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ORIGINAL ARTICLE

# The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights

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**Abstract**
The 1951 Refugee Convention and its 1967 Protocol are the main legal documents governing the movement of refugee and asylum seekers across international borders. As the number of displaced persons seeking refuge has reached unprecedented numbers, states have resorted to measures to circumvent their obligations under the Convention. These range from bilateral agreements condemning refugees to their vessels at sea to the excision of certain territories from national jurisdiction. While socio-economic developments and the rise of the worldwide web have led to deterritorialization of vast domains of the economy and the media which enable them to escape from state control, territorial presence, whether on terra firma or on vessels at sea which are functional surrogates for territorial sovereignty, continues to be the basis for the entitlement to human and citizens' rights. We are facing a dual movement of deterritorialization and territorialization at once, both of which threaten the end of the 1951 Convention. This article is an exercise in non-ideal theory which, nonetheless, has implications for a seminal question in ideal democratic theory as to how to define and justify the boundaries of the demos. If the demos refers to the constitutional subject of a self-determining entity in whose name sovereignty is exercised, regimes of sovereignty, including those which govern the movement of peoples across borders, define the prerogatives as well as obligations of such sovereign entities under international law. The period ushered in by the 1951 Convention was such a sovereignty regime which today may be nearing its end.

**Keywords** Refugee Convention · Jurisdiction · Territorialization · Deterritorialization · Crimmigration

## 1 Introduction: Territoriality, Rights, and Sovereignty

Michel Foucault's path-breaking early book *Folie et déraison. Histoire de la Folie*[1] begins with a haunting image of a boat full of persons with mental and emotional disabilities traveling

[1]M. Foucault [1965] 1988, 7 ff.

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the waterways of Europe without being permitted to disembark at any port. Whereas the medieval villages of old Europe had their town fools—madmen and women who roamed freely and were quasi-permanent fixtures of the landscape—modernity distinguishes those who are fully rational and able-bodied from those whom society considers useless human waste and refuse, condemned to roam the waterways until death or illness removes them.

It is more than ironic—almost tragic—that the second decade of the twenty-first century presents us once more with many cases of maritime vessels that are condemned—even if very briefly—to roam the seas or wait at ports without being able to disembark. Unlike the wandering vessels that Foucault describes, these rubber dinghies and makeshift boats stranded in the Mediterranean carry people of diverse abilities and disabilities—all equally condemned at sea. The Mediterranean has now become a sea of death. In 2015, the Italian Maritime Rescue Coordination Centre saved around 150,000 people and 3771 deaths were registered. After the Save and Rescue operation of the Italian coast guard ceased, in 2016, the number of arrivals topped 363,348 while deaths increased to 5079.[2] Two years later, during the summer of 2018, a ship of refugees—the *Aquarius*—sailing from the coast of Africa with 629 people on board, including 123 minors traveling alone, 11 children, and seven pregnant women, stood at the center of the European refugee crisis. Denied admission to Italy by Interior Minister Matteo Salvini of the anti-immigrant and neo-fascist party, Liga Nord, the *Aquarius* drifted around the seas for days and was eventually granted permission to disembark at the port of Valencia by Spain's newly elected socialist government.[3]

With the global pandemic caused by the COVID-19 virus, a new kind of refugee is emerging; unlike the passengers of the Aquarius who were deterred from disembarking because they were poor, black, brown, and undocumented, these passengers were either ill or possibly infected with the virus and needed to be quarantined. Moored for days in front of the port of Oakland, California, the US citizens of the luxury cruise ship, *Grand Princess*, found little sympathy from President Trump and were eventually evacuated to military bases upon the orders of the Governor of California and the mayor of Oakland.[4] There was widespread resistance to their touching ground from the local population; what happened to the ship's crew, the cooks, waiters, cleaning personnel, and maids, many of whom were from third-world countries and who also may have been infected, we do not know and hardly seem to care.

The demented and mentally ill of early modernity, the refugees and asylum seekers from Africa asking for hospitality in Europe, and US citizens, affluent and materially secure enough to

[2] Cited in I. Mann 2018, n104, the figures collected by the International Organization for Migration. See also J. DeParle 2017, 31–36.

[3] Such encounters at sea take place under the aegis of international law, 1982 United Nations Convention on the Law of the Sea (UNCLOS). https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf; Article 98), Duty to Render Assistance.

The sea captain who is on international waters has an obligation to accept these individuals on board (as long as this can be done without great danger to the vessel) and bring them to safety ashore to some country where they can place their requests for asylum. If the refugee vessels encounter ships sailing on designated national waters, carrying the flag of a national government, there is an obligation to bring the refugees ashore to be placed under the jurisdiction of that particular national government, which is then obliged to process their asylum applications in accordance with international law. In the case of *Aquarius*, this would have been Italy, which rescinded its obligations under international and EU law and was subsequently condemned by the Italian High Court as well as the European Court of Human Rights. See also *German Law Journal* (2020) special issue *Border Justice: Migration and Accountability for Human Rights Violations*, vol. 21, No. 3.

The *Aquarius* affair was preceded by an interception at sea by the Libyan coastguard under a bilateral agreement with the Italian government of a humanitarian rescue operation on November 6, 2017 which led to the death of at least 20 migrants. See C. Heller, L. Pezzani, I. Mann, V. Moreno-Lax, E. Weizman 2018.

[4] See T. Sanchez, J. King, L. Hernández, M. Cabanatuan 2020.

afford a Mexican cruise but who were potential victims of a virus, are united through the fact that for various reasons they are not permitted onto the territories of states and their rights as human beings as well as citizens are imbricated with their territorial presence in complex ways. Although it would be anachronistic to speak of human rights in the period which Foucault was discussing, it must not be forgotten that this period is also the beginning of the doctrine of natural rights, that is, those rights which "children, fools, and madmen"[5] (Hobbes) were not entitled to.

The use of territorial exclusion to deny rights is one of the reflex mechanisms of the modern statal imaginary[6]: the deep-seated fear of the outsider and the stranger as an invisible threat, as a potential carrier of disease and danger is so embedded in the imaginary of the modern state that even without any proof that asylum seekers and non-citizen foreigners were potential carriers of the COVID-19 or were even infected by it, in the Spring of 2020, one state after another closed its borders to them.[7] Not only was travel between the USA and Europe suspended for all non-citizens, but the European Union followed suit by shutting its outside borders to all non-EU citizens, while leaving movement across the Schengen borders to the discretion of individual states.[8]

The tightening of the distinction between the citizen and the non-citizen has implications for the lives of those already inside a country and not simply for those on the other side of the border.[9] The USA, long considered a country of immigrants and proud of offering refuge to "huddled masses" coming to its shores, in recent years has intensified the othering and criminalization of migrants as well as refugees.[10] There is firm evidence that recent US actions and policies along the US-Mexico border violate the principle of "non-refoulement" of the 1951 Geneva Convention incorporated into US law through the Immigration and Nationality Act.[11]

In "The End of Asylum. A Pillar of the Liberal Order is Collapsing – but Does Anyone Care?," Nanjala Nyabola has observed that there is enough blame to go around. "The United States is far from the only country to slam its gates on those fleeing crumbling social, political, and economic systems. Around the world, rich and poor countries alike are pulling up their drawbridges, slashing the number of refugees they are willing to accept, and denying asylum to those who might have been admitted in the past. …In Africa, Asia, and South America, the mood is much the same."[12]

[5] T. Hobbes, [1651] 1968, 216.
[6] See J.C. Scott 1998.
[7] See Z. Kanno-Youngs, M.D. Shear, M. Haberman 2020.
[8] According to the Schengen accords, internal borders and controls were eliminated among the member countries of the European Union. Today the Schengen Area encompasses most EU States, except for Bulgaria, Croatia, Cyprus, Ireland, and Romania. However, Bulgaria, Croatia, and Romania are currently in the process of joining the Schengen Area. Of non-EU States, Iceland, Norway, Switzerland, and Liechtenstein have joined the Schengen Area. See web page "Schengen Area," European Commission, Migration and Home Affairs 2016.
[9] See Department of Homeland Security, et al. v. New York, et al., on Application for Stay, 589 U.S. (2020), No. 19A785, denying the application for permanent residency of those legally in the US if they were also to apply for medical, food, or housing assistance.
[10] The USA still leads the world's migration statistics with 50 million, constituting more than 15% of the US population. See "International Migration Report 2017: Highlights," report no. ST/ESA/SER.A/404, 2017. For an analysis of developments leading to securitization and criminalization of migratory movements even before the advent of the Trump regime, see J. Resnik 2016, 117–159. See S. Ghosh 2020 for the historical interdependence of detention and interdiction measures. See also, M. Mittelstadt, D. Meissner, and M. Chishti 2011.
[11] See Al Otro Lado v. John H. Kelley, et seq., Complaint for Injunctive and Declaratory Relief, Case No. 2:17-cv-511, (2017); Al Otro Lado v. Nielson, et. seq., Second Amended Complaint for Injunctive and Declaratory Relief, Case No. 3:17-cv-02366-BAS-KSC, (2018). Many thanks to Professor Elora Mukherjee for alerting me to this case. See section 5 for an extensive discussion.
[12] Nyabola 2019.

Taken together, these developments undermine the 1951 Refugee Convention, and with it, the balance between territorial sovereignty and respect for human and citizens' rights upon which the post-WW II regime of statal sovereignty rested.[13] This is happening at a time when the number of forcibly displaced persons worldwide stands at an all-time high with 70.8 million people at the end of 2019. Among displaced persons, only those who cross internationally recognized borders are called "refugees." The UNHCR classifies 41.3 million as internally displaced persons; 25.9 million are refugees, among whom 5.5 million stand under *UNRWA's (United Nations Relief and Works Agency for Palestine Refugees in the Near East)* mandate; and 3.5 million are asylum seekers.[14]

Refugees, asylees, I.D.P's (internally displaced persons), P.R.S.'s (those in protracted refugee situations who are long-term residents of refugee camps), and stateless persons are categories of human beings created by an international state system in turmoil and are subject to a special kind of precarious existence; they have become *metaphors* as well as *symptoms* of a deeper malaise in the politics of late modernity.[15] I will characterize this malaise as originating with the dual commitments of the post-WW II state system to respect the territorially circumscribed sovereign jurisdiction of equal and independent political units, on the one hand, and the internationalization of human rights, on the other. It is my thesis that while socio-economic developments and the rise of the worldwide web have led to *deterritorialization* of vast domains of the economy and the media which enable them to escape from state control, territorial presence, whether on *terra firma* or on vessels at sea which are functional surrogates for territorial sovereignty, continues to be the basis for the entitlement to human and citizens' rights. We are facing a dual movement of *deterritorialization* and t*erritorialization* at once.

The internationalization of human rights has been spurred in large part by a growing recognition of the limits of territorial sovereignty in a globalizing world. This takes two main forms: First, the internationalization of human rights emerges as a response to the insights gained from the horrors of the twentieth century when human rights remained merely the rights of citizens. Second, this is also accelerated by various material forces of globalization that enable the digitization of the economy through the rise of mass-scale digital communications technologies (including the internet) that are not easily amenable to state control. Even under these conditions, states are increasingly implementing *deterritorialization* tactics to avoid triggering international human rights obligations (including excising land in an attempt to shrink territorial jurisdiction. See Section 4 below). The irony here is that these deterritorialization tactics are also allowing states to preserve and reinvent territorial sovereignty. *Put differently, precisely what seems to be the most menacing to territorial sovereignty—deterritorialization—is emerging as the latest strategy by which territorial sovereignty is being reasserted against the internationalization of human rights*. This gives rise to certain pathologies of the state system, most poignantly and tragically reflected in the predicament of the refugee population of our times.

I begin with a brief discussion of the antinomy between human rights and territorialization in the work of Hannah Arendt and Louis Henkin (2). I then proceed to an analysis of the 1951

[13] This regime of sovereignty never included the colonies and dependent territories of this period, some of which remained under the UN mandate regime of partial or dependent sovereignties until the 1960's. For a critique, see A. Anghie 2005.

[14] In: "Global Trends: Forced Displacement in 2018" 2018.

[15] See G. Agamben 1998; J. Butler 2004. See also J. Rancière 2004, in which Rancière argues against constructions of the refugee as an "abject" subject of pity and humanitarian assistance, emphasizing refugees' political agency and initiative.

Refugee Convention[16] at the level of legal doctrine and discuss some of the difficulties of interpretation as well as implementation the Convention faces more than half century since its formulation (3). Part 4 then focuses on recent state practices which are basically subverting their obligations under the Convention. Part 5 turns to US policies that threaten compliance with domestic law as well as the 1951 Convention. In Part 6, I consider normative questions in the political philosophy of the modern state concerning the "boundaries of the demos" and distinguish three sovereignty regimes: liberal nationalism, liberal internationalism, and cosmopolitanism. I conclude that only the cosmopolitan position can balance the dual claims of territorial sovereignty and international human rights, including refugee rights. Liberal nationalism and liberal internationalism are not to be rejected in toto, but I argue that only a differentiated cosmopolitan position can integrate their insights into a viable vision for the future of the transnational movement of peoples (7).

This article is an exercise in non-ideal theory which has significant implications for a seminal question in ideal democratic theory, namely, how to define and justify the boundaries of the demos.[17] Much recent discussion of the boundaries of the demos takes place via an ideal theory of normative reconstruction with scant attention to legal doctrine and institutions that govern these boundaries. But migration and refugee law, and more generally, laws governing transnational movement across borders, are the site at which today's *demoi* are defining and negotiating their identities as *demoi.* If the *demos* refers to the constitutional subject of a self-determining entity in whose name sovereignty is exercised, regimes of sovereignty, including those which govern the movement of peoples across borders, define the prerogatives as well as obligations of such sovereign entities under international law. An analysis of these international law obligations—be they grounded in treaties, in the common law of nations, on *jus cogens* norms or upon multilateral human rights covenants—can shed light on the legal limits of sovereign self-determination and the reconstitution of the *demoi*. Reconceptualizing sovereignty as a regime of global interdependence is the first step in this process.

## 2 Brief Historical Excursus: Hannah Arendt and Louis Henkin

As Hannah Arendt anticipated in 1949,[18] the plight of refugees and stateless peoples reveals a fateful disjunction between so-called human rights—or "the rights of man" in the older locution—and the rights of the citizen, between the universal claims to human dignity and equality and the real indignities suffered by people who possess nothing but their human rights and who have lost membership in some political community. In an article written for the journal, *Die Wandlung*, and in part later reproduced in *The Origins of Totalitarianism*, Arendt argued that there was only one *human* right, and that was "the right to have rights," to be recognized as a member of an organized political community. The passage from *The Origins of Totalitarianism* states:

"We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation...the right to have rights, or

[16] 1951 Convention relating to the Status of Refugees, adopted July 28, 1951, entered into force Apr. 22, 1952, 189 UNTS 137 ("1951 Refugee Convention" hereafter).
[17] See A. Abizadeh 2008; A. Abizadeh 2012.
[18] H. Arendt 1949.

the right of every individual to belong to humanity, should be guaranteed by humanity itself. *It is by no means certain whether this is possible.*"[19]

Arendt's phrase has been the subject of extensive commentary in recent years: one set of commentaries focuses on the justification of Arendt's concept of rights, the relation between moral and legal rights, as well as international human rights and citizens' rights, while a second set discusses the "right to have rights" in terms of its implications for the plight of the stateless, the refugee, the asylum seeker, and displaced persons.[20]

Considered from the historical standpoint of the development of refugee rights, Arendt's 1949 essay confuses the refugee with the stateless person. "The post-war expression of 'displaced persons,'" she writes, "has been expressly invented in order to make disappear from the world the disturbing fact of 'statelessness' by ignoring it."[21] Arendt was not right on the connection between statelessness and displaced persons: not *all* displaced persons, whether in their own countries or across international borders, are stateless. At the time Arendt wrote, the predominant discussion was around the stateless or, in Paul Weiss's words, those without "diplomatic protection" and "refugees without 'international protection.'" Refugees may be stateless or not. According to Weiss, "It is not their nationality status but the absence of protection by a State which is a determining element of their refugee character. Therefore, in the case of refugees and stateless persons *who have been called floatsam, res nullius, a vessel on the open sea not sailing under any flag,* it would be more proper to speak of de facto and de jure unprotected persons. Owing to this lack of protection, their situation in customary international law is anomalous."[22]

Whether the 1951 Refugee Convention should have included international legal protection for the stateless was discussed extensively during the preparatory conference, but it was decided that they should be dealt with under a separate treaty. Such protection was subsequently brought into force via the *Convention Relating to the Status of Stateless Persons*[23] and the *Convention on the Reduction of Statelessness*.[24]

It is also ironic that at the time of the publication of *The Origins of Totalitarianism* in 1951, Arendt was quite skeptical about the institutions of international law, likening defenders of human rights to those who work in organizations against cruelty toward animals.[25] As I have discussed elsewhere, Arendt's view of international law underwent significant transformations between 1951 and 1963 when she published *Eichmann in Jerusalem*. By that point she was willing to write that crimes against humanity was not only a moral but also a jurisprudential category.[26]

[19] H. Arendt 1967, 269-267. First published in London in 1951 as *The Burden of Our Times*.
[20] For the first see S. Benhabib 2018, 103–115, and for the second, A. Gundogdu 2015; A. Kesby 2012; A.L. Hirsch, N. Bell, 2017; L. Bosniak, 2017. See also J.A. \Gordon, 2019, 25–29, in which Gordon criticizes Arendt's concept of "statelessness" for failing to take into account the perspective of the Global South.
[21] H. Arendt 1949, 755.
[22] P. Weiss 1971, 35. My emphasis. See also P. Weiss 1954.
[23] Adopted Sept. 28, 1954, entered into force Jun. 6, 1960, 360 UNTS 117, with 91 state parties as of 2019 ("1954 Convention on Statelessness" hereafter).
[24] Adopted Aug. 30, 1961, entered into force Dec. 13, 1975, 989 UNTS 175, with 71 state parties as of 2019 ("Reduction of the Stateless Convention" hereafter).
[25] See H. Arendt 1967, 292. Arendt writes: "Even worse was that all societies formed for the protection of the Rights of Man, all attempts to arrive at a new bill of human rights were sponsored by marginal figures – by a few international jurists without political experience of professional philanthropists supported by the uncertain sentiments of professional idealists. The groups they formed, the declarations they issued, showed an uncanny similarity in language an composition to that of societies for the prevention of cruelty to animals."
[26] See S. Benhabib 2011, 41–57.

Consider now an observation made by Louis Henkin, one of the architects of the liberal international human rights regime in the post-WW II period. Whereas Hannah Arendt rejects sovereignty on the basis of her ontology of the human condition,[27] Henkin situates the tensions around this norm in the internal tensions of the sovereignty regime in post-WW II period, and states: "I don't like the "S word." Its birth is illegitimate, and it has not aged well. The meaning of "sovereignty" is confused and its uses are various, some of them unworthy, some even destructive of human values."[28]

Claiming that "the sovereignty of states in international relations is essentially a mistake, an illegitimate offspring," transported into interstate relations from a domestic context, Henkin breaks down sovereignty into three elements: political independence, territorial integrity, and nationality.[29] Each of these elements has changed and is now embedded in a new system of interstate relations. With the end of WW II and the establishment of the United Nations, wars of aggression became illegal.[30] Cooperative institutions of a new world order such as a World Bank and an International Monetary Fund were instituted, all of which are nonetheless "limited by the concept of sovereignty."[31] Political independence and territorial integrity were thus guaranteed by international institutions of the post-WW II period.

The third and most important transformation, in Henkin's view, is the rise of the international human rights movement, to which sovereign states begrudgingly but slowly "accommodated"[32] themselves. Henkin warns against too sanguine a view of this system of international human rights: "Sovereign states accept international human rights standards, if they wish to, when they wish to, to the extent they wish to. They submit to monitoring, to judgments by international human rights courts and commissions, if they wish, to the extent they wish."[33]

[27] See H. Arendt, [1961] 1993, 164–165: "The famous sovereignty of political bodies has always been an illusion, which, moreover, can be maintained only by the instruments of violence, that is, with essentially non-political means. Under human conditions, which are determined by the fact that not man but men live on the earth, freedom and sovereignty are so little identical that they cannot even exist simultaneously. Where men wish to be sovereign, as individuals or as organized groups, they must submit to the oppression of the will, be this the individual will with which I force myself, or the "general will" of an organized group. If men wish to be free, it is precisely sovereignty they must renounce."

[28] L. Henkin 1999, 1

[29] L. Henkin 1999, 2. Whether the origins of the concept of "sovereignty" lie in the domestic realm as opposed to the public one, is a matter of some contention. Hans Kelsen claims that sovereignty derives from "*supranus*." Cf. H. Kelsen 1960, 627: "The most current of these meanings is, according to the etymological origin of the term that derives from the Latin *supranus*, that of a special quality of the state, the quality of being a supreme power, or supreme order of human behavior."

[30] United Nations Charter, art. 2, paras 1–4.

[31] L. Henkin 1999, 3.

[32] L. Henkin 1999, 4.

[33] L. Henkin 1999, 5. In recent years, there has been an intense discussion about what effect human rights treaties have on state behavior. We may distinguish among the realist and internationalist positions in this debate. For the first group, see E.A. Posner 2014a; E.A. Posner 2014b; S. Hopgood 2013. For the state-realist position, see O. Hathaway 2002 and O. Hathaway 2007. Many other scholars disagree with the realist position, whether statist or not, and argue that human rights treaties do influence state behavior. See B. Simmons 2009; K. Sikkink 2011; K. Sikkink 2017; T. Risse, S.C. Ropp, K. Sikkink (eds) 2013; C.H. Heyns, F. Viljoen 2002. Samuel Moyn has been a skeptic about the significance of the politics of human rights based on his conviction that national sovereignty is essential to human rights practice. See his claim that the history of human rights reveals "the persistence of the nation-state as the aspirational forum for humanity" in S. Moyn 2010, 212. I have criticized Moyn's position and his sovereigntist interpretation of human rights, in S. Benhabib 2013. See also Philip Alston's critique of Moyn's latest book (S. Moyn 2018) in P. Alston 2017. Many thanks to the anonymous reader of this journal for reminding me of different voices in this debate.

With respect to global developments in international markets, cyberspace, and the environment, Henkin asks: *where*, in fact, are these domains and systems located physically,[34] and can they be subject to state jurisdiction?[35] But there cannot be an analogous question about the *whereabouts* of the human person and her body. That is why migrants' and refugees' bodies become *the site* upon which sovereignty can inscribe itself in a world where controls over money, capital, the cyberspace and the environment are increasingly deterritorialized, abstracted and rendered invisible, fueling anxieties about "losing control."[36]

The tensions arising from the dualistic commitments of this sovereignty regime to territorial jurisdiction and recognition of international human rights have not been resolved. In fact, a swing of the pendulum toward "the new sovereigntism," and increasing violations of and departure from international human rights standards are now in full view.[37] Nowhere are the paradoxes generated by these dualistic commitments more visible than in the regulation of the transnational movement of peoples across borders as migrants, refugees, or asylum seekers.

## 3 Post-WW II International Human Rights Regime and the 1951 Refugee Convention

The 1951 Refugee Convention is one of the seminal texts of the post-WW II international human rights regime and was signed in recognition of the dangers to human beings of being rendered homeless and stateless through persecution. The articles relevant for the Convention were already laid out in the UDHR.

–Article 13 of the UDHR reads: "Everyone has the right of freedom of movement and residence within the borders of each state." The second clause of the Article states: "Everyone has the right to leave any country, including his own, and to return to his country."

[34] L. Henkin 1999, 6.

[35] "Jurisdiction" is a crucial but nevertheless slippery concept. In an important article, Samantha Besson begins to unpack the relationship between human rights and jurisdiction and writes that ".. it is unclear why the universality of human rights (and human rights-holders) ought to imply the universality of human rights duty-bearers vis-à-vis any right-holder without reference to their political and legal relationship…an extensive interpretation of the extraterritorial application of international and European human rights law … contradicts the way in which international human rights treaties only apply formally to every given state party's institutions and not to all other states at once, and not to other subjects of international law but to states, on the one hand, and only vis-à-vis certain individuals situated in specific relations to them and not to everyone, on the other." In S. Besson 2012, p. 859. This leads her to conclude: "Without state jurisdiction over certain people, those people do not have human rights against that state and that state has no human rights duties toward these people." (S. Besson 2012, p. 862–63). From the standpoint of refugee rights, Besson's point of view would have disastrous consequences in that not only would *non-refoulement* be denied a universal human right status, but states could easily claim that those refugees over whom it bears no jurisdictional responsibility do not impose human rights duties upon them either. Hence the temptation of many states to deny refugees territorial access at all, which is one of the principal ways in which the responsibility of jurisdiction arises and can be shirked when the refugee is neither on the territory nor functionally under the jurisdiction of the state involved. This is a conclusion that many states draw to avoid their moral as well as legal human rights responsibilities. My critique of Besson is not whether she interprets the position of the ECtHR or the CJEU correctly, but whether from a normative point of view, we should to endorse such a narrow view of refugees' human rights. See note 61 and section 6 below.

[36] See S. Sassen 2015.

[37] "The new sovereigntism" is an umbrella term I use to refer to a larger research project dealing with a range of developments, including the role of foreign and international law in US courts; the role of transnational human rights treaties and the courts that monitor them; the rise of movements for national self-assertion on the right and the left, and of course, control of immigration and refugee movements. See S. Benhabib 2016.

–Article 14 encodes "the right to asylum": "Everyone has the right to seek and enjoy in other countries asylum from persecution." The second clause places certain limitations by stipulating that "this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts to the contrary to the purposes and principles of the United Nations."

– Article 15 seeks to guarantee against "denaturalization" or "loss of citizenship" by stating that "everyone has the right to a nationality," and further, "no one shall be arbitrarily deprived of his nationality nor be denied the right to change his nationality." This is reiterated in Article 34 of the 1951 Refugee Convention.[38]

The Preamble to the 1951 Refugee Convention acknowledges the Charter of the United Nations and the UDHR as legitimizing documents and accordingly Article A 2.1. of the Convention states: For the purposes of this Convention, the term "refugee" shall apply to any person who, "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[39] The restriction of the scope of article 1 (A) "to events occurring in Europe before 1 January 1951," was changed with the 1967 Protocol, and the refugee status was universalized, since "… new refugee situations … have arisen since the Convention was adopted and … the refugees concerned may therefore not fall within the scope of the Convention."[40]

Originally, the Convention was signed by 26 state parties, heavily representing North America and Europe, and was attended by a significant number of international organizations and NGO's who also participated in deliberations.[41] Today there are 146 state parties to the Convention and 147 to the Protocol, since the USA has signed the Protocol but not the Convention.[42] The universalization of the refugee status through the 1967 Protocol has given rise to a series of discrepancies between the letter of the Convention and the purposes it is being asked to serve. In particular, the five protected categories specified by the Convention have come under criticism.

It is stated that, "The principle of *nonrefoulement* is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ("*refouler*") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom."[43] Yet there are five protected categories, namely, race, religion,

[38] 1951 Refugee Convention, Article 34: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

Article 24 (3) of the International Covenant on Civil and Political Rights ("ICCPR" hereafter) enjoins that "Every child has the right to acquire a nationality."

[39] See 1951 Refugee Convention.

[40] Protocol relating to the Status of Refugees, General Assembly Resolution 2198(XXI), 1967 ("1967 Protocol" hereafter).

[41] For a critique of the Euro-centric bias of the 1951 Convention, see B.S. Chimni (2020, forthcoming); S.E. Davies 2007. For a detailed discussion of the "post-colonial critique," see S. Benhabib and Nishin Nathwani (2020, forthcoming).

[42] See "American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis," Harvard Law Review, 2017–2018.

[43] See 1951 Convention, Article 33.

nationality, political opinion, and membership of a particular social group, on the basis of which claims of persecution are evaluated. The category of "membership in a social group" (MSG) has been expanded in recent years to cover gender-based and gender-related crimes such as the persecution of lesbian, bisexual, intersex, and transgender applicants as well as practices of child marriages and female genital mutilation.[44] However, as noted by many scholars with regard to the five protected categories, this "limitation seems to be more a matter of policy than of principle. It seems implausible that persecution for other reasons is different in principle. Furthermore, it seems implausible that persecution is the only valid form of necessity. Natural disasters,[45] wars, famines could be equally compelling reasons of necessity since they can induce a well-founded fear of harm."[46] The temporary protection status offered by many states to refugees fleeing for these reasons is only partially adequate to deal with the quandaries generated by the Convention's five protected categories.

The 1951 Refugee Convention requires proof of individual persecution, imposing on refugees themselves and the receiving states a heavy administrative procedure of examination and verification. In an age of increased generalized violence, ethnic cleansing, civil wars, and armed confrontations among non-state groups, in what sense then are these categories adequate to deal with the rights of the most vulnerable? In response to such concerns, the Heads of State of the Organization of African Unity (now African Union) formulated the *Convention governing the Specific Aspects of Refugee Problems in Africa*, adopted in Addis Ababa on 10 September 1969 and entered into force in June 20, 1974.[47] A similar document, *The Cartagena Declaration on Refugees*, was adopted at a colloquium held at Cartagena, Colombia, on 19–22 November 1984. This document, while non-binding, set out regional standards for refugee processing and resettlement in Central America, Mexico, and Panama. The Cartagena declaration states that "among refugees [are included] persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[48]

In fact, the world's largest asylum receiving countries are *not* in Europe. According to the latest data from the UNHCR published in June 2018, Turkey leads with more than 3.7 million, mainly Syrian refugees; Pakistan harbors 1.4 million; Uganda 1.2 million; Lebanon 998,900; Iran 979,400; and Bangladesh 932,000.[49] Among European countries, only Germany makes it unto this list with 1.1 million refugees.[50] What this list reveals is that the globalization of the 1951 Refugee Convention has not been accompanied by a corresponding globalization of responsibilities for the fate of the world's refugees. It is still neighboring countries in the Middle East and Africa that bear the burden of refugee movements caused by international conflicts and civil wars. In many cases, territorial jurisdictional lines drawn between these countries were simply the product of past imperialist conquests and made little sense for the

[44] J.C. Hathaway and M. Foster 2014, 444–45, 449–451 for "age-related persecution." Female Genital Mutilation (FGM) is discussed by Hathaway and Foster under the category of "torture or cruel, inhuman or degrading treatment" as well in J.C. Hathaway and M. Foster 2014, 214–215. Cf. T. Inlender 2009.
[45] On refugee movements caused by climate change, such as the sinking of the territory of island nations, see D. Wong 2013.
[46] Niraj Nathwani 2000, 376.
[47] See "Convention Governing the Specific Aspects of Refugee Problems in Africa" 1969.
[48] See "Cartagena Declaration on Refugees" 1984.
[49] See "Figures at a Glance: Statistical Yearbooks."
[50] See "Poorer countries host most of the forcibly displaced", UNHSR 2017.

daily existence and well-being of the populations involved.[51] For many countries in these regions, it is increasingly impossible to distinguish state failure, official corruption, and grinding poverty from well-grounded fears of persecution.

In an attempt to respond to some of the shortcomings of the 1951 Convention in the light of the changing global situation, Hathaway and Foster present a striking reinterpretation of the Convention and its Protocol by taking into account developments in international human rights: "Refugee Law may be the world's most powerful international human rights mechanism,"[52] they write. Noting that there is no single body charged with the authoritative interpretation of the 1951 Refugee Convention such as to resolve conflictual issues, they warn of the growing risk of fragmentation and regionalization and propose to provide "a principled treaty interpretation,"[53] which is also normative. Hathaway and Foster acknowledge the difficulty of linking human rights law and the 1951 Refugee Convention and therefore propose to view human rights treaties as establishing standards of "permissibility" in the consideration of serious harms. In their view, so long as "the risk of denial of a broadly accepted international human right is sustained, in the sense that, as a practical matter, it is ongoing or systemic … it can reasonably be said that there is a risk of "being persecuted" of the kind that may engage Convention obligations."[54]

The obvious objection to this method of interpretation is that it may broaden the scope of the 1951 Convention to the point of indeterminacy, making it impossible for states not to judge and meddle in one another's domestic affairs via an assessment of their respective human rights' violations. Hathaway and Foster concede that "not all codified human rights are created equal: some rights have long pedigrees, others are of more recent vintage; some rights are nearly universally agreed, others enjoy only minimal support…"[55] One option, therefore, is to focus on the most "basic international human rights standards" which they find embodied not only in the ICCPR and the ICESC but in the Convention of the Elimination of Racial Discrimination; in CEDAW; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities, among others.[56]

As laudable as Hathaway and Foster's approach may be, it presents a dilemma: either to eliminate the distinctive features of the 1951 Refugee Convention and its Protocol that were concerned to address a discrete set of individuals in discretely identifiable situations, or to limit the meaning of "basic international human rights standards" and create "a hierarchy of human rights for the purposes of asylum policy,"[57] such as to tailor them to refugees' needs. The *realist* will object that in neither case will states' cooperation be forthcoming since the temptation of meddling in each other's human rights record will be considerable. The *formal-legalist* will claim that this is an arbitrary procedure without

[51] See L. Anderson 2016, 21.
[52] J.C. Hathaway and M. Foster 2014, 1.
[53] J.C. Hathaway and M. Foster 2014, 5.
[54] J.C. Hathaway and M. Foster 2014, 195.
[55] J.C. Hathaway and M. Foster 2014, 200.
[56] See Convention on the Elimination of Racial Discrimination, adopted Dec. 21, 1965, entered into force Jan. 4, 1969, 660 UNTS 195; with 179 state parties;
Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec. 18, 1979, entered into force Sept. 3, 1981, 1259 UNTS 13; 189 state parties; Convention on the Rights of the Child, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, 1577 UNTS 3; 196 state parties; Convention on the Rights of Persons with Disabilities," entered into force May 3, 2008, 2515 UNTS 3; 177 state parties.
[57] Cf. Niraj Nathwani's critique of this approach in Niraj Nathwani 2000, 365.

much justification in the history and intentions of the Convention.[58] In their defense, Hathaway and Foster will counter that unless the 1951 Convention and its 1967 Protocol are viewed in the broader context of subsequent developments in international human rights law, we will fail in providing an interpretation that ensures that the Convention will be seen "as a living thing, adopted by civilized countries for a humanitarian end which is constant in motive but mutable in form."[59]

Hathaway and Foster are surely right that we must adopt legal doctrine and interpretation to the developing needs of a human community.[60] Yet their approach only further highlights some of the quandaries in the linkage of territorial presence and respect for human rights. While some states are ready to accept the doctrine of non-refoulement in the case of refugees found to be so according to Convention standards, they reject the expansion of human rights' protections to others deemed non-Convention refugees who are said to raise false claims to state protection.[61]

The 1951 Convention does not recognize conditions of extreme poverty and material deprivation as grounds for legitimate asylum. Economic migrants are considered individuals who raise spurious claims to protection and refuge. The binary between "deserving refugees" and "undeserving migrants" is one that governs popular imagination as well as state policy. But how valid is this distinction? Why are extreme poverty and material deprivation not legitimate ground for seeking opportunities to escape from them? Persecution on the basis of race, religion, and nationality as well as political opinion result in unemployment or under-employment, job discrimination, and economic marginalization. Particularly under conditions of global economic interdependence when the policies of developed economies as well as so-called BRIC (Brazil, Russia, India, and China) countries which cause damage to the environment all over the globe have far-reaching consequences, how can such a sharp distinction between economic starvation versus a "well-founded" fear of persecution on the basis of race, religion, nationality, and the like be made? Hathaway and Foster concede that, "Nonetheless, where poverty provides the causal connection to a well-founded fear of being persecuted, it is sensibly understood to be the basis for a recognition of refugee status under the rubric of the social group ground."[62] This conclusion strikes me as being inevitable and logical, but note how the 1951 Convention bleeds inevitably into redressing global economic inequality, since such inequality is considered one of the main reasons for refugees to seek flight and asylum in the first place. On this view, the 1951 Convention morphs into a document which not only

[58] This would certainly be the implication of Samantha Besson's position discussed above in note 35. See S. Besson 2012.

[59] J.C. Hathaway and M. Foster 2014, 11, quoting R v. Immigration Appeal Tribunal, Ex parte Shah [1997] Imm AR 145 (Eng. HV, Oct. 25. 1996), 862 [6].

[60] In J.C. Hathaway 1991, 120–122, Hathaway claims that a human rights-focused conception of persecution recenters the fact that the distinctive feature of refugee status is not simply harm or fear thereof, but rather harm that prompts a coercive separation between the refugee and her home, and thereby a rupture in the State-citizen relationship. Thus understood, refugee law *qua* human rights law becomes a means to enable "persons to disengage from states which have forfeited their claim to international legitimacy by failure to adhere to basic standards of human rights law" See also J.C. Hathaway 1997, where he defends the Refugee Convention's nexus requirement in part as a mechanism to identify "the most deserving as among the deserving" in a world with insufficient capacity to accommodate all those with legitimate claims to fearing serious harm. Thanks to Nishin Nathwani for a clarification of Hathaway's position in S. Benhabib and Nishin Nathwani (2020, forthcoming).

[61] Cathryn Costello writes: "The RC [Refugee Convention] may not be part of IHRL [International Human Rights Law] in one view, in that it only applies when flight to another country triggers its legal protections. However, I include it within the notion of IHRL here as the key instrument that sets out the rights and obligations of states toward a *vulnerable category of foreigners*, namely asylum seekers and refugees." C. Costello 2012, 258 n4.

[62] J.C. Hathaway, M. Foster 2014, 454.

attempts to address major human rights violations but also becomes an instrument to redress *global distributive justice inequalities*.[63]

A perverse consequence of the distinction between "deserving refugees" and "undeserving migrants" is that those who gain Convention refugee status become a kind of aristocracy deeply envied by others. There are reports of Afghani and Iraqi refugees in Greek refugee camps, for example, of stealing Syrian refugees' documents or falsifying their own identity papers to pass as Syrians because, in the vast majority of cases, the latter are recognized as "convention refugees."[64] Already prior to the Syrian refugee crisis, Matthew Gibney had concluded that, "Increasingly, the term 'asylum-seekers' became shorthand in public and media discourse for 'economic refugees,' people taking advantage of the asylum route to escape normal immigration control; immigrants in pursuit of the benefits of welfare state at the expense of citizens; or, especially after 11 September 2001, as potential terrorists or security threats … Economic migration and movements of refugees fleeing conflict had become increasingly entangled."[65] Gibney's reflections lead him to the haunting phrase 'A Thousand little Guantánamos." According to him, "We have reached the *reductio ad absurdum* of the contemporary paradoxical attitude towards refugees. Western states now acknowledge the rights of refugees but simultaneously criminalize the search for asylum."[66]

## 4 "A Thousand Little Guantánamos"

By a "thousand little Guantánamos" Gibney means that in the last two decades, "centres of power" have been created, "where states (and their formal and informal agents) act free from the constraints imposed on their activities by courts, international and domestic law, human rights groups, and the public at large."[67] Such centers emerge through the use of exclusionary

[63] E. Tendayi Achiume challenges the "formulation of state sovereignty, which justifies the assertion of a largely unfettered right to exclude economic migrants," and "identifies Third World Migration to the First World as *an entitlement of neocolonial imperial membership on grounds of political equality*…" (E.T. Achiume 2019, 1509, 1521, my emphasis). While I am in deep agreement with Achiume's critique of liberal nationalist conceptions of sovereignty (see (E.T. Achiume 2019, 1567 and my discussion in section 6), I do not think that the 1951 Convention should be considered solely from the point of view global distributive or reparative justice in the neo-colonial world order. This has the consequence of diluting a major human rights instrument of the post-world war II period through formulations such as what Achiume calls "the heuristic of corrective justice," that are not only very difficult to institutionalize but which can also limit individual choice. She writes: "I propose the following heuristic: "For any given First World Country X, the nature of its decolonial admission and inclusion obligations to Third World migrants form country Y depends on the extent of exploitative benefit or advantage country X derives from neocolonial empire and the extent of subordination or disadvantage that a given migrant endures by virtue of being a national of Country Y." (E.T. Achiume 2019, 1560).

[64] See, K. Calamur 2015; S. Mekhennet, W. Booth 2015; S. George 2015.

[65] M.J. Gibney 2006, 146.

[66] M.J. Gibney 2006, 143.

[67] M.J. Gibney 2006, 152. Although the status of some prisoners in Guantánamo still remains unresolved, the US Supreme Court asserted the jurisdiction of US law over the prisoners held there. According to US law, Guantánamo did not become wholly extra-territorialized but the rhetorical power of Gibney's evocative phrase is clear. See Hamdi v. Rumsfeld, 542 U.S, 507 (2004) (holding that US citizens may be designated as enemy combatants, but due process rights still apply to any U.S. citizens in detention. They also have the right to a hearing on enemy combatant status before a neutral tribunal). In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Court held that Congress had not authorized military tribunals, either through the Uniform Code of Military Justice (UCMJ) or the Authorization for Use of Military Force (AMF). Tribunals, however constituted and on whatever authority, must comply with domestic and international law. In Boumediene v. Bush, 553 U.S. 723 (2008), the US Supreme Court stated that (the prisoners had a right to the writ of habeas corpus under the United States Constitution and that the Military Commission's Act of 2006 was an unconstitutional suspension of that right. The United States by virtue of its complete jurisdiction and control, retains de facto *sovereignty* over this territory.)

visa measures; imposition of carrier sanctions on airlines and shipping companies through the employment of immigration staff at these sites; declaration of airports as international zones in which states would not be obliged to offer those in such places the protections available on state territory, and the like. In one of the most radical measures of this kind, Australia, with "A 2001 law, 'excised' Christmas Islands, Ashmore Reef, the Cocos Island, and other territories from its migration zone, so that the landing of asylum seekers on these territories did not engage most of the country's protection obligations."[68]

A consequence of these *deterritorialization* strategies is the delinking of the bond between territory, jurisdiction, and the public in whose name and with whose authorization law and coercion are presumably exercised. Through "border-induced displacements," an ethical and political distance is created between migrants and refugees upon whose body the law is exercised and the national public who presumably authorizes it. Distance-creating strategies undermine processes of democratic accountability and legitimacy by removing, literally and metaphorically, from the public's eye the measures exercised in their name. Violeta Moreno-Lax and Martin Lemberg-Pedersen who introduce the term "Border-Induced Displacement" define it as follows:

"The externalization of European border control can be defined as the range of processes whereby European actors and Member States complement policies to control immigration across their territorial boundaries with initiatives that realize such control extra-territorially and through other countries and organs rather than their own. The phenomenon has multiple dimensions. The spatial dimension captures the remoteness of the geographical distance that is interposed between the locus of power and the locus of surveillance. But there is also a relational dimension, regarding the multiplicity of actors engaged in the venture through bilateral and multilateral interactions, usually through coercive dynamics of conditional reward, incentive, or penalization."[69]

The extra-territorialization of refugee control through bilateral interactions between states have multiplied along the Mediterranean in particular. The most consequential among these is the agreement concluded between the European Union and the Turkish government in 2015, that committed Turkey to preventing, by force if necessary, refugees from crossing by sea or by land into European Union borders. For every refugee hindered from crossing into the European Union, the EU pledged to take in one refugee from camps officially under the monitoring of the UNHCR in Turkey. This has now stopped, and on 10 September 2018, the UNHCR ended its registration and resettlement activities for applicants coming from countries other than Syria for international protection in Turkey. Since then, Syrian refugees have been caught up in President Erdoğan's diplomatic wars with the European Union. According to a recent report, "On 27 February [2020] Turkey's President Erdoğan announced that he would 'open the Greek-Turkish border' which, under the 2016 EU-Turkey statement, he had been tasked to protect from irregular crossings. The resulting influx of asylum-seekers, migrants and refugees into Greece was met with violence at the borders, with Greek police using tear-gas, water cannons, and stun grenades. The violence at the border has been complemented by a war of words and the usual blame game amongst EU, Turkish and Greek actors."[70]

[68] M.J. Gibney 2006, 150. Called "The Pacific Solution," the goal of this policy was to transport asylum seekers to detention centers in the Pacific Islands, rather than allowing them to land on the Australian mainland. Although suspended in 2007, in 2012, the Nauru Regional processing Centre and Manus Regional Centre for offshore processing were reopened, striking a Regional Resettlement Arrangement between Australia and Papua New Guinea "to divert all 'unauthorised maritime arrivals' to mandatory detention on Manus Island with no possibility of attaining Australian residency." See I. Mann 2016, 143–147. See also J. Phillips 2012.

[69] V. Moreno-Lax, M. Lemberg-Pedersen 2019.

[70] N. Enria, S. Gerwens 2020.

## 5 And the USA?

As has often been noted by scholars of international law, although the USA has been at the forefront of many human rights treaties and conventions in the post-WW II period, its own compliance with these and accession to them can only be characterized as "exceptionalism" morphing into "exemptionalism."[71] Thus, although the USA was a high contracting party to the 1951 Geneva Convention, it only acceded to the 1967 Protocol in 1968 but did not pass legislation implementing the Convention until 1980. After the Vietnam debacle, Congress passed the Refugee Act of 1980,[72] which established procedures for admitting refugees and handling asylum applications.

Nonetheless, the USA avails itself of all the deterritorialization measures listed above to dispense with its obligations under the Refugee Convention and has done so for quite some time. One of the first examples of bilateral agreements such as the one signed between Italy and Libya was the case involving the interception of Haitians on high seas and their forcible return to Haiti. In 1981, President Reagan entered into an agreement with the Haitian government to interdict vessels sailing for the USA, with only short refugee screening interviews by coast guards conducted on the ships. According to Tang Thanh Trai Le, "In 1992, responding to a large increase in Haitian migration flowing from a military coup, President Bush ordered interdiction and return with no screening whatsoever. Although President Clinton had denounced the Bush policy during the presidential campaign, the Clinton Administration continue[d]s to forcibly interdict all Haitian boats headed toward the United States."[73]

Nor is the practice of extra-territorial detention unfamiliar in the USA. Haitian refugees who had tested positive for HIV were detained at Guantanámo Bay, because the statute in force at the time made persons with a "communicable disease of public health significance" excludable. The law was amended in 1993.[74] Through mass prejudgment of refugees without proper interviews and the routine detention of asylum seekers, the USA contravened the spirit, if not the letter, of the Convention.[75]

All this pales in comparison with the transformation of American immigration and refugee law in the wake of the attacks of September 11, 2001. "Not since Prohibition has a single category been prosecuted in such record numbers by the federal government,"[76] writes Ingrid V. Eagly. Judith Resnik notes that, "in the years between 2008 and 2015, immigration prosecutions have represented more than half of the annual federal caseload."[77] In addition to criminal prosecutions, incarceration and deportation have become the preferred punishment for dealing with migration felonies, leading to the emergence of a system of "Crim-Imm," or "crimmigration."[78]

As early as the Fall of 2014, the Obama Administration had begun detaining mothers and children from the Northern Triangle countries, namely, El Salvador, Honduras, and Guatemala. As Soba S. Wadhia recounts these developments, "On February 20, 2015, a federal judge

[71] See M. Ignatieff 2005, 23.
[72] Refugee Act, Pub. L. No. 96-212. 94 Stat. 102 (1980). See also T.T. Trai Le 1994.
[73] T.T. Trai Le 1994, 586. In note 70 of the text, Trai Le adds that US policy was the second instance when a 1951 Convention signatory has repatriated potential refugees without any screening, "The other occasion involved Italy's forcible return of Albanians in 1991" (T.T. Trai Le 1994, 586). See also S. Ghosh 2020.
[74] See 8 US.C.A. & 1182 (1)(A) (I) (West Supp. 1994).
[75] T.T. Trai Le 1994, 588.
[76] I.V. Eagly 2010, 1281.
[77] J. Resnik 2016, 128.
[78] Ibid. See also S.S. Wadhia 2017, 672. ("The prominence of immigration in the national security debate has been controversial and has legitimized a selective enforcement policy drawn along lines of race, religions, nationality and citizenship.")

certified the class of mothers and children and issued a preliminary injunction blocking DHS's policy."[79] Undeterred, in January 2016, DHS began arresting mothers and children in order to detain and deport them; in some cases, they were transferred to family detention centers in Texas and Pennsylvania. The so-called current "emergency" at the southern border of the USA has been brewing for a long time and is more continuous with Democratic administrations' policies than has been acknowledged.

In July 2017, the nonprofit immigrant advocacy group *Al Otro Lado*, represented by the Center for Constitutional Rights, the Southern Poverty Law Center, and the American Immigration Counsel, filed suit in district court for the Southern District of California alleging that DHS immigration policy was violating refugee and asylee rights under statutory, constitutional, and international law.[80] They wrote: "Specifically, the Immigration and Nationality Act ("INA") and its implementing regulations set forth a variety of ways in which such individuals may seek protection in the United States", and they list various articles in the US law such as, "8 U.S.C. § 1157 (admission of refugees processed overseas); 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1231(b)(3) (restriction of removal to a country where individual's life or freedom would be threatened); 8 C.F.R. §§ 208.16-18 (protection under the Convention Against Torture)."[81]

More precisely, any non-citizen "who is physically present in or who arrives in the United States" is given a statutory right to apply for asylum, regardless of such individual's immigration status under the Immigration and Nationality Act.[82] Also CBP (Customs and Border Patrol)[83] must refer for a credible fear interview any non-citizen who presents herself at a point of entry and indicates an intention to apply for asylum for fear of persecution, or place the asylum seeker directly into regular removal proceedings such as to allow that person to seek their asylum claim before an immigration judge.[84]

Through a combination of tactics involving misrepresentation of refugee rights and US law, outright lies, coercion, deceit,[85] and creating waiting lists, enjoining asylum seekers to return to Mexico and get a number there for their interview,[86] the Customs Border Patrol officials and the Department of Homeland Security have violated US and international law and created an emergency at the US-Mexico border. The emergency is caused not only by the increase in the number of refugees arriving per month which has declined to a trickle in the first 3 months of 2020 because of the combined measures of deterrence together with the COVID-19 pandemic.

[79] S.S. Wadhia 2017, 675. The case is R.I.L-R, et al., Plaintiffs, v. Jeh Charles Johnson, et al., Defendants, US District Court, District of Columbia, 80 F.Supp.3d 164 (2015).

[80] Al Otro Lado v. John H. Kelley, et seq., Complaint for Injunctive and Declaratory Relief, Case No. 2:17-cv-511, (2017) at 2 ¶ 6. Many thanks to Laura I. Schaefer, Esq., from the American Bar Association for clarifying some procedural aspects of this case for me.

[81] Al Otro Lado v. John H. Kelley, et seq., (2017) at 33 ¶ 105.

[82] See INA § 208(a)(1) (8 U.S.C. § 1158(a)(1).

[83] See 8 U.S.C. § 1225(b)(1)(A)(ii) and 8 Code of Federal Regulations. § 235.3(b)(4).

[84] *Al Otro Lado v. John H. Kelley,* et seq., (2017) at 34 ¶ 106.

[85] In November 2018, Al Otro Lado filed a Second Amended Complaint against then-Secretary of DHS, Kristin Nielson. *Al Otro Lado v. Nielson, et. seq.*, Second Amended Complaint for Injunctive and Declaratory Relief, Case No. 3:17-cv-02366-BAS-KSC, (2018), here at 1 ¶ 2. "Since 2016 and continuing to this day, CBP has engaged in an unlawful, widespread pattern and practice of denying asylum seekers access to the asylum process at POEs on the U.S.-Mexico border through a variety of illegal tactics. These tactics include lying; using threats, intimidation and coercion; employing verbal abuse and applying physical force; physically obstructing access to the POE building; imposing unreasonable delays before granting access to the asylum process; denying outright access to the asylum process; and denying access to the asylum process in a racially discriminatory manner." Retrieved from https://ccrjustice.org/sites/default/files/attach/2019/05/189%20Second%20Amended%20Complaint%202018.11.13.pdf

[86] Al Otro Lado v. Nielson, et. seq., at 2, ¶ 3.

The real emergency is that this crisis may be manipulated to become a state of exception, in which the constitution is suspended and the "most intense and extreme antagonism" between friend and enemy unfolds—the essence of the political according to Carl Schmitt.[87]

## 6 The Demoi, Sovereignty, and Interdependence

Why did we get here? Why is it that most liberal democracies, such as the USA, Germany, Italy, the UK, France, Australia, and the list can go on, are abdicating their commitments to defend human rights, violating international law, and creating zones of lawlessness by building refugee detention centers; outsourcing the dirty work of preventing refugees from reaching their shores to lawless and failed states such as Libya or to authoritarian regimes such as Turkey; or even excising territories from their own jurisdiction, so as not to be responsible for arriving refugees? In an age of rapid transformations in which the coordinates of our everyday lives are melting into thin air, the refugee and the migrant have become the quintessential others and strangers. All the while, migratory movements are accelerating as a result of civil wars, cycles of poverty and corruption, domestic gang violence, climate change, and desertification.[88] In the age of *liquid modernity*, to use a felicitous expression by Zygmunt Bauman,[89] blaming the stranger is a way of reducing complexity and avoiding responsibility. The perception of strangers as dangers is easy, seductive, and psychologically deep-seated when human beings themselves are threatened and feel insecure. The sense of being abandoned by their own state, while being "dumped upon" to care for the poor migrant and the displaced asylum seeker in their own neighborhoods and schools, exacerbates fears among the native population that they too could easily find themselves in the predicament of the unwanted and vulnerable stranger.

Do liberal democracies have the moral, political, and intellectual resources to deal with these dynamics? Or, must they succumb to the politics of fear and *ressentiment*? The political philosopher, Judith Shklar, once noted that the principal task of liberal societies was not only to render justice but also to forbid *cruelty*.[90] Cruelty inflicts not only physical harm and torture but subjects its victims to humiliation and indignity. Cruelty is spreading in liberal democracies at the cost of those who are most vulnerable, whether *within* or *without* our borders. How can the politics of cruelty be avoided? How can liberal democracies respect their commitments to human rights, dignity, and solidarity while respecting the moral as well as international human rights of migrants and refugees?[91]

[87] C. Schmitt [1922] 1985, 6 ("The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.") See also C. Schmitt [1932] 1996, 29. Bernard Harcourt argues that an even more momentous historical and political transformation has taken place in recent years from a "state of exception" to the utilization of "counter-insurgency" techniques against the US population, in: B. Harcourt 2018, 6–7.

[88] It is not the *absolute* number of migrants or their proportion of the world's population that merits attention (they still only constitute about 3.4% of the world's population of 7 billion) but the fact that the number of migrants has grown *faster* than the world's population in this period. From 2000 to 2017, the world's population increased from 6 billion to 7 billion, whereas the rate of increase of international migration for the same time period of 17 years is 50% from 175 million to 257. See "Global Migration Trends Factsheet" 2015.

[89] Z. Bauman 2000.

[90] J. Shklar 1996, 23.

[91] Linda Bosniak introduces the term "status non-citizens" to characterize the condition of those who not only are not *de jure* non-citizens but who live in various conditions of vulnerability, both *de jure* or de facto, in their host societies, in: L. Bosniak 2017.

From the standpoint of ideal political theory, the justification of the *boundaries* of the demos—that is to say, defining who counts as a member while excluding others, as strangers, aliens, the undocumented, etc.—is one of the most vexing problems in liberal-democratic theory. According to the classical formulation by Frederick Whelan, "The boundary problem is one matter of collective decision that cannot be decided democratically… We would need to make a prior decision regarding who are entitled to participate in arriving at a solution …[Democracy] cannot be brought to bear on the logically prior matter of the constitution of the group itself, the existence of which it presupposes."[92] Robert Dahl had observed half a century ago that the problem of how the democratic people can be legitimately constituted had been neglected by democratic theorists.[93]

How far does the privilege of a democratic people to define itself by constituting its rules of membership extend? Can democratic peoples simply block the entry of refugees and refuse to accept migrants? By focusing on recent developments in the application and interpretation of the 1951 Refugee Convention and states' refugee admission practices, this article has attempted to throw light on some of the empirical trends that ideal theory must heed in order to articulate a more adequate defense of the boundaries of the demos. I will distinguish among three normative positions in contemporary political philosophy that try to deal with this question: *liberal nationalism*, *liberal internationalism*, and *cosmopolitan interdependence*.[94]

*Liberal nationalists* claim that without well-protected borders, there can be no democratic self-governance. There must be a centralized agent of some kind that takes responsibility for protecting a country's natural and material assets, and that ensures continuity of its public culture and democratic values. Immigration and transnational movements across borders are permitted, but the regulation of their quantity and quality remain sovereign privileges. Countries may admit more or less numbers of refugees and respect the claims of asylum seekers; they have the right to regulate access to their labor markets and to turn away certain

[92] F.G. Whelan 1983, 22.

[93] R. Dahl 1979, 59–63; R. Dahl 1989, 119–131.

[94] There is an additional type of refugee regime which we may call "authoritarian hospitality." Turkey is a principal example of such a regime since Turkey is a signatory to the 1951 Geneva Conventions, but it recognizes as a convention refugee only those who have become refugees because of actions originating in Europe; in other words, refugees coming from *non-European* countries are not under the protection of the Geneva Conventions but fall under Turkey's own laws and legislation covering their status via a Directive named the "Temporary Protection Directive" (Gecici Koruma Yönetmeligi, adopted in 2013). This law granted temporary protection for non-European asylum seekers who had been forced to leave and could not return to their country, while their claim for refugee status was being evaluated by the UNHCR. No clear limit was set on the duration of the temporary protection status. See "Turkey: Law of Foreigners and International Protection" 2013. With the influx of Syrian refugees, on 22 October 2014, Turkey promulgated a *Temporary Protection Regulation* particularly for those coming from the Syrian Arab Republic, setting out specific provisions for registration and documentation procedures. It provided refugees with the right to stay in the country until safe returns were established in Syria, regulated the issuance of Temporary Protection documentation and granted access to social benefits and services such as health, education, and (limited) entry in to the labor market. See "Turkey: Temporary Protection Regulation" 2014. Since the suspension of UNHCR's registration and resettlement activities, the Turkish Directorate General of Migration Management (DGMM) is responsible for the refugee status determination. See "Turkey: UNHCR ends registration of non-Syrian asylum seekers" 2018. Many thanks to Sibel Karadag, a Fulbright scholar at Yale during 2018–2019, for clarifying these policies for me. The type of refugee politics practiced by the Erdogan government is clearly a hybrid which relies on the ideology of extreme nationalism, while paying lip service to legal internationalism insofar as Turkey is a signatory to the 1951 Convention, and also practicing a form of Islamic cosmopolitanism. The most frequent justification for the admission of Syrian refugees into the country was that they were Muslims in need, also connected to Turkey through historical and familial ties formed during the Ottoman Empire. Thank to Jamal Greene for raising questions about refugee protection in non-liberal regimes.

strangers. Furthermore, the rights of strangers who are admitted to such societies are regulated through the sovereign determination of legislatures. Although liberal nationalists consider it desirable that their legislatures should act in accordance with international law, what counts in the first place, is "our" law, "our" precedents, and "our" values. The liberal nationalist position has a formidable array of adherents, among others: Rawls, Walzer, Nagel, and Miller.[95]

The weakness of the liberal nationalist position is that it neglects international law constraints on the sovereignty of the demos by constructing state sovereignty as if it were solely defined by the self-assertion of the demos. Under conditions of economic, technological, and epidemiological pressure, the two halves of liberal nationalism often come apart and liberalism is readily sacrificed to nationalism. We see this very clearly in the rise of contemporary populist movements throughout liberal democracies who consider migrant and refugee rights to be secondary, and in many cases, damaging to national interests and self-assertion.

*Liberal Internationalists* argue that it is wrong to think of sovereignty as a unilateral prerogative to be wielded against others.[96] Rather, states exist within regimes of sovereignty that change over time. The Westphalian model of the absolute jurisdiction of a central authority over all that is living and dead in its territory is a myth of the past (if it was ever a historical reality is doubtful). Liberal international sovereignty is exercised within a system of international law and is regulated by institutions like the United Nations Charter, the UDHR, and the regimes of human rights that have been created in the aftermath of World War II.[97] States must respect their obligations under international law. In the protection of their borders, they must balance self-interest with international obligations. Such balancing is understood to be beneficial economically as well, because international prosperity requires respecting the rules of the game, be it of trade or diplomacy. While respecting their obligations under international law, states have the prerogative to define their labor market policies as they choose. Migration models that privilege meritocracy or those that give first priority to family affiliations are both acceptable. The rights of the strangers among us ought to be determined in accordance with national and regional as well as international norms.

The principal weakness of this regime, even in view of the emergent New Liberal Consensus around refugee rights, is sharply articulated by T. Alexander Aleinikoff: "In accepting a State-based refugee regime, the New Liberal Consensus approaches the international refugee regime not as a system but as a series of bilateral and multilateral bargains."[98] As the bilateral agreements between Italy and Libya, the multilateral agreement between Turkey and the EU, and the bilateral agreements between the USA and Mexico as well as Guatemala show, such deals are quite compatible with states shirking their responsibilities under the 1951 Convention. These arrangements encourage what I have called the

[95] See J. Rawls 1999, 38–39; M. Walzer 1983, 51; T. Nagel 2005, 113–147. For a trenchant critique of Nagel, see J. Cohen and C.F. Sabel 2006. Among liberal nationalists, David Miller seriously grapples with obligations to refugees and migrants generated by international law as well as ethical concerns. He weighs the interests of "people who are liable to be severely harmed as a result of the persecution they are undergoing," against "those of bounded political communities that are able to sustain democracy and achieve a modicum of social justice but need closure to do this," ultimately prioritizing the latter. See D. Miller, 2016.

[96] See Henkin discussed above in Section 2. See also M. Doyle 2018; H. Koh 1997; A. Slaughter 2004, 93.

[97] For an incisive account of some of the tensions of the liberal-international position, see J.L. Cohen 2012, 159–165.

[98] T.A. Aleinikoff 2018, 298. The 'New Liberal Consensus,' for Aleinikoff, involves expanding the refugee definition; encouraging the housing of refugees primarily in neighboring states; aiding refugee self-reliance and employment programs; burden sharing with countries of first asylum and condemning non-entrée and xenophobia.

*deterritorialization* of responsibilities by outsourcing them, by encouraging non-entrée of refugees and even by excising territory. Short of a more radical restructuring of conceptions of state sovereignty, a more robust commitment to global responsibility sharing is impossible.

*Cosmopolitan Interdependence* The cosmopolitan position pushes liberal internationalists beyond the perspective of the state, which, whether liberal or not, privileges an "ontology of containment" that denies the radical fluidity, historical variability and interdependence of peoples, histories, cultures, and territories on both sides of the border. Cosmopolitanism proceeds from the premise that human mobility is an anthropologically deep-seated drive of the human species, and that the regulation of human motility through national borders is quite recent in human history.[99]

This is not a plea for a world without borders, because democracies require jurisdictional boundaries. In that sense, the liberal nationalists are right: We must know in *whose name* the law is being enacted and how we can request accountability from those who enact it. But these jurisdictional boundaries need not be co-terminous with militarily armed and violently guarded border regimes.[100]

If we move our gaze below as well as above the level of the state, we see that municipalities, regions, and borderlands shape and define the interdependency of citizens and strangers. Cosmopolitans insist that migratory movements, be it for searching for work or seeking asylum, occur because of "push" and "pull" factors. What are such factors and what is our share of responsibility in enabling them, if any? The cosmopolitan perspective enjoins us to investigate and analyze, much prior to the migrant and refugee arriving at the door, how, if at all, our national and regional policies may have contributed to such movements. Both the liberal nationalist and the internationalist treat migratory movements across international borders primarily as matters to be regulated, governed, and controlled. Thus, the European Union will continue to intercept migrants at sea but unless and until economic dislocations caused by aspects of EU agricultural policy that protect French farmers at the expense of African ones are understood; unless and until state collapse in Libya is handled; unless and until the endemic corruption of some of these regimes that sell their natural resources to international corporations while letting their people starve comes to an end, people from Africa will flock to refugee boats to cross the Mediterranean.

When we consider the recent surge of migrants and refugees to the USA, we have to ask how US policy, pursued by successive Administrations, of cooperating with enforcement agencies in Honduras, Guatemala, and El Salvador has resulted in the creation of narco-states, in which the police and parts of the military are enablers of the extortionist gang violence in these countries rather than defenders of their citizens.[101] And if US aid is cut down to these countries in the midst of climate change that is killing their precious coffee crop, what responsibilities do we bear toward those who knock on our doors? Do our public narratives

[99] "The Model International Mobility Convention," initiated by Michael Doyle and his colleagues, advocates a "holistic approach to human mobility" and attempts "to address growing gaps in protection and responsibility that are leaving people vulnerable," in: M. Doyle 2018, 220, 221. The Convention proceeds from a cosmopolitan premise but remains state-centric despite the wish to have the MIMC apply *erga omnes*.

[100] See Matthew Longo for a detailed analysis of border cooperation regimes which have increased the powers of shared surveillance and detention on the part of border security guards at the expense of human beings, whether nationals or refugees or asylum seekers who want to cross borders. See M. Longo 2018.

[101] See R. Saviano 2019, 14. ("In reality, Honduras and Central America have paid an enormous price precisely because of US policies. The dire situation in Honduras right now is shaped by the drug market, and the world's largest consumer of cocaine is the United States.")

criminalize the other, the stranger or do we seek for the roots of the ethical responsibilities we bear toward each other resulting from the economic and political systems we are situated in?

Two recent global compacts initiated by the UN reflect precisely the tension between liberal nationalism, liberal internationalism, and cosmopolitanism. "The Global Compact on Refugees" (December 17, 2018) emphasizes the need for a more equitable and responsibility-sharing system, "recognizing that a sustainable solution to refugee situations cannot be achieved without international cooperation" (https://www.unhcr.org/en-us/the-global-compact-on-refugees.html. Accessed June 8, 2020). The Global Compact on Refugees is not legally binding; it will perform its operation through voluntary contributions to be determined by each state and relevant stake holder. In the attempt to balance respect for the sovereign equality of states with a more robust and equitable system of international cooperation, the Compact acknowledges the "generous" contributions of those states that are not signatories to the 1951 Convention to refugee protections and prevention, and encourages them to consider acceding to those instruments and recommends to States parties with reservations to the Convention to give consideration to withdrawing them. (https://www.unhcr.org/gcr/GCR_English.pdf, A/73/12 (art II), article 6). In other words, despite cosmopolitan intentions, the Compact not only recognizes the principle of equal state sovereignty of non-compliance with the Convention but also leaves open many loopholes that excuse non-cooperative and non-complying state behavior.

"The Global Compact for Safe, Orderly and Regular Migration" (19 September 2016) is likewise a non-binding document "that respects states' right to determine who enters and stays in their territory" (https://www.iom.int/global-compact-migration). Its goal is to enhance international governance of migrants' mobility by addressing all aspects of international migration such as humanitarian, human rights, and economic development issues while acknowledging that the refugee condition is governed by a different set of norms.[102]

Without a doubt, any international agreement that would depend on state cooperation and compliance has to accept the dual foundations of the legitimacy of the international state system: international human rights law and sovereign state equality. Within these limitations, the virtue of both Global Compacts is to bring into international visibility the transnational movement of peoples across borders without resolving, however, any of the contradictions of the dual legitimation system.

As E. Tendayi Achiume observes, "Achieving an ideal form of global migration governance would, in other words, require remedying the fatally flawed conception of state sovereignty at the heart of international law and which nation States are strongly incentivized to protect."[103] At the level of ideal theory, the task is to embed democratic self-determination in a new international law of interdependent sovereignties.

## 7 Conclusion

In our times, when the tide of history seems to be flowing in quite the opposite direction from interdependent sovereignty toward reimaginings of national autarchy and megalomaniacal visions of self-sufficiency, to reconcile democratic self-determination with a new law of

[102] On the distinction between refugees and migrants, see "The Global Compact for Safe, Orderly, and Regular Migration" 2018, article 4.
[103] E.T Achiume 2018, 262.

interdependent sovereignties may seem like a quixotic task. But just as the COVID-19 crisis has revealed the dysfunctionality of *interdependence without solidarity*, the 1951 Refugee Convention was the product of a moment in history when the murderous dysfunctionality of the system of border controls within the European context in particular was revealed, and a small group of nations recognized their interdependence and agreed to extend fundamental human rights protection to those whom their own state had rendered most vulnerable. At a time when some of the dysfunctionalities resulting from the universalization of the post-WW II refugee regime have become quite visible, more radical thinking is required for a new conceptualization of sovereign jurisdiction and renewed respect for human lives and rights. This is a plea for strengthening the 1951 Convention by embedding it in a more rigorous system of global burden sharing than both Global Conventions call for and whose premises embody the dualism that renders them vulnerable to state manipulation, non-compliance and pressure, and particularly to the arbitrary good will of big donors.

My central argument is that the current refugee protection regime is not only inadequate for the life and well-being of the nearly 70 million displaced persons in our times, but that it also jeopardizes the demos by encouraging state practices that undermine international law. Such practices create deterritorialized zones of lawlessness at border crossing, airports, and maritime ports and encourage the excision of territories as well as the building of outsourced camps on the territories of failed states. By accepting these practices in its own name, the demos undermines its own commitments to democracy. In that sense, ideal democratic theory cannot ignore the laws and practices governing the boundaries of the demos.

In conclusion, let me emphasize that the kind of cosmopolitan perspective I am advocating is not a unitary but a pluralist one: it accepts the value as well as necessity of multiple jurisdictions of democratic self-determination. It also supports liberal internationalists in pushing the current state regime toward increased cooperation under systems of shared governance subtended by international law; but "seeing like a state" is not the sole perspective when thinking about the refugee problem. In the final analysis, refugees are displaced because of the violence and injustice committed against them by their own states, and because the political authority governing the territories in which they reside has failed to assure their membership and human rights. In that sense, one cannot deny that as long as refugees exist, their existence is an indictment of our current regime of state sovereignty as well.

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## References

### Articles, Chapters, and Books


Abizadeh A (2008) Democratic theory and border coercion: no right to unilaterally control your own borders. Political Theory 36:37–65

Abizadeh A (2012) On the demos and its kin: nationalism, democracy, and the boundary problem. Am Polit Sci Rev 106:867–882

Achiume ET (2018) The fatal flaw in international law for migration. C J Transl Law 56:257–262

Achiume ET (2019) Migration as decolonization. Stanf Law Rev 71:1509–1574

Agamben G (1998) Homo Sacer: sovereign power and bare life. Stanford University Press, Stanford

Aleinikoff TA (2018) Taking mobility seriously in the model international mobility convention. Ca J Transl Law 56:296–302

Alston P (2017) The populist challenge to human rights. J Hum Rights Pract 9:1–15

American Courts and the U.N (2017-2018) High commissioner for refugees: a need for harmony in the face of a refugee crisis. Harv Law Rev 131:1399

Anderson L (2016) 'Creative destruction': states, identities and legitimacy in the Arab world. In: Benhabib S, Kaul V (eds) Toward new democratic imaginaries: Istanbul dialogues on Islam, culture and politics. Springer, Geneva

Anghie A (2005) Imperialism, sovereignty and the making of international law. Cambridge University Press, Cambridge

Arendt H (1949) Es gibt nur ein einziges Menschenrecht. Die Wandlung 754–770

Arendt H (1967) The origins of totalitarianism. Harcourt, Brace and Jovanovich

Arendt H [1961] (1993) Between past and future: eight exercises in political thought. Penguin Books, New York

Bauman Z (2000) Liquid modernity. Polity Press, Cambridge

Benhabib S (2011) Dignity in adversity: human rights in troubled times. Polity

Benhabib S (2013) Moving beyond false binarisms: on Samuel Moyn's the last utopia. Qui Parle 22:81–93

Benhabib S (2016) The new sovereigntism and transnational law. Legal Utopianism, Democratic scepticism and statist realism. *Global Constitutionalism,* 5:109–144

Benhabib S (2018) Exile, statelessness, and migration: playing chess with history from Hannah Arendt to Isaiah Berlin. Princeton University Press

Benhabib S, Nathwani Nishin (forthcoming) The ethics of international refugee protection. In: The Oxford handbook of international refugee law. Oxford University Press, Oxford

Besson S (2012) The extraterritoriality of the European convention on human rights: why human rights depend on jurisdiction and what jurisdiction amounts to Leiden. J Int Law 25:857–884

Bosniak L (2017) Status non-citizens. In: Shachar A, Bauboeck R, Bloemraad I, Vink M (eds) The Oxford handbook of citizenship. Oxford University Press, Oxford, pp 314–336

Butler J (2004) Precarious life: the powers of mourning and violence. Verso, London and New York

Calamur K (2015) The flourishing black market in Syrian passports. In: The Atlantic

Chimni BS (Forthcoming) The evolution of international refugee law: a postcolonial perspective. In: The Oxford Handbook of International Refugee Law. Oxford University Press, Oxford

Cohen J, Sabel C (2006) Extra Rempublicam Nulla Justitia? Philos Public Aff 34:147–175

Cohen JL (2012) Globalization and sovereignty: rethinking legality, legitimacy, and constitutionalism. Cambridge University Press, Cambridge

Costello C (2012) Human rights and the elusive universal subject: immigration detention under international human rights and EU law. Indiana J Glob Leg Stud 19:257–303

Dahl R (1979) After the revolution? Authority in a Good Society. Yale University Press, New Haven

Dahl R (1989) Democracy and its critics. Yale University Press, New Haven

Davies SE (2007) The Eurocentric 1951 convention. In: Legitimising rejection: international refugee law in Southeast Asia. Brill, Leiden, pp 23–55

DeParle J (2017) The sea swallows people. In: The New York Review of Books, vol 64, pp 31–36

Doyle M (2018) The model international mobility convention. C J Transl Law 56:219–238

Eagly IV (2010) Prosecuting immigration. Northwest Univ Law Rev 104:1281

Enria N, Gerwens S (2020) Greek-Turkish border crisis: refugees are paying the price for the EU's failure to reform its asylum system. In: EUROPP: The London School of Economics and Political Science

Foucault M (1988) [1965] Madness and civilization: a history of insanity in the age of reason. Vintage, New York

George S (2015) The men who pretend to be Syrian refugees. Foreign Policy

German Law Journal (2020) special issue. Border justice: migration and accountability for human rights violations, 21:3
Gibney M (2006) A thousand little Guantanamos: Western states and measures to prevent the arrival of refugees. In: Tunstall K (ed) Migration, displacement, asylum: the Oxford amnesty lectures 2004. Oxford University Press, Oxford, pp 139–160
Gordon JA (2019) Statelessness and contemporary enslavement. Routledge, New York
Gündoğdu A (2015) Rightlessness in an age of rights: Hannah Arendt and the contemporary struggles of migrants. Oxford University Press, Oxford
Harcourt BE (2018) The counterrevolution: how our government went to war against its own citizens. Basic Books, New York
Hathaway JC (1991) Reconceiving refugee law as human rights protection. J Refug Stud 4:113–131
Hathaway JC (1997) Is refugee status really elitist? An answer to the ethical challenge. In: Carlier JY, Vanheule D (eds) Europe and refugees: a challenge? (L'Europe et les réfugiés: un défi?). Kluwer Law International, The Hague, pp 79–88
Hathaway JC, Foster M (2014) The law of refugee status, 2nd edn. Cambridge University Press, Cambridge
Hathaway OA (2002) Do human rights treaties make a difference? Yale Law J 111:1935–2042
Hathaway OA (2007) Why do countries commit to human rights treaties? J Confl Resolut 51:588–621
Heller C, Pezzani L, Mann I, et al (2018) 'It's an act of murder': how Europe outsources suffering as migrants drown. The New York Times
Henkin L (1999) That S word: sovereignty, and globalization, and human rights, et cetera. Fordham Law Rev 68: 1
Heyns C, Viljoen F (2002) The impact of the United Nations human rights treaties on the domestic level. Kluwer Law International, The Hague
Hirsch AL, Bell N (2017) The right to have rights as a right to enter: addressing a lacuna in the international refugee protection regime. Hum Rights Rev 18:417–437
Hobbes T (1968) [1651] Leviathan. In: Penguin Books
Hopgood S (2013) The endtimes of human rights. Cornell University Press, Ithaca
Ignatieff M (2005) Introduction: American exceptionalism and human rights. In: Ignatieff M (ed) American exceptionalism and human rights. Princeton University Press, Princeton
Inlender T (2009) Status quo or sixth ground? Adjudicating gender asylum claims. In: Benhabib S, Resnik J (eds) Migration and mobilities: citizenship, borders and gender. New York University Press, New York and London, pp 356–380
Kanno-Youngs Z, Shear MD, Habeman M (2020) Trump prepares to tighten border with Mexico. In: The New York Times, vol 9
Kelsen H (1960) Sovereignty and international law. Georget Law J 48:627–640
Kesby A (2012) The right to have rights: citizenship, humanity, and international law. Oxford University Press, Oxford
Koh HH (1997) Why do nations obey international law? (review essay). Yale Law J 106:2599–2659
Longo M (2018) The politics of borders: sovereignty, security, and the citizen after 9/11. Cambridge University Press, Cambridge
Mann I (2016) Humanity at sea: maritime migration and the foundations of international law. Cambridge University Press
Mann I (2018) Maritime legal black holes: migration and rightlessness in international law. Eur J Int Law 29: 347–372
Mekhennet S, Booth W (2015) Migrants are disguising themselves as Syrians to enter Europe. Washington Post
Miller D (2016) Strangers in our midst: the political philosophy of immigration. Harvard University Press
Mittelstadt M, Speaker B, Meissner D, Chishti M (2011) Through the prism of national security: major immigration policy and program changes in the decade since 9/11. Migration Policy Institute
Moreno-Lax V, Lemberg-Pedersen M (2019) Border-induced displacement: the ethical and legal implications of distance-creation through externalization. Questions of International Law
Moyn S (2010) The last utopia: human rights in history. Harvard University Press
Moyn S (2018) Not enough: human rights in an unequal world. Harvard University Press, Cambridge
Nagel T (2005) The problem of global justice. Philos Public Aff 33:113–147
Nathwani Niraj (2000) The purpose of asylum. Int J Refug Law 12:354–379
Nyabola N (2019) The end of asylum. Foreign Affairs
Phillips J (2012) The 'Pacific solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island. Social Policy Section, Department of Parliamentary Services, Parliament of Australia
Posner EA (2014a) The twilight of human rights law: inalienable rights series. Oxford University Press, Oxford
Posner EA (2014b) The case against human rights. The Guardian
Rancière J (2004) Who is the subject of the rights of man? S Atl Q 103:297–310

Rawls J (1999) The law of peoples. Harvard University Press, Cambridge
Resnik J (2016) "Within its jurisdiction": moving boundaries, people, and the law of migration. Proc Am Philos Soc 160:117–159
Risse T, Ropp SC, Sikkink K (eds) (2013) The persistent power of human rights: from commitment to compliance. Cambridge University Press, Cambridge
Sanchez T, King J, Hernández L, Cabanatuan M (2020) Stricken cruise ship to dock in Oakland; governor, mayor defend decision; others wary. San Francisco Chronicle
Sassen S (2015) Losing control?: sovereignty in the age of globalization. Columbia University Press, New York
Saviano R (2019) The migrant caravan: made in USA. In: The New York Review of Books, vol 63
Schmitt C (1985) Political theology: four chapters on the concept of sovereignty. MIT Press, Cambridge
Schmitt C (1996) The concept of political. MIT Press, Cambridge
Scott JC (1998) Seeing like a state: how certain schemes to improve the human condition have failed. Yale University Press, New Haven
Shklar J (1996) The liberalism of fear. In: Rosenblum N (ed) Liberalism and the moral life. Harvard University Press, Cambridge
Sikkink K (2011) The justice cascade: how human rights prosecutions are changing world politics. W.W. Norton & Co, New York
Sikkink K (2017) Evidence for hope: making human rights work in the 21st century. Princeton University Press, Princeton
Simmons BA (2009) Mobilizing for human rights: international law in domestic politics. Cambridge University Press, Cambridge
Slaughter A-M (2004) A new world order. Princeton University Press, Princeton
Trai Le TT (1994) The legal status of the refugee in the United States. Am J Comp Law Supp 42:576–615
"Trump prepares to tighten border with Mexico," (2020) New York times, March 18, 2020, A9
Wadhia SS (2017) Is immigration law national security law? Emory Law J 66:669
Walzer M (1983) Spheres of justice: a defense of pluralism and equality. Basic Books, New York
Weis P (1954) The international protection of refugees. Am J Int Law 48:193–221
Weiss P (1971) Human rights and refugees. Israel Yearbook on Human Rights 35–50
Whelan FG (1983) Prologue: democratic theory and the boundary problem. Nomos 25:13–47
Wong D (2013) Sovereignty sunk? The position of "sinking states" at international law. Melbourne J Int Law 14: 346–391

## Legal Cases

*Al Otro Lado v John H Kelley, et seq, Complaint for Injunctive and Declaratory Relief* (2017) US District Court for the Central District of California 3:17-cv-02366-BAS-KSC [2:17-cv-05111] <https://ccrjustice.org/sites/default/files/attach/2017/07/AOL%20Complaint%207.12.2017.pdf>
*Al Otro Lado v Nielson, et seq, Second Amended Complaint for Injunctive and Declaratory Relief* (2018) US District Court for the Southern District of California 17-cv-02366-BAS-KSC <https://ccrjustice.org/sites/default/files/attach/2019/05/189%20Second%20Amended%20Complaint%202018.11.13.pdf>
*Boumediene v Bush* (2008) 553 U.S. 723 <https://supreme.justia.com/cases/federal/us/553/723/>
*Department of Homeland Security, et al v New York, et al* [2020] Supreme Court of the United States 19A785 <https://www.law.cornell.edu/supremecourt/text/19A785>
*Hamdan v Rumsfeld* (2006) 548 U.S. 557 <https://supreme.justia.com/cases/federal/us/548/557/>
*Hamdi v Rumsfeld* (2004) 542 U.S. 507 <https://supreme.justia.com/cases/federal/us/542/507/>
*R v Immigration Appeal Tribunal, Ex parte Shah* (1997) United Kingdom: Court of Appeal (England and Wales) Imm AR 145 (Eng. HV, Oct. 25. 1996) <https://www.refworld.org/cases,GBR_CA_CIV,3ae6b67f0.html>
*RIL-R, et al, Plaintiffs, v Jeh Charles Johnson, et al, Defendants* (2015) United States District Court, District of Columbia 80 F.Supp.3d 164 <https://www.leagle.com/decision/infdco20150220f84>

## Conventions, Charters, Declarations, Statutes

Cartagena declaration on refugees (1984) <https://www.refworld.org/docid/3ae6b36ec.html>
Convention governing the specific aspects of refugee problems in Africa (1969) <https://www.refworld.org/docid/3ae6b36018.html>
Convention on the elimination of all forms of discrimination against women (1979) (1259 UNTS 13) <https://www.refworld.org/docid/3ae6b3970.html>

Convention on the elimination of all forms of racial discrimination (1965) (660 UNTS 195) <https://www.refworld.org/docid/3ae6b3940.html>
Convention on the law of the sea (1982) (1833 UNTS 397) (UNCLOS)<https://www.refworld.org/docid/3dd8fd1b4.html>
Convention on the reduction of statelessness (1961) (989 UNTS 175) <https://www.refworld.org/docid/3ae6b39620.html>
Convention on the rights of persons with disabilities (2008) (2515 UNTS 3) <https://www.refworld.org/docid/45f973632.html>
Convention on the rights of the child (1989) (1577 UNTS 3) <https://www.refworld.org/docid/3ae6b38f0.html>
Convention relating to the status of refugees (1951) (189 UNTS 137) <https://www.refworld.org/docid/4ec4a7f02.html>
Convention relating to the status of stateless persons (1954) (360 UNTS 117) <https://www.refworld.org/docid/415c3cfb4.html>
Global compact for safe, orderly and regular migration (2018) [A/RES/73/195] <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195>
Global compact on refugees (2018) [A/73/12 Part II] <https://www.unhcr.org/gcr/GCR_English.pdf>
Immigration and Nationality Act of (1990) (Pub L No 101–649 104 Stat. 4978) <https://www.uscis.gov/legal-resources/immigration-and-nationality-act>
International covenant on civil and political rights (1966) <https://www.refworld.org/docid/3ae6b3aa0.html>
Protocol relating to the status of refugees 1967 <https://www.refworld.org/docid/4ec4a7f02.html>
Refugee Act (1980) (Pub L No 96–212 94 Stat 102) <https://uscode.house.gov/statutes/pl/96/212.pdf>
Turkey: law of foreigners and international protection (2013) (6458) <https://www.refworld.org/docid/5167fbb20.html>
Turkey: temporary protection regulation (2014) <https://www.refworld.org/docid/56572fd74.html>
United Nations Charter <http://www.un.org/en/sections/un-charter/>
Universal declaration of human rights adopted by UNGA Resolution 217 A (III) on in 1948. https://www.jus.uio.no/lm/en/pdf/un.universal.declaration.of.human.rights.1948.portrait.letter.pdf

## Reports

‘Figures at a glance: statistical yearbooks’ (UNHCR) <https://www.unhcr.org/figures-at-a-glance.html> accessed 17 April 2020
Ghosh S (2020) Locking up & Locking Out. On file with author.
‘Global migration trends factsheet’ (IOM, Global Migration Data Analysis Centre 2015) <https://gmdac.iom.int/global-migration-trends-factsheet> accessed 14 April 2019
‘Global trends: forced displacement in 2017’ (UNHCR 2018) <https://www.unhcr.org/en-us/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html> accessed 17 March 2019
‘Global trends: forced displacement in 2018’ (UNHCR 2019) <https://www.unhcr.org/globaltrends2018/> accessed 17 April 2019
‘International Migration Report 2017: highlights’ (United Nations, Department of Economic and Social Affairs, Population Division 2017) ST/ESA/SER.A/404 <http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf> accessed 18 April 2019
'Poorer countries host most of the forcibly displaced' (2017) UNHCR <https://www.unhcr.org/news/latest/2017/2/58b001ab4/poorer-countries-host-forcibly-displaced-report-shows.html> accessed 17 April 2020
‘Schengen area’ (*European Commission, Migration and Home Affairs*, 6 December 2016) <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en> accessed 30 March 2020
‘Turkey: UNHCR ends registration of non-Syrian asylum seekers | asylum information database’ *Asylum Information Database, European Council on Refugees and Exiles* (9 2018) <https://www.asylumineurope.org/news/08-09-2018/turkey-unhcr-ends-registration-non-syrian-asylum-seekers>