. In the context of the private sponsorship program, this sovereignty of individuals finds its way into the international arena and into formal structures of international law. Before this article gives more detail on this vision of refugee protection, it is necessary to understand the second element that guides this proposal for the future of human rights and refugee protection, namely, the Canadian private sponsorship program.

#### 4. Private sponsorship: between hospitality and bureaucracy

Private sponsorship was introduced in Canada in 1978 with the coming into force of the 1976 Immigration Act.<sup>42</sup> Section 13(2) of the current Immigration and Refugee Protection Act,<sup>43</sup> which forms the basis for private sponsorship in Canada today, reads as follows:

<sup>40</sup> N Mansfield, ‘Sovereignty as Its Own Question: Derrida’s Rogues’ (2008) 7 Contemporary Political Theory 361–75, at 367.

<sup>41</sup> *ibid*, 373.

<sup>42</sup> Immigration Act, 1976–77, c 52, s 1, (IA).

<sup>43</sup> Immigration and Refugee Protection Act, LC 2001, c-27 (IRPA).

A group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province, and an unincorporated organization or association under federal or provincial law, or any combination of them may, subject to the regulations, sponsor a Convention refugee or a person in similar circumstances.

From a larger international law perspective, private sponsorship of refugees constitutes a part of one of the durable solutions for refugees: resettlement.<sup>44</sup> However, it also has other more important aspects that go beyond the simple tool for resettling refugees. These aspects of private sponsorship are only rarely and marginally addressed, if at all. Before turning to these more interesting aspects of private sponsorship, it is necessary to understand the main traits of this program.

Private sponsorship of refugees should first be distinguished from the governmental sponsorship of refugees, which is the more common way of providing refugees with an opportunity for resettlement.<sup>45</sup> As the authoritative UNHCR Handbook on Resettlement states, '(r)esettlement involves the selection and transfer of refugees from a State in which they have sought protection to a *third State which has agreed to admit them* – as refugees – with permanent residence status'.<sup>46</sup> Since states are primary actors according to this definition of resettlement, the traditional vision of sponsorship means that the government will provide necessary administrative and financial means to enable the resettlement of the refugee. Moreover, taking into account the disparity between available resettlement places and resettlement needs,<sup>47</sup> the government will also establish criteria and select refugees who, according to its vision, are more deserving of resettlement. Thus, until the adoption of the 2002 IRPA, the selection of refugees for resettlement in Canada was directed exclusively by the criterion of ability 'to become successfully established in Canada'<sup>48</sup> and not by any humanitarian consideration, such as, for example, the hardship of the refugees' situation. The 2002 IRPR created special categories of persons, 'in urgent

<sup>44</sup> UNHCR promotes three durable solutions: local integration in the country of asylum; return to the country of origin; and resettlement to a third country. See, eg, UNHCR, 'Framework for Durable Solutions for Refugees and Persons of Concern', May 2003, in particular, paras 12–16.

<sup>45</sup> According to UNHCR, there are currently 24 countries worldwide that offer resettlement places for refugees. Canada is the only country among them to have, in addition to government sponsorship, a private sponsorship program: UNHCR, 'Projected Global Resettlement Needs 2011', 16th Annual Tripartite Consultation on Resettlement, Geneva, 6–8 July 2010, 7–8.

<sup>46</sup> UNHCR, 'Resettlement Handbook', Nov 2004, I/2 (emphasis added).

<sup>47</sup> According to UNHCR estimates for 2011, out of every 100 refugees in need of resettlement, only 10 are resettled each year. For more detail, see UNHCR, above n 45.

<sup>48</sup> S 6(1) IA defined general principles of admissibility of immigrants in the following way: 'Subject to this Act and the regulations, *any immigrant, including a Convention refugee*, and all dependants, if any, may be granted landing if it is established to the satisfaction of an immigration officer that the immigrant meets the selection standards established by the regulations for the purpose of determining whether or not and the degree to which the immigrant will be able to become successfully established in Canada, as determined in accordance with the regulations.' (emphasis added).



need for protection<sup>49</sup> and ‘vulnerable’,<sup>50</sup> who are processed in a more speedy manner and who are not examined for their ability ‘to become successfully established in Canada’.<sup>51</sup> These two categories create the possibility for refugees to be resettled because of their needs for protection and not because they are regarded as potentially efficient members of the Canadian community. For other persons in need of resettlement, the ability to establish successfully in Canada is determined on the basis of such factors as their resourcefulness, and other similar qualities that assist in integration in a new society; the presence of their relatives, including the relatives of a spouse or a common-law partner in the expected community of resettlement; their potential for employment in Canada, given their education, work experience and skills; and their ability to learn to communicate in one of the official languages of Canada.<sup>52</sup> These criteria make resettlement to Canada impossible for many refugees, despite the hardship of their situations. The only solution for refugees unable to qualify under either these criteria, or as vulnerable or in urgent need of protection, is private sponsorship.

In order to become admissible for private sponsorship the person has to fulfill the criteria of the refugee definition as contained in 1951 Geneva Convention, or has to be in a refugee-like situation. The latter included, until 6 October 2011, two classes of persons. First, to continue to be considered persons in a refugee-like situation, those who fled their country of origin must ‘have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights’ both in their country of origin as well as in the country where they reside at the time of application.<sup>53</sup> Secondly, protection through resettlement could previously also be granted to persons who had not yet left their country of origin but who otherwise fell under the definition of a refugee of the 1951 Convention, or who were ‘being seriously and personally affected by civil war or armed conflict in that country’, or who had been or were ‘being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate

<sup>49</sup> According to the definition provided in the s 138 of the Immigration and Refugee Protection Regulations (IRPR), SOR/2002-227, a person is considered in urgent need of protection if it can be established that her ‘life, liberty or physical safety is under immediate threat and, if not protected, the person is likely to be killed, subjected to violence, torture, sexual assault or arbitrary imprisonment; or returned to their country of nationality or of their former habitual residence’.

<sup>50</sup> According to s 138 IRPR, “‘vulnerable’ means, in respect of a Convention refugee or a person in similar circumstances, that the person has a greater need of protection than other applicants for protection abroad because of the person’s particular circumstances that give rise to a heightened risk to their physical safety’.

<sup>51</sup> The term itself is defined in s 139 (1)(g) IRPR. S 139(2) explicitly states that this requirement does not apply to vulnerable persons and persons in urgent need for protection.

<sup>52</sup> *ibid.*

<sup>53</sup> IRPR, s 147. This is the so-called country of asylum class.



exercise of civil rights pertaining to dissent or trade union activity'.<sup>54</sup> Their country of origin or habitual residence had to be on the list created according to rules formulated in the IRPR.<sup>55</sup> Unfortunately, for various reasons that cannot be discussed here, the government, instead of reforming and enlarging access to sponsorship, decided to repeal the source country category with immediate effect on 6 October 2011.<sup>56</sup> For the purposes of this article, this last category of persons, who were until very recently able to benefit from resettlement, will still be taken into account, because it illustrates well several Derridian ideas and supports some of the theses advanced here.

Thus, the benefit of private sponsorship can be enjoyed not only by refugees *stricto sensu* but also by other persons whose life, corporal integrity, liberty or other human rights are in danger. Most importantly, in some cases, although a restricted number, protection through resettlement could be enjoyed by persons who had not yet managed to leave their country of origin. This meant that the person had not had to risk her life, or get into debt with a smuggler, to fulfill the criterion of having crossed of an international border. With this addition the Canadian sponsorship scheme responded to two major criticisms of the international refugee protection system. First, it enables the protection of persons suffering severe human rights violations who are otherwise unable to qualify as refugees because the persecution they suffer is not one of the grounds enumerated in the 1951 Convention.<sup>57</sup> Secondly, the protection could be requested from within the country of origin, removing the requirement to cross an international boundary, which can be arbitrary and inadequate in many regards, as explained above.<sup>58</sup>

<sup>54</sup> IRPR, s 148(1) in its previous version, the so called source country class.

<sup>55</sup> See, in particular, previous s 148(2) and 149 IRPR. The countries that are considered 'source countries' were listed in sch 2. Lastly, 6 countries were set out in this schedule: Columbia, El Salvador, Guatemala, Democratic Republic of Congo, Sierra Leone, and Sudan.

<sup>56</sup> The official position of the government, as well as its responses to various objections, can be found in *Canada Gazette*, vol 145, No 22, 26 Oct 2011, available at: <<http://www.gazette.gc.ca/rp-pr/p2/2011/2011-10-26/html/sor-dors222-eng.html>>, accessed 17 Dec 2011. The overall result of the repeal is that the fate of more persons is left to the discretion of the government, whose decisions are not always guided by legal criteria but by utilitarian political considerations.

<sup>57</sup> This requirement of the refugee definition was not discussed in detail previously in this article. According to art IA(2) of the Geneva Convention, in order to be recognized as a refugee the person should be persecuted 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. If the persecution is generalized and does not target a person for one of these reasons, she does not fall under the definition and thus cannot be recognized as a refugee. The most telling example of inadequacy of this vision is the case of civil populations suffering 'incidentally' from armed hostilities taking place in their region. In order to address this inadequacy, broader definitions of refugee have been advanced at regional levels. For a more detailed discussion of this issue, see, eg, E Arboleda, 'Refugee Definition in Africa and Latin America' (1991) 3 *IJRL* 185–207.

<sup>58</sup> It should be emphasized that the possibility of renouncing the requirement of crossing an international border can also be particularly welcome from the point of view of combating the organized crime of human smuggling to which many Western states devote considerable resources and energy. Eg, the recently released report by the United Nations Office on Drug and Crime (UNODC) clearly demonstrates that the increased severity of border controls and visa regimes led to the development of and increase in the activities of organized smugglers. See UNODC, 'The Role of Organized Crime in the Smuggling of Migrants from West Africa to European Union', Jan 2011, available online at

The major distinguishing feature of private sponsorship is the fact that the initiative to grant protection through resettlement comes exclusively from private actors: either organizations, or groups of five citizens or permanent residents.<sup>59</sup> Provided the person whom they wish to assist falls into one of the categories mentioned above, private sponsors are free to choose a person they wish to sponsor from a government list of visa officer referred refugees, that is, persons who meet the above criteria and need a sponsor in order to resettle in Canada. This right to sponsor a refugee of their own choice is contingent upon an obligation to sponsor the person for at least twelve months.<sup>60</sup> Sponsorship includes financial responsibilities, as well as general assistance to help the person to successfully settle in the community.<sup>61</sup> Thus, private sponsorship in Canada has two main distinguishing features. It enlarges the circle of persons who can be assisted through resettlement beyond the traditional category of refugees. Furthermore, it allows private actors – individuals and organizations – to make choices and decisions that will directly contribute to the protection of persons suffering from human rights violations, thus having an impact at the level of international law. Under the private sponsorship scheme, private actors fulfill certain international obligations traditionally regarded as a duty and a prerogative of states as sovereign entities.

The operation of the private sponsorship schemes in Canada encountered from its outset several challenges, some of which remain a concern today. The principal difficulties arise from the tension between the desires and choices of private sponsors and the political orientations and administrative and bureaucratic practices of the government. The two main concerns that result from this are long processing delays and high refusal rates for privately sponsored refugees.<sup>62</sup> CIC statistics indicate that in many visa offices the processing times after submission of a complete application

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<[http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Report\\_SOM\\_West\\_Africa\\_EU.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Report_SOM_West_Africa_EU.pdf)>, accessed 10 June 2011.

<sup>59</sup> Using more technical terms, the following classes of private sponsors are distinguished: Sponsorship Agreement Holders (SAHs), Constituent Groups, Groups of Five, and Community Sponsors. SAHs, as their name indicates, already have a formal agreement with the government that facilitates the processing of their requests for sponsorship. Constituent Groups have the same advantage because they are authorized by SAHs. For a simple and clear presentation of the basic differences between these various types of private sponsors, see, Citizenship and Immigration Canada, 'Guide to the Private Sponsorship of Refugees Program', 2005, 4–6.

<sup>60</sup> IRPR 154 (2). The duration of the undertaking can be more than one year, but should not exceed three years (154(3)).

<sup>61</sup> See, eg, IRPR 153(1) a) and b), 154 (1) b).

<sup>62</sup> See, eg, the discussion of these challenges in Employment and Immigration Canada, 'Private Sponsorship of Refugees. National Consultation Report' (1991), and the re-emergence of the same issues with greater concern in Canadian Council for Refugees, 'Private Sponsorship of Refugees Program: Current Challenges and Opportunities' (Apr 2006). Employment and Immigration Canada was the ministry responsible for issues related to immigration and thus to refugees until 1994, when it was replaced with Citizenship and Immigration Canada (CIC) which remains the competent ministry today.

package can be more than three years.<sup>63</sup> This is a delay sufficient to significantly affect the situation of the sponsor, as well as of the sponsored person, so that the sponsorship could become impossible (for example, a change in the financial situation of the sponsor, or death of the refugee) or involve a significantly modified situation (for example, deterioration of the medical condition of the sponsored person, death of family members, or psychological factors).<sup>64</sup> In order to respond to this problem, in January 2011, the CIC adopted a rather controversial measure imposing a limit on the number of applications private sponsors can file. As far as the high refusal rates are concerned, there are complaints from both sides: the government alleges that private sponsors misuse the program to bring family members, who are not in reality in need of protection, to Canada; while organizations and individuals involved as sponsors denounce biased and inadequate treatment of cases.<sup>65</sup> The recent case law from the Canadian Federal Court seems to confirm the latter version, whereas the evidence for the former is very limited.<sup>66</sup> Finally, it should be emphasized that research on private sponsorship is rather rare and there are few systematic studies on the issue. However, the available evidence indicates that this program not only helps to respond to resettlement needs, but also facilitates the long-term successful adaptation of sponsored persons to life in Canada. According to some research, the private sponsorship scheme is more successful in this regard than the government sponsored program.<sup>67</sup> The personal commitment of private sponsors leads to a strong interpersonal bond between the sponsor(s) and

<sup>63</sup> CIC, 'Processing times for privately sponsored refugee applications processed by visa offices out-side Canada' (27 Apr 2011), update, available at: <<http://www.cic.gc.ca/english/information/times/perm/ref-private.asp>>, accessed 3 June 2011.

<sup>64</sup> For a more detailed discussion, see, eg, analyses made by Canadian Council for Refugees (CCR), a non-profit umbrella organization that provides an excellent forum for discussion and coordination of issues relating to immigration and refugees across Canada. All CCR publications mentioned are available online: <<http://ccrweb.ca/en/library>>. CCR, 'No Faster Way? Private Sponsorship of Refugees: Overseas Processing Delays', Oct 2004; CCR, 'Nairobi: Protection Delayed, Protection Denied', Oct 2009.

<sup>65</sup> For a discussion of the issue, see, eg, B Treviranus, M Casasola, 'Canada's private sponsorship of refugees program: a practitioner's perspective of its past and future' (2003) 4 *Journal of International Migration and Integration* 177–202 at 186–7; CCR, 'Private Sponsorship of Refugees Program: Current Challenges and Opportunities', Apr 2006, at 5–6.

<sup>66</sup> Thus, CCR expressed concerns at the analysis of cases of Iraqi asylum seekers at the Damascus visa office, as well as of Eritrean asylum seekers at the Cairo visa office. Private sponsors attracted the attention of CCR to these cases. See CCR, 'Analysis of a small number of Iraqi private sponsorship applications refused at Damascus', Dec 2006; and CCR, 'Concerns with Refugee Decision-making at Cairo', Jan 2010. As a result, 4 cases found their way to the Federal Court, where the judge confirmed the inadequacy of the visa officer's analysis of claims in these cases. See, *Henok Aynalem Ghirmatson v Minister of Citizenship and Immigration*, 5 May 2011, 2011 FC 519; *Tsegeroman Zenawi Kidane v Minister of Citizenship and Immigration*, 5 May 2011, 2011 FC 520; *Tsegay Kiflay Weldesilassie (AKA Tsegay Fiklay Weldesilassie) v Minister of Citizenship and Immigration*, 5 May 2011, 2011 FC 521; *Selam Petros Woldehellasie v Minister of Citizenship and Immigration*, 5 May 2011, 2011 FC 522.

<sup>67</sup> M Baiser, 'Sponsorship and resettlement success' (2003) 4 *Journal of International Migration and Integration* 203–15.

the refugee, facilitating access to the wider Canadian community and reinforcing solidarity and social cohesion.<sup>68</sup>

The operation of the private sponsorship program demonstrates the tension between the openness and hospitality of individual sponsors, who are willing to open their spaces (homes, communities, cities) to a stranger they scarcely know, and the suspicious and hostile bureaucracy of the state, which uses legal and political tools to protect its '*domaine réservé*' and to reaffirm its sovereign powers. However, strangely, this same suspicious and hostile state adopted the legislation required to make the hospitality and openness of individuals towards non-citizens possible. The article will address this tension and paradox in more detail below to develop a proposal for future refugee and human rights protection.

## 5. The other and sovereignty: an *other* sovereignty

As previously discussed, according to the analysis of sovereignty provided by Derrida, the overriding nature of state sovereignty can only be countered by unconditionality (power) coming from within it, which itself should be sovereign in order to constitute a viable alternative. Derrida also states that individuals empowered by human rights can represent this *other* sovereignty that has the potential to effectively oppose the nation state sovereignty. In 'On Cosmopolitanism' Derrida envisaged the sovereign cities of refuge as an alternative to states' unwillingness to comply with their international obligations, specifically, in the area of refugee protection. The previous analysis of the Canadian private sponsorship program demonstrates that individuals can also represent an alternative to states unwilling to protect refugees and other persons suffering from human rights violations. In the context of the private sponsorship program, this sovereignty of individuals finds its way into the international arena and into formal structures of international law. This occurs in two steps.

First, the state, by adopting laws which allow individuals to assume the responsibility in the framework of private sponsorship, creates a space where this sovereignty can be exercised. What we see at work in this process is that which is within sovereignty and 'goes beyond it and thus turns against' state sovereignty. This first step is made from within state sovereignty itself, namely, through the claim made by certain citizens, who are a part of 'we the people' with whom sovereignty identifies itself. At a certain point sovereignty, through the legislator, accepts the call made by its own constituents to respect its international obligations, which the sovereign state took upon itself because it is sovereign.

<sup>68</sup> M Lanphier, 'Sponsorship: Organizational, sponsor, and refugee perspectives' (2003) 4 Journal of International Migration and Integration 237–56, at 245–6.

The second step is made after the legislation is adopted. Individuals who take the power and exercise this other sovereignty, made possible through the first step, claim more power and more space using the tools that thus became available. The state attempts to control this exercise of sovereignty by individuals, but is definitely not able to have a final say in all matters. The tensions existing within the Canadian private sponsorship program demonstrate it perfectly.

At the moment of its creation the Canadian state needed – mainly in financial terms – the input from private sponsors in order to respond to the refugee crisis of the time. This input was necessary in order to sustain the image of Canada as a sovereign nation that is able to comply with its obligations in the area of refugee and human rights law.<sup>69</sup> By making an appeal to the Canadian public as a ‘donor’, the state did not envisage what turn the program might take in future.<sup>70</sup> The reality revealed today goes far beyond the initial project.

Individuals ascertain their sovereignty against the sovereignty of the state, making resettlement possible even to those whom the state does not wish to admit to its territory. This autonomy acquired by private sponsors is well illustrated by the complaints by government about the number of sponsor-nominated refugees. The difficulties of processing delays and high refusal rates, described above, are also a result of the sovereign exercise of power by individuals in directions not necessarily desired by the government. Obviously, government uses all available means to suppress and limit this independent and unexpected exercise of power. The elimination of the source country class, as well as the limit placed on the number of private sponsorship applications allowed, are the best examples. Persons and organizations working with refugees, including private sponsors, do not remain passive. They use this opportunity to claim even more power. For instance, the CCR has stated that ‘(t)he Source Country Class should be universal, that is available in any country and not limited to named countries’.<sup>71</sup>

Thus, the Canadian private sponsorship program provides an excellent example of the way in which individuals and organizations can participate directly in the implementation of international obligations. It should certainly be kept in mind that the program itself is not perfect and many aspects should ideally be improved and strengthened, but, for the purposes

<sup>69</sup> ‘It was recognized at that time that in addition to a planned government effort to help refugees, *Canada would benefit* from a mechanism that would allow private citizens and corporations to become involved in refugee resettlement’, Employment and Immigration Canada, ‘Private Sponsorship of Refugees Program, Discussion Paper’ (1992) 12 Refuge 2–11, at 2 (emphasis added).

<sup>70</sup> ‘What was originally viewed as a very incidental part of the system of refugee intake, if it were ever to be utilized, quickly became the most imaginative innovation in refugee resettlement ...’, *ibid.*

<sup>71</sup> CCR, ‘Comment on Proposed Elimination of Source Country Class’ (Apr 2011), available at: <<http://ccrweb.ca/en/comments-proposed-elimination-source-country-class>>, accessed 1 June 2011.

of this article, it was important to demonstrate how the move beyond state sovereignty can be conceived or imagined in practical terms.

The innovative nature of the private sponsorship program resides also in the relationship that can be established between this program and the concept of unconditional hospitality developed by Derrida. Any state by its very nature will always establish conditions and prerequisites in order for a foreigner to be admitted to its territory. These conditions will extend far beyond the refugee definition of the Geneva Convention as the modern international practice of states demonstrates. It is not possible to affirm that the private sponsorship of refugees is an example of the exercise of unconditional hospitality, but there are many elements within the program that point towards a practice of unconditional hospitality. The limits placed by the Canadian state through the definition of classes of persons to be sponsored cannot be transgressed by private sponsors. However, within these limits private sponsors welcome persons whom they know very little about. They commit themselves to helping and assisting these persons, not because they expect some future benefit but because they know the person needs help. Feelings at play in sponsor/sponsored relationships cannot emerge in the official, state supervised, administrative context, but only within the context of interaction between private individuals, who are not constrained by institutional frameworks, and who are not functionaries of the state. As stated by Van Selm in her analysis of the public–private partnerships in refugee resettlement:

Ultimately, there are services that no government can provide, and that are not normally organized in a way that would promote the insertion of newly arrived invited refugees into society ... (T)he organizations ideally placed to assist governments in their provision, whatever the system, currently seem to be private, civil-society based NGOs and voluntary agencies – and *people prepared to befriend and guide resettled refugees*.<sup>72</sup>

The analysis of the Canadian private sponsorship program demonstrates that people can intervene and are better placed to intervene, not only once the refugee has arrived in the territory of the state, but also before, in order to make this arrival possible. The analysis can obviously be criticized from several perspectives. The most challenging argument against the vision presented above would be to say that, in the end, it is the state that decides and makes the operation of the program possible, in the same way as it contracts with some NGOs and other entities to do the tasks on government's behalf. However, as argued above, the fact that the state creates the program through the adoption of laws does not diminish the power and value of this exercise of sovereignty by individuals. Individual

<sup>72</sup> J van Selm, 'Public-private partnerships in refugee resettlement: Europe and the US' (2003) 4 *Journal of International Migration and Integration* 157–74, at 173 (emphasis added).



sponsors are able to impose their choices on the government, as recent cases decided by the Canadian Federal Court demonstrate. Of course, in doing so, they use available legal tools and procedural mechanisms established by the state itself. However, if these private sponsors did not act and remained passive, the refugees themselves could not make their voices heard. Private sponsors, as individuals, are also better placed to welcome the refugees and to help them to establish themselves in Canadian society. Another important aspect of private sponsorship is the voice and power that it gives to refugees themselves. Refugees, once established in Canada, and having acquired Canadian permanent residence or citizenship, are in turn able to engage in private sponsorship and provide help and protection to other persons in need.

The operation of the Canadian private sponsorship program has undeniable consequences at the level of international law. It also demonstrates how entities other than states can become powerful subjects of international law influencing international politics. To advance this project further, and to make the impact of individuals and private organizations more significant, there needs to be further development of and an increase in this practice.

This article has argued that the future of refugee protection depends to a significant extent on advocating the introduction of private sponsorship programs to other states. The Canadian people were able to persuade their government as to the appropriateness of the program, and the same development should be possible in other countries. When adopting laws on private sponsorship, governments should follow three major features of the Canadian program. First, the possibility for resettlement should be available not only to refugees *stricto sensu*, but also to other categories of persons in need of protection, at least as defined within the Canadian program. Secondly, the possibility to apply for resettlement from within the refugee's country of origin, without the requirement to cross an international border, should not only be kept open, but expanded to allow applications from any country. Finally, private sponsors should be able to choose the persons they would like to sponsor themselves. This is particularly important because they often have closer connections to places where human rights violations are taking place, and can quickly understand the protection needs due to their informal information networks.<sup>73</sup>

<sup>73</sup> This is one of the most important issues to explore in relation to the private sponsorship program. Until now, there has been no research on how private sponsors respond to humanitarian crises, compared, eg, to UNHCR or governments. CCR identified this issue in 2007 and stated: 'Sponsors also work closely with refugee networks who have sources of information about refugees in need that may not be available to the government or UNHCR.... In many instances, it takes some time before the UNHCR recognizes and is able to respond to the resettlement needs of certain group of refugees. While SAHs responded quickly to the crisis of displaced persons from Iraq, beginning to sponsor Iraqi refugees some time ago, the UNHCR was until quite recently considering the displacement of Iraqis as a temporary problem.' CCR, 'Comments on Private Sponsorship of Refugees Evaluation', Sept 2007 at 6.



Another important aspect of any future development should be closer attention to and recognition of the contribution of private sponsors at the international level.<sup>74</sup> A complete understanding of the importance of the work done by private sponsors will also require further research not only on what sponsors have already achieved, but also on their future goals and opportunities. For example, in the context of the Canadian private sponsorship program, the capacity of sponsors to welcome refugees greatly exceeds the capacity, and even willingness, of the Canadian government to process submitted applications, or to allow new submissions.<sup>75</sup> Ignoring the work done by private sponsors and the difficulties they encounter not only overlooks the improvements this program makes to refugee situations, but also fails to recognize the problems of the program that make private sponsorship more difficult. Failing to acknowledge the potential of this program risks missing the opportunity to positively influence the future not only of refugees, but also of human rights protection in general. Further development of the program could also influence the nature and operation of public international law, completely redefining it in many significant aspects.

## 6. Imagining the future

The above analysis of the Canadian private sponsorship program in the light of the Derrida's vision of sovereignty and hospitality demonstrates possibilities for the future development of public international law. State sovereignty does not need to be or to remain the only possible sovereignty at the level of international law. The state can not only share its sovereign powers with individuals, but also the individual can become a bearer of sovereignty distinct from the state and can effectively oppose this state sovereignty. It should be stressed that, as the Canadian private sponsorship

<sup>74</sup>The only gesture that has recognized the value of private sponsorship at the level of international law was the attribution of the Nansen Refugee Award by UNHCR to Canadian people in 1986. However, the summary of the reasons for attributing this award does not even mention the private sponsorship program: <<http://www.unhcr.org/pages/49c3646c467-page5.html>>, accessed 1 June 2011. On the relationship between private sponsorship and the attribution of the award, see, eg, Treviranus & Casasola, above n 65, at 185.

<sup>75</sup>As for the discrepancy between sponsors' capacities and governmental processing ability, see explanations and figures in CCR, above n 62, at 3–4. A more telling story appeared recently in a Canadian local newspaper, in which private sponsors explain how they are prevented by the government, despite available resources and the success of their sponsored refugees, to continue their work. As the representative of one organization involved in private sponsorship explains: 'It used to be that the only limit was the compassion and generosity of people who help us ... Now because the federal government refuses to hire enough clerks to process refugees, we are going to be limited. We are limited by the lack of will in government to interview these people.' C Grant, 'Refugee sponsorship grinds to halt: New rules mean no more refugees for Cranbrook/Kimberley this year', *Daily Townsman*, 7 June 2011, available at: <<http://www.dailytownsman.com/article/20110607/>> CRANBROOK0101/306079987/-1/cranbrook/refugee-sponsorship-grinds-to-halt>, accessed 10 June 2011.

program demonstrates, this exercise of sovereignty by individuals goes far beyond simple democratic participation in the decision making within the state. Individuals are able to step into the international arena and fulfill international obligations better and more efficiently than states.

To take the idea further, we could envisage the operation of private sponsorship programs not only from within the state, but also from within an international body that would process proposals submitted by individual sponsors *directly*. UNHCR is an obvious candidate, as it is well placed to adapt to this task, relying not only on its internal staff and facilities, but also on its large network of local NGOs. However, submitted cases should not be assessed exclusively through the prism of the refugee definition of the Geneva Convention. As mentioned above, humanitarian classes should be retained, as should the opportunity for persons to request protection through resettlement without having to first cross an international border. If there are financial means available to support the arriving person; if there is a group of individuals ready to support this person for a period of time sufficient for acquiring independence; and if the person is in need of protection, the state will have no reason to refuse them entry to its territory. The state will have no legal justification for any unwillingness to allow entry to such persons in need of protection.<sup>76</sup> Therefore, a refusal for political preference would likely bring moral as well as legal condemnation.

It is more difficult to imagine how individuals could intervene and act in other areas of international law. However, in order to open the possibility in the future, the contributions by individuals already made towards better implementation and the safeguarding of human rights and other rules of international law needs to be fully recognized. When analyzing these contributions they should not be seen as simply an informal activity, but their impact on the better fulfillment of international obligations and their public value, equal to that of state actions, should be acknowledged. The inclusion of classes of persons in addition to refugees, as defined in the Geneva Convention, is a development that extends the areas of law in which individuals can exercise their sovereignty by fulfilling international obligations. This goes beyond refugee protection and steps into the larger field of human rights protection, thus presenting both not as two separate fields, but as a continuum.

Another important development in terms of international law that could result from these processes is the full recognition of individuals and other

<sup>76</sup> In terms of the Canadian private sponsorship program, persons to be resettled have also to undergo medical and security checks (see ss 34–8 of IRPA). As far as the latter is concerned, again the UNHCR, or other international body, is well placed to carry out the assessment in conformity with international law. The medical assessment could be entrusted to other international organizations present in the field, such as *Médecins Sans Frontières*, Red Cross, or even the International Organization for Migration, which already has experience of doing medical checks for persons wishing to immigrate to Canada.

private actors as subjects of international law. This would entail the power of individuals to influence the establishment and development of rules of international law in the areas in which they intervene. For instance, as far as the customary international law is concerned, the practice of individuals fulfilling obligations at international level should have the same value as that of state actions. Furthermore, these new subjects of international law can be not only individuals or private organizations, but also cities, municipalities and other administrative entities, as proposed in the context of Derrida's essay 'On Cosmopolitanism'. Why not allow cities and municipalities to sponsor persons in need of protection, for example?

## 7. Conclusions

This article attempted to demonstrate that the Canadian private sponsorship program is not just a way for the government to attract additional financial support for its obligations in the area of resettlement. Viewed through the prism of Derrida's analysis of sovereignty and hospitality, it reveals itself as a tool for individuals to become active subjects of international law, able to fulfill international obligations in the area of refugee and human rights protection. Derrida's insights on sovereignty teach us that this program is an efficient way for individuals to exercise an *other* sovereignty that is the only force able to counter nation state sovereignty.

The article also explored some ways in which this experience of exercising sovereignty can inform the future development of refugee and human rights protection through the use of available institutional structures. However, the article argued that this experience can be a precursor to future, more general, modifications of the way we conceive fulfillment of international obligations.

These developments can also themselves be regarded as a means for individuals (those who assist and those who are assisted) to make their opinions significant and actions effective. Only through the unconditional recognition of the value of individuals' contributions to the implementation of international obligations can they become really sovereign human beings. Moreover, international law will finally become a tool with which human rights, as a promise of protection for all, without regard to citizenship or place of residence, can be fulfilled.