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1. Introduction

THE normative foundations of refugee admission and protection are contested. On the one hand, the human rights origins and orientation of the international refugee protection regime ushered in by the Refugee Convention and its 1967 Protocol are firmly established. Most recently, the Global Compact on Refugees reaffirms that international refugee protection 'emanates from fundamental principles of humanity and international solidarity', as guided *inter alia* by 'relevant international human rights instruments'.[1] In this sense, refugee law and the protections it affords are instances of the operationalization of international human rights law, insofar as we understand the varieties of persecution suffered by refugees to be a subset of serious human rights violations and the remedies offered by refugee law as a form of international human rights protection.[2]

On the other hand, the Global Compact equally maintains that international refugee protection operates within a framework rooted in 'the principle of sovereign equality of States'[3] that recognizes the 'primary responsibility and sovereignty of States'.[4] The document reasserts 'the primacy of national ownership and leadership'[5] of refugee protection programmes and the importance of proceeding in 'consultation with national authorities and in respect of relevant [national and local] legal frameworks'.[6] If, as Hathaway argues, 'international human rights law is fundamentally a means of delimiting (p. 115) state sovereignty',[7] then this dual emphasis on international human rights and the

priority of State sovereignty reflects a conceptual and practical tension. This tension frames the various ethics of refugee protection explored in this chapter.

The Global Compact carefully but irresolutely negotiates between the cosmopolitan lexicon of ‘responsibility-sharing’, ‘burden-sharing’, ‘human rights’, and ‘dignity’,[8] and the more sovereigntist language of ‘generosity’, ‘national security’, ‘limited resources’, and ‘national legislation, policies, and priorities’.[9] Several disjunctive logics are thus at play in the text of the Global Compact: cosmopolitanism versus State sovereignty, charity versus legal obligation, national security versus humanitarian necessity, international versus national law.

In this chapter, we outline two diverging strands in the literature on the ethics of refugee protection: first, what we call the ‘statist ethics of refugee protection’, of which the positions of liberal nationalists and liberal internationalists are paradigmatic; and second, what we call the ‘cosmopolitan ethics of refugee protection’, which we subdivide into three dominant positions: the agency-centric view, the power-centric view, and the postcolonial view. Our aim is to outline each of these positions, and then to sketch briefly the contours of a sixth position based on Benhabib’s concept of jurisgenerativity.[10]

2. Statist Ethics of Refugee Protection

The English term ‘refugee’ in its current usage originated to describe the roughly 400,000 French Huguenot *réfugiés* who fled to England in 1685 following Louis XIV’s revocation of the Edict of Nantes that had granted religious liberty to French Calvinists almost a century earlier in 1598.[11] While some scholars argue that the concept of the ‘refugee’ is thus endogenous to the modern nation-State system,[12] the experience that prompted the Huguenots’ flight from France—what we now call ‘persecution’—is transhistorical and transcultural. The nascent field of refugee history has started to map how migratory populations fleeing harm have been variously constituted across time and space.[13] Broadly understood, the refugee is in fact a much older figure than the citizen.[14]

(p. 116) The protection of the most vulnerable escaping targeted harm and natural disaster has long been central to the predominant ethical systems of the world—both ancient and modern, religious and secular.[15] Of course, the parameters of these ethical, as opposed to legal, obligations have traditionally depended not only upon whom we recognize as the most vulnerable, but also on how we understand the causes of their vulnerability. It is widely accepted that those who cause refugees to flee may have remedial obligations to them, as reflected, for example, in the financial compensation that successive German governments pay to Jews and other minorities persecuted in the Holocaust.[16]

In what we call the ‘statist ethics of refugee protection’, such ethical obligations are assessed in relation to the proper ‘balancing’ between the moral rights of the vulnerable and the ethical obligations of those who are in a position to offer them protection. Importantly, these duties are not ‘perfect’,[17] in that they do not oblige unconditionally, but depend on the circumstances underlying the vulnerability in question and past ethical relations between the implicated parties. From this standpoint, refugee protection becomes an act of beneficence and of compensatory or remedial justice. In contemporary debates, two versions of this view are dominant—what we call the ‘liberal nationalist’ and the ‘liberal internationalist’ positions.

a. Liberal Nationalism

Liberal nationalists subscribe to the view that assessing responsibilities towards refugees requires weighing the interests of ‘people who are liable to be severely harmed as a result of the persecution they are undergoing with those of bounded political communities that

are able to sustain democracy and achieve a modicum of social justice but need closure to do this'.[18]

Underpinning this view is the notion that democratic self-governance is predicated on well-protected territorial borders. According to liberal nationalists, a centralized agent is required to assume responsibility for protecting a country's natural and material assets and to ensure continuity of its public culture and democratic values. Immigration is permitted, but it remains a privilege regulated through the sovereign determinations of a State's legislature.

(p. 117) Although liberal nationalists consider it desirable that 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, including, amongst others, Rawls, Walzer, Nagel, and Miller.[19] For the purposes of this discussion, we briefly sketch Miller's and Rawls' versions of this argument, which we take to be paradigmatic.

Miller and Rawls both underline the priority of democratic self-determination in assessing States' duties towards immigrants and refugees. For Miller, this entails the twofold right of a population with a shared national identity to (a) occupy a territory that it has 'transformed' over time and endowed with 'material and symbolic value',[20] and (b) to determine policy in that territory via a representative State within the limits prescribed by human rights.[21]

Rawls similarly emphasizes territorial sovereignty as a precondition of self-determination, but offers a more Lockean justification in arguing that a territory is ultimately an 'asset' that, like other forms of property, would deteriorate unless a defined agent, namely a 'people', assumes responsibility for its maintenance.[22] However arbitrary a given border regime might appear from a transhistorical viewpoint, Rawls maintains that control of human flows across borders is therefore necessary (in the absence of a world State) to secure 'in perpetuity'[23] the fundamental asset on which the existence of a 'people' depends —its territory.[24]

Nonetheless, for Rawls and Miller alike, the right of territorially predicated self-determination is subject to constraints. For Rawls, self-determination cannot entail the subjugation of another people;[25] but this constraint means equally that another people cannot be compensated for their 'irresponsibility in caring for their land and its natural resources by…migrating into other people's territory without their consent'.[26] For Miller, the right of self-determination is restricted insofar as States are committed to human rights. This commitment generates both ethical obligations towards displaced persons in general—irrespective of whether their claims stem from 'state persecution, state collapse, or natural disaster'[27]—and more particular obligations to refugees when the receiving State is at least partly responsible for the factors leading to their displacement.

Still, both agree that these limitations to territorial sovereignty do not *ipso facto* obligate States to admit refugees. Miller argues that the right of self-determination justifies substitutive measures by States to fulfil their duties towards refugees without offering full admission. These measures include refugee-trading schemes between receiving States (including cash transfers agreements),[28] skills-based admission (p. 118) policies,[29] national admission quotas,[30] and, in certain instances, 'outside intervention' in States of origin (such as humanitarian aid, investments, or support to create 'safe havens').[31] Rawls, by contrast, emphasizes that liberal-democratic peoples have a 'duty of assistance' to support 'burdened societies' 'to manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples',[32] principally by establishing 'just basic institutions for a free constitutional democratic society'.[33] He does not, however, extend this duty of assistance to protect those who seek asylum at a State's border. Similarly, Miller asserts that when a State 'sincerely and reasonably believes it has done enough, taking into

account the cost of accepting refugees', it is 'better to say honestly that not every one [sic] can be rescued'.[34]

Undergirding Miller's and Rawls' shared commitment to territorial sovereignty as a 'trump card' against obligatory refugee admission is a common concern for cultural self-preservation. For Miller, immigrants in significant numbers change the 'self' in 'self-determination' by altering the composition of the *body politic*, and therefore also the public culture of a society. Miller thus reasons that political self-determination entails a right on the part of the representative State to limit immigration to serve this end.[35]

Rawls likewise invokes the protection of liberal-democratic culture as a justification for discretionary immigration control, citing Michael Walzer.[36] But he goes a step further in implying that the ills facing individuals in 'burdened societies' stem from certain 'religious, philosophical, and moral traditions', rather than from material constraints or inequalities in global distributive justice.[37] Accordingly, he insists that while the causes of migration are multifaceted, including the 'persecution of religious and ethnic minorities, the denial of their human rights', migration would cease to be of concern once 'religious freedom and liberty of conscience, political freedom and constitutional liberties, and equal justice for women' are instituted globally.[38]

Rawls' and Miller's accounts reflect the broader liberal nationalist position that the right of territorial self-determination means that any ascertainable State obligations to protect refugees can be subsumed under a broader duty of care to remedy the causes of displacement in various 'burdened' countries of origin. Admission is not the *sine qua non* of ethical standard through which States must fulfil such duties towards refugees. As we later discuss in the context of power-centric and postcolonial critiques of refugee protection, some iterations of the liberal nationalists' prescription for 'outside assistance' are worryingly conducive to justifications of cultural, economic, and perhaps even military imperialism, however inadvertently.

(p. 119) b. Liberal Internationalism

Liberal internationalists interrogate the treatment of territorial sovereignty as the preponderant consideration in assessing our duties towards refugees. They highlight that sovereignty is not an intrinsic property or 'first principle' of isolated States, but emerges from an international system of mutual recognition whereby States reciprocally recognize territory and other aspects of sovereignty according to shared norms. In Haddad's words, 'sovereignty is never absolute and international society could not exist without an element of concession on the part of individual states'.[39] Because territorial sovereignty emerges endogenously to international legal-political norms and processes, it cannot ground an ethical or political limitation to international legal duties towards refugees in the way suggested by liberal nationalists.

To be clear, liberal internationalists do not claim that territorial sovereignty is meaningless, but rather that the Westphalian model of the absolute jurisdiction of a central authority over all persons within a State's territory is a myth of the past. Liberal international sovereignty is structured by the principles and commitments outlined in international law, including the UN Charter (1945), the UDHR (1948), and the regimes of human rights created in the aftermath of the Second World War, including the ICCPR (1966) and the ICESCR (1966). In the protection of their borders, States must not derogate from these international commitments.

Immigration policies that privilege 'meritocratic' assessments, or that prioritize immigrants with family affiliations, may be acceptable from a liberal international perspective if they are adopted by national legislatures in compliance with international human rights norms. But the rights of the strangers amongst us are not at the discretion of States alone; they must be in conformity with national, regional, as well as international norms. Prominent

liberal internationalists include, amongst others, Henkin, Doyle, Koh, Hathaway, and Slaughter.[40]

Some liberal nationalists argue that obligations towards refugees stem only from States' voluntary accession to the Refugee Convention and the 1967 Protocol. However, there is a crucial normative link between State sovereignty and the protection of human rights, including refugee rights, that is not exhausted by States' commitment (or lack thereof) to the primary instruments of refugee law. As Hathaway argues, international human rights are essential to State sovereignty insofar as they 'establish a benchmark of a government's (p. 120) right to claim sovereign authority over a people'.[41] States that violate international human rights norms fail to achieve the minimum standard for international legitimacy and delegitimize their claim to 'autonomous authority'.[42] Henkin elaborates that although the Refugee Convention and its Protocol were largely distinct from international human rights law in their inception, serving as 'a small concession by compassionate states addicted to and fearful for their "sovereignty" ',[43] the situation over the past six decades has changed this relationship substantially. International human rights law has since grown from a series of non-binding declarations to 'binding covenants and conventions'; and accordingly, international refugee law has become inextricably enmeshed with international human rights law insofar as 'massive flows of refugees result from massive human rights violations'.[44]

According to Costello and Foster, this entanglement is reflected in part through the fact that the norm of *non-refoulement* is gradually attaining the status of a *jus cogens* norm.[45] This places *non-refoulement* alongside other universal, non-derogable norms in international law, such as the prohibitions on genocide and torture. For Henkin, an updated reading of international refugee law must thus recognize 'not only the Refugee Convention but the International Covenants and the UN Charter; not only UNHCR, but the Human Rights Committee and, if necessary, the UN Security Council'.[46]

For Hathaway, the increasing entanglement of refugee and human rights law means reorienting the concept of 'persecution' at the centre of the Refugee Convention. Since international human rights serve principally to define the basic duties that States owe to their citizens and those within their jurisdiction, understanding persecution specifically as a failure of State protection resituates refugee protection within the purview of human rights law.[47] In particular, Hathaway claims that a human rights-focused conception of persecution re-centres the fact that the distinctive feature of persecution is a form of harm that entails a coercive separation between the refugee and his or her home, and thereby a rupture in the State–citizen relationship.[48] 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'.[49]

Hathaway recognizes that the Refugee Convention's requirement to demonstrate a nexus between serious harm feared and one of five enumerated grounds—race, religion, nationality, membership of a particular social group, or political opinion—precludes (p. 121) other categories of persons fleeing human rights violations from accessing international protection; the Convention could even be accused of elitism for privileging dissidents and government opponents. Still, he defends the Refugee Convention's nexus requirement in part as a mechanism to identify 'the most deserving as among the deserving'[50] in a world with insufficient capacity to accommodate all those with legitimate claims to fearing serious harm.[51]

Souter adds that within this prioritized group are those who are '*doubly* deserving' of asylum because they also have claims to 'reparative asylum specifically from a *particular* state'.[52] In reconceiving of asylum as reparation for historical harm, Souter offers an ethic of refugee protection based on diachronic, rather than only synchronic, notions of justice. Souter contends that under certain conditions, asylum can serve as an appropriate remedy

by States that are causally responsible for harm leading to displacement. He admits that discerning causation and assigning State responsibility require a scalar approach, in which, for instance, 'an Iraqi refugee claiming asylum in the United States since its invasion appears to have a stronger reparative claim than a Rwandan seeking asylum in Belgium on account of its past colonial rule'.[53] But he posits nonetheless that reparative justice should be one amongst several considerations in prioritizing claims for refugee status.[54]

Despite their divergences in emphasis, these various accounts encapsulate the broader liberal internationalist view that claims to State sovereignty cannot pre-empt obligations deriving from ratified treaties, *jus cogens* norms, or international human rights law. But as Parekh highlights, discussion about the legal and ethical obligations of receiving States at their borders should not occlude an equally important aspect of refugee protection: upholding their dignity and autonomy.[55] In this vein, we turn to other perspectives that situate ethical obligations towards refugees as matters of respect for their human dignity and agency, and not only as forms of beneficence, remedial duty, or legal obligation on the part of States. We call these views the 'cosmopolitan ethics of refugee protection'.

(p. 122) 3. Cosmopolitan Ethics of Refugee Protection

The cosmopolitan position pushes liberal internationalists beyond the perspective of the State, which, whether liberal or not, privileges an 'ontology of containment' that occludes the radical fluidity, historical variability, and interdependence of peoples, histories, cultures, and territories across borders. Cosmopolitanism proceeds from the premise that mobility is an anthropologically deep-seated drive of the human species, and that the regulation of human mobility through national borders is relatively recent in human history.[56]

The cosmopolitan view is not, however, a plea for a world without borders. To the contrary, cosmopolitans generally recognize that republics and democracies require jurisdictional boundaries.[57] In this aspect, cosmopolitanism in fact converges with liberal nationalists' emphasis on democratic self-determination, that is, to know in whose name the law is enacted and who is accountable for its enactment. But for cosmopolitans, these jurisdictional boundaries need not be coterminous with violently guarded territorial border regimes. If we shift our gaze below and above the level of the State, we begin to recognize various forms of interdependence amongst citizens and strangers at the level of municipalities, regions, borderlands, and transnational alliances.

While both liberal nationalists and internationalists treat migratory movements as matters to be regulated and governed, cosmopolitans seek to identify how, at the causal level, such movements express forms of structural dependence and interdependence amongst peoples. Cosmopolitans situate the roots of the ethical responsibilities we bear towards each other in the economic and political systems in which we are mutually implicated. Three versions of the cosmopolitan position have achieved prominence in the political–theoretic literature on refugee protection—what we call the 'agency-centric view', the 'power-centric view', and the 'postcolonial view'.

a. Agency-centric Views

Drawing on Arendt's insights, the 'agency-centric views' can be attributed to the work of several scholars, including Benhabib,[58] Gündoğdu, and Mann, amongst others. These views are grounded upon two interrelated claims. First, agency-oriented theorists argue (p. 123) that the tribulations suffered by refugees are irreducible to the specific harms that determine eligibility for refugee status. Rather, at the core of refugeehood is the loss of a 'world'—that is, following Arendt, the loss of membership in a political community where one is 'judged by one's actions and one's opinions'.[59] In deploying a conception of human personhood and dignity that is explicitly political, rather than legal–formal, agency-centric theorists emphasize the importance of restoring some form of political membership through the realization of the 'right to have rights'. Ethical obligations towards refugees are not

exhausted by temporary protection but extend towards their integration into civil and political society.

Secondly, the agency-centric account holds that ethical responsibilities towards refugees are reducible neither to the legal obligations between States generated by international law, as asserted by legal positivists, nor to any obligations towards 'humanity as such', implied by an ontological account of human rights as pre-political and inalienable, as understood in natural rights theory.[60] While States and international institutions might be the formal adjudicators of rights claims, such claims are justified with reference to moral and political obligations amongst human beings that are irreducible to statist terms. The encounter between those who have rights and those who lack them is thus at the core of the ethics of refugee protection.

The agency-centric account is oriented around Arendt's insight that the legal-political institutionalization of international human rights has failed to meaningfully challenge the equation of the 'rights-bearer' with the citizen. As Gündoğdu elaborates, it is precisely when certain categories of migrants become *de facto* stateless—that is, when they can no longer fully avail themselves of the benefits of citizenship—that we can yet discern the degree to which the guarantee of human rights remains contingent upon citizenship. For Gündoğdu, however, this continued disjunction between 'man' and 'citizen'—traceable to the 1789 Declaration of the Rights of Man and Citizen—does not lead to the cynical view that human rights ought simply to be dismissed as 'logical inconsistencies, hypocritical gestures, or deceptive ploys'.[61] Rather, the political core of human rights becomes apparent and actionable only when we realize that specific human rights presuppose the more foundational 'right to have rights'—that is, the right to membership in a polity in which one's deeds and actions have significance. Because the predicament of the rightlessness of refugees reveals that human rights are not entailed in 'bare life', that is, in the *factum brutum* of human living, we begin to understand that rights must be enacted and demanded; and thus they must be understood as intrinsically political.

Gündoğdu characterizes politics as encompassing 'practices of enacting freedom understood as the capacity to begin something new and interrupt processes that were (p. 124) taken to be automatic'.[62] Such practices build a shared world of understanding and establish a community of equals amongst 'human beings who are otherwise "different and unequal" '.[63] These politicizing practices that endow subjects with the 'right to have rights' lie in tension with anti-political impulses within the domain of what Arendt calls the 'social' and which 'reduce politics to an administration of life's necessities'.[64] Such anti-political impulses predominate in certain humanitarian approaches that treat refugees as speechless subjects[65] or destitute victims[66] and limit remedies to the temporary provision of their basic needs for survival.

At the same time, the language of human rights is deployed by migrants and refugees who paradoxically 'claim and exercise the rights that they are not fully authorized to claim and exercise'.[67] Through her account of the *sans-papiers* movement of undocumented migrants in France, Gündoğdu argues that migrants and refugees do not passively receive juridical determinations of the scope of their rights, but rather participate in 'political practices of founding human rights' through which they 'render their speech audible and intelligible, position themselves as political subjects capable of making rights claims, and establish the validity of these claims by wooing the consent of their interlocutors'.[68]

While Mann shares Gündoğdu's broadly Arendtian goal to recover refugee agency in the shaping of international law, he argues that the ethical core of human rights stems 'not from inclusion in particular communities but from the bare life of humans as such, as experienced by those of us who are bound by human rights law'.[69] The action of 'demanding consideration'[70] for oneself by 'putting oneself in the hands of'[71] an authority—of thrusting

oneself upon sovereignty[72]—constitutes what Mann calls the fundamental 'right of encounter'.

Mann symbolizes the right of encounter through the figure of the 'universal boatperson'—that is, the refugee in distress who seeks assistance from a coastguard or navy agent at high seas outside of sovereign jurisdiction.[73] Mann treats the boatperson's encounter with the State as a 'litmus test for law' in determining whether any rights stem from bare life as such, beyond State authority, contractual obligation, and sovereign consent.[74] His answer is clear: even where sovereignty has no dominion, this encounter generates an obligation experienced existentially by both the boatperson and the State agent as an ethical imperative to protect. He argues that this imperative is the ontogenesis of international human rights law insofar as it generates rights and duties that cannot be derived from a positivist account that treats sovereignty as the cornerstone of (p. 125) international law.[75] Because refugees impose duties on States and citizens in exercising the right of encounter, 'making human rights claims remains a political action even if not engaged from a position of reason but responds to need, necessity, and fear'.[76]

For agency-centric theorists, the tension between the political and the anti-political potentialities of human rights law remains the site of hope: for Gündoğdu, because refugees do not take the denial of their rights as a limit on possibilities for political action, and for Mann, because refugees deploy novel means, including emerging technologies, to facilitate face-to-face encounters with 'rights-bearing' others despite deterrence efforts. Most importantly, for agency-centric theorists, the meaning of the law is always predicated on the broader political world. In this insight, there is both fragility and possibility.

b. Power-centric Views

The 'power-centric views' focus on a critique of governmentality[77] in the ethics of protection. While accepting the critique of legal-formalistic interpretations of human rights advanced by agency-centric theorists, the power-centric position assumes a much more cynical view of the insight that the meaning of human rights is fundamentally political. In this account, human rights become an instrument to further occlude the voices and actions of the vulnerable, rather than to engender new possibilities for the exercise of their agency. In refiguring refugees as mere victims, humanitarian programmes, drawing on the language of human rights, produce docile subjects whose inclusion is predicated on their depoliticization.

Power-oriented critics of human rights and humanitarian protection include, to name a few, Agamben, Moyn, Fassin, Rancière, and Ticktin. We briefly reconstruct the positions of Rancière and Fassin as representative of the broader power-centric view.

For Rancière, the discourse of human rights took a contradictory turn at the end of the twentieth century. While announcing themselves as the universal premise of global democracy following the collapse of the Soviet Union, human rights are increasingly revealed as the rights of victims, of 'those who were unable to enact any rights or even any claim in their name, so that eventually their rights had to be upheld by others'.[78] The universal rights of the human are transformed into the particular rights of the 'humanitarian' to intercede on behalf of the dispossessed. For Rancière, (p. 126) international human rights thus ushered in a new right of invasion through 'humanitarian interference'.[79]

While certain elements of Rancière's critique resemble the more political aspects of the agency-centric position, he departs from them in his account of what human rights have become in practice. For Rancière, instead of following a path of dissensus,[80] the institutionalization of human rights seeks *consensus*—that is, 'closing the spaces of dissensus by plugging the intervals and patching over the possible gaps between appearance and reality or law and fact'.[81] He claims that the turn towards 'consensus' in

human rights law seeks to reify rights as attributes of 'real groups, attached to their identity and to the recognition of their place in the global population'.[82] In the guise of universalizing rights, consensus aims to legally formalize human rights, or to achieve the semblance of the 'identity of law and fact'.[83] For Rancière, refugees and others without effective State protection possess human rights only to the degree that they use them to resist their reduction to 'bare life'. There is no fundamental 'right to have rights' other than the one erected in oppositional struggle.

Fassin offers a related but more ethnographically rooted account of the perils of what he calls 'humanitarian reason', or the logic of power that 'governs precarious lives…that humanitarian government brings into existence by protecting and revealing them'.[84] At the broadest level, he claims that there has been a shift in State discourses from the political rights of precarious populations to their pain and misfortune, resulting in new requirements to expose 'suffering' to gain access to recognition and services.

Applying his critique to the asylum regime in France, Fassin argues that asylum authorities have progressively altered the 'site of veracity' of asylum adjudication since the 1970s. Although asylum seekers' narrative accounts of their flight were 'long the only evidence testifying to their story and justifying their request', the new regime casts suspicion on the evidentiary value of narrative testimony, instead focusing on claimants' bodies as the vehicles on which the veracity of their narratives is inscribed.[85] This change in the asylum system's 'truth regime' creates a new purview for medical-technocratic expert authority in the adjudication process to ascertain 'the scars left by the violence suffered'.[86] The truth of the expert supplants the truth of the claimant.

For Fassin, this increasing focus on the corporeality of asylum seekers both betrays the possibility anchored in the Refugee Convention of securing refugee status on the (p. 127) basis of a well-founded *fear* of persecution (even where actual persecution has not occurred) and neglects the formal characteristics of many instances of modern State-sponsored violence. '[B]y an ironic turn', he notes, 'it is at a moment when the practice of torture is developing toward increasingly invisible forms that a visibility of marks on the body is demanded to confirm that persecution did indeed take place'.[87] But the body often has little to say because expert 'torturers silence it'.[88]

Fassin's argument parallels Rancière's in suggesting that the recent technocratization of adjudicating refugees' claims masks new modalities of State power that aim to depoliticize the experiences of 'precarious subjects' (borrowing from Butler)[89] as a precondition for recognition. If Rancière highlights that the body is already political, and never simply 'bare life', then Fassin elaborates the tactics deployed by States to *actually* depoliticize the bodies of precarious subjects by refiguring them as independent sites of truth to be decoded by experts. While remaining deeply sceptical of institutional remedies and other programmatic solutions, adherents of the power-centric position hint at an oppositional potential for human rights as a language of political mobilization and resistance.

c. Postcolonial Views

Drawing on the experiences of formerly colonized nations in the Global South, postcolonial theorists rewrite the history of international humanitarian and human rights law to expose how these ostensibly universalistic frameworks reflect the partial interests of former colonial powers in Europe and North America.[90] Some postcolonial theorists argue that key concepts underlying international law, including the notion of 'humanity', as formulated by European Enlightenment thinkers such as Immanuel Kant, cannot be detached from the history of Western imperial expansion in Asia, Africa, and Latin America.[91]

In bringing these theoretical claims to bear on international refugee law, postcolonial theorists argue that the 1967 Protocol's universalization of refugee status beyond Europe, and more importantly, the removal of its temporal limitation, was insufficient to mitigate the deep Eurocentrism in the nexus requirements attached to the concept of persecution in the original Refugee Convention.[92] Even proponents of the universal relevance of the Refugee Convention, such as Hathaway, often concede that defending the treaty requires assuming States' willingness to continually stretch the scope of the five (p. 128) enumerated forms of civil–political status to match 'contemporary realities' beyond Europe, such as the prevalance of generalized conflict without specific targets of individualized harm.[93] It is clear, however, that States of asylum in the Global North do not universally accept such interpretive flexibility.

In recognition of the limited scope of the Refugee Convention, several States have adopted supplementary legal instruments to broaden the scope of the refugee definition, such as the OAU Convention in Africa and the Cartagena Declaration covering Central America, Mexico, and Panama. Despite these legal advances, the fact that 84 per cent of refugees are hosted in developing countries[94] reveals that the globalization of refugee law has not been accompanied by a corresponding globalization of responsibilities for the fate of the world's refugees. While neighbouring countries in the Global South bear a disproportionate responsibility for accommodating the vast majority of refugees,[95] the territorial lines between these countries were in many cases drawn by former colonial powers with little regard for the daily existence and well-being of the populations concerned.[96] In these regions, it is frequently difficult to distinguish State failure, official corruption, and grinding poverty, from a well-founded fear of persecution.

In view of these ironies, some postcolonial scholars engage in a more radical critique, interrogating the distinction between refugees and migrants altogether. Achiume, for instance, argues that the treatment of refugees as an exceptional group worthy of admission in an otherwise closed-border State system is undergirded by a 'neocolonial' conception of State sovereignty as the 'right to exclude foreigners and nonnationals'.[97]

For Achiume, the notion of sovereignty as the 'right to exclude' occludes the fact that the forms of globalization structuring the contemporary world stem from nineteenth-century colonial institutions designed to afford political and economic advantages, such as freedom of movement, to colonizing nations, while systematically denying such advantages to colonized populations.[98] These asymmetrical global associations were not only 'in significant part condoned by the European international law in force at the time', but were further ossified by international law at the end of empire through the pairing of 'formal political independence with structural political and economic subordination to First World nation-states'.[99]

Against this regime of 'quasi-sovereignty', Achiume contends that '[p]olitical self-determination requires economic agency',[100] and that such agency is predicated on (p. 129) having an equal say in the 'effective collective vehicles of self-determination presiding over the field of neocolonial empire'.[101] According to Achiume, because neocolonial dynamics ensure that these 'vehicles' of self-determination remain 'First World' nation-States, she claims that States in the Global North have 'no right to exclude Third World persons',[102] including migrants of all forms, insofar as they are committed to universal political equality.

Echoing other postcolonial critics, Achiume's call for 'migration as decolonization' advocates a radical departure from theories of sovereignty that authorize migration only as occasional deviations from a territorial conception of sovereign self-determination premised on the 'right to exclude'.

4. Towards an Ethical Reorientation

Counterposing the positions discussed in this chapter—liberal nationalism, liberal internationalism, and the three varieties of cosmopolitanism—reveals divergences along several key axes, such as territorial sovereignty versus international obligation, legal formalism versus political action, and victimhood versus agency. These various commitments compete for preponderance in defining the source and scope of our obligations towards those displaced across international borders. One overarching tension, however, encapsulates the rest: *the legal versus the political*.

Liberal nationalists argue that positive domestic law represents the political will of a bounded *demos*, and that international law lacks legitimacy when it is unchained from mechanisms of democratic accountability. We must therefore look first and foremost to our legislatures to define our responsibilities towards non-citizen 'others'. Liberal internationalists, in contrast, contend that respect for the territoriality underlying democratic self-determination has always been premised on mutual recognition of sovereignty in an international system. As such, international positive law is equally a precondition for democratic politics. Our obligations towards refugees must thus be situated in the context of international treaties.

Agency-oriented cosmopolitans shift the register of discussion, arguing that law at all levels —local, national, and international—is always supervenient on a broader political world that provides the hermeneutic horizon for legal interpretation. In this view, we must turn towards refugees themselves to enact the obligations that we owe them, and not to the law alone, although we are jointly responsible for their institutionalization. While power-centric cosmopolitans loosely share the premise that duties stem from political encounters, they add the major caveat that the law mirrors and further entrenches the power structures that configure the larger political world, (p. 130) despite its purported neutrality and universalism. They join postcolonial theorists in arguing that the obligation to protect the 'other' cannot be cleanly separated from the impulse to dominate that 'other'. Protection must be wrested through political struggle.

Above all, what is at stake in this debate is whether the source of our responsibilities towards 'strangers among us' ought to be derived from *positive law*, as defined either by a State or by international declarations and treaties, or from *political praxis*—that is, from the declarations, actions, and demands of refugees themselves. Of course, these are not mutually exclusive possibilities. Indeed, our main contention is that the duality between the legal and the political is much more porous than each of these positions, taken in isolation, presupposes. Drawing on Benhabib's concept of 'jurisgenerative politics', we argue that a responsible ethics of refugee protection must look both to the law and to political praxis to elaborate our obligations towards those forcibly displaced across borders without effective State protection.

As Cover contends, there is a fundamental disjunction between law as *power* and law as *meaning*. While law as power flattens competing normativities into a singular authoritative interpretation backed by coercive force, the 'uncontrolled character' of law as meaning 'exercises a destabilizing influence upon power. Precepts must "have meaning", but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal law-making'.[103] Benhabib elaborates that the:

> [l]aw's normativity does not consist in the grounds of its formal validity, i.e. legality, alone. Law can also structure an extra-legal normative universe by developing new vocabularies for public claim-making, by encouraging new forms of subjectivity to

engage with the public sphere, and by interjecting existing relations of power with forms of justice to come—*à venir*, in Derrida's terms.[104]

The *validity* of the law is not limited to its *facticity* alone as determined in juridical interpretation and enforced by coercive agencies. Just as the law is amenable to the tactics of humanitarian reason that depoliticize the asylum claim-making process, it can equally serve as a modality of 'dissensus' for the mobilization of the *sans papiers* in France, as Gündoğdu demonstrates.[105] Formal legal institutions alone provide no ' "originary" source of meaning, or an "original" to which all subsequent forms must conform'.[106] Legal norms transcend their own formalism as they are adopted in political struggles.

We can conceptualize this bivalence of the law through the notion of *democratic iterations*. If we accept the premise that the law has no monopoly on the spectrum of its (p. 131) own possible meanings in the social world, then we begin to discern that every invocation of a legal norm in a political struggle is a modification of that norm in view of its contextual function. In other words, each iteration serves to resignify the norm in light of the situation in which it is deployed.[107] Such iterations are not mere deviations from an originary meaning, but rather enhance and transform the content of the norm to the point that 'when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority on us as well'.[108] Each iteration is thus at the 'same time its dissolution as the original and its preservation through its continuous deployment'.[109]

As Gündoğdu and Mann warn as well, because the law's meaning is contingent and ever-shifting, it is also fragile. If we can envision a politics of meaning-making that seizes the language of the law to expand protection and political agency to the rightless amongst us—that is, a *jurisgenerative politics*—then we can equally discern, with Rancière and Fassin, how democratic iterations can also be used to yield 'sterile, legalistic, or populistic'[110] readings of the law that curtail these emancipatory possibilities. Following Cover, we refer to these possibilities as *jurispathic*. There are no guarantees in the iterative process; the possibility of jurisgenerativity offers no sure trajectory towards a human rights utopia.

If power-centric cosmopolitans neglect to conceptualize fully the mediated relationship between law and politics, then liberal nationalists fail to acknowledge that a similar mediation can take place between international law and conceptions of territorial sovereignty. To the extent that States convert their commitments in ratified treaties into domestic law, they undertake an iterative process that interprets and contextualizes these commitments. In such democratic iterations, cosmopolitan norms are reconfigured through the pre-existing body of law, modifying the content of the norms themselves. This recursivity forces cosmopolitan imperatives into mediation with the will of democratic majorities in a mutually reconstitutive process.

Of course, the possibility of jurispathic outcomes looms ever large in this process. As the recent populist turn towards a 'new sovereigntism' in the Global North makes clear, there are many possibilities for States to exploit the gaps between national and international law to justify refugee containment, deportation, and non-entrée policies that fall only trivially short of *refoulement*—as we have witnessed with the recent EU deals with Turkey and Libya.[111] In recent years, the United States has even directly abrogated the norm of *non-refoulement* by criminalizing the entry of refugees through 'non-designated ports', by pushing them back into Mexican territory, and by asserting (p. 132) that refugees passing through 'safe third countries' have no right to seek asylum in the US—a claim contradicted by the Refugee Convention.[112]

Locating our obligations towards refugees in a jurisgenerative politics—between the legal and political—is also important for another reason. As Benhabib argues, a purely political conception of human rights 'runs the risk of burdening the most vulnerable with their own defense as well as being voluntaristic in making the entitlement to rights dependent upon the capacity to assert them as well as to have them recognized'.[113] The claim to rights, in

other words, ‘cannot rest on the *ability* to make others recognize them who may or may not be inclined to do so’.[114] This critique applies equally to strong versions of the agency-centric position and the power-centric cosmopolitan position.

At the same time, a purely juridical conception of rights, as reflected in highly formalistic versions of both the liberal nationalist and internationalist positions, neglects that:

> legal regimes create further differentiations and distinctions that trap individuals in conditions of *administrative dependency*. This aspect of *legal governmentality*, which generates such distinctions as among displaced persons, refugees in protracted situations, and stateless persons, is a double-edged sword, often robbing individuals of the autonomy, dignity, and initiative that their protection of human rights was intended to guarantee in the first place.[115]

In defining our duty to offer protection to refugees and others without effective State protection, we must therefore balance the *specificity* of the law with the *generality* of political praxis. We must recognize that international refugee and human rights law alone provide no remedy for the victims of global neoliberalism, including those fleeing abject poverty and natural disasters. Likewise, we must remain attentive to the perverse incentives that refugee law generates for States to keep refugees in protracted or permanent precarity, to disincentivize flight on the part of others, and to prevent extending citizenship to those on their territory.

We must also acknowledge that in broadening the scope of what might be a legitimate claim for protection, certain cosmopolitan views, including those rooted in postcolonial theory, risk creating a framework in which normative questions about immigration policy writ large are elided with questions about the treatment of displaced persons more specifically. In doing so, these positions risk inadvertently producing an ethic of responsibility towards a unitary migrant ‘other’ that might ultimately erode, rather than expand, States’ obligations towards refugees. We must be equally wary of the dangers of (p. 133) making our duties towards refugees contingent on their ability to compel us to uphold their rights.

Our contention, at its core, is that we must resist dichotomous approaches to the ethics of refugee protection. The notion of jurisgenerativity offers one strategy to negotiate the line between the critique of humanitarian reason and the institutionalization of rights, between the refugee as an ‘abject subject of compassion and administrative logic’[116] and as a subject capable of agentic action, between international law and political mobilization in solidarity with refugees. There are, no doubt, other such possibilities. Above all, we must give up neither on law nor on politics in defining the scope of refugee protection.

Footnotes:

1 Global Compact on Refugees, para 5.

2 For discussion of the link between refugee protection and human rights see eg Chapter 11 in this volume.

3 Global Compact on Refugees, para 2.

4 ibid para 33.

5 ibid para 35.

6 ibid para 37.

7 James C Hathaway, ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4 JRS 113.

[8] Global Compact on Refugees, paras 5, 7, 9, 11.

[9] ibid paras 1, 5, 14, 56.

[10] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (CUP 2004).

[11] Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 IJRL 238, 239.

[12] See eg Emma Haddad, 'Who Is (Not) a Refugee?', EUI Working Paper SPS No 2004/6, 4 n 11.

[13] Olaf J Kleist, 'The History of Refugee Protection: Conceptual and Methodological Challenges' (2017) 30 JRS 161.

[14] See eg Anne Dufourmantelle, 'Hospitality under Compassion and Violence' in Thomas Claviez (ed), *The Conditions of Hospitality* (Fordham University Press 2013) 14. Dufourmantelle argues that hospitality has been at the root of primitive societies because 'you could immediately become the very stranger that you opened your door to'. The term 'hospitality' derives from the Latin terms *hospitalia* or *hospitia*, which were dwellings specifically for foreigners (*hospites*), a practice also found amongst the ancient Greeks. cf James A Chamberlain, 'Responsibility for Migrants: From Hospitality to Solidarity' (2019) Political Theory 1.

[15] See eg Kleist (n 13) 162–3. For an overview of the biblical conception of the 'cities of refuge', see Moshe Greenberg, 'The Biblical Conception of Asylum' (1959) 78 Journal of Biblical Literature 125.

[16] 'Summary of Major Holocaust Compensation Programs' (Claims Conference: The Conference on Jewish Material Claims against Germany 2000).

[17] Henry Sidgwick outlines a distinction between *imperfect* moral duties—that is, conditional duties subject to exceptions and limitations based on legitimate grounds of self-preservation—and *perfect* moral duties—that is, duties that oblige unconditionally without exceptions or limitations. For Sidgwick, obligations towards refugees are imperfect duties of charity rather than perfect duties of justice. For a longer discussion, see Benhabib (n 10) 36–7.

[18] David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Harvard University Press 2016) 93.

[19] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 38–9; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 51; Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy and Public Affairs 113. For a trenchant critique of Nagel, see Joshua Cohen and Charles Sabel, 'Extra Rempublicam Nulla Justitia?' (2006) 34 Philosophy & Public Affairs 147; Miller (n 18).

[20] Miller (n 18) 60.

[21] ibid 62.

[22] Rawls (n 19) 39.

[23] ibid.

[24] ibid.

[25] ibid 38.

[26] ibid 39.

[27] Miller (n 18) 93.

28 ibid 88–92.

29 ibid 91. Miller maintains that skills-based or other economic admissions considerations are only defensible at the second stage of assessment, namely, in determining whether a recognized refugee should be admitted with a form of permanent residence to the country of asylum or transferred to another safe State, and not at the first stage of assessment, namely, adjudicating claims for refugee status as claims about 'the necessity of escaping a serious threat to human rights'.

30 ibid 88.

31 ibid 82.

32 Rawls (n 19) 111.

33 ibid 107.

34 Miller (n 18) 93.

35 ibid 60–1.

36 Rawls (n 19) 39 n 48.

37 ibid 108.

38 ibid 9.

39 Emma Haddad, 'Refugee Protection: A Clash of Values' (2003) 7(3) The International Journal of Human Rights 1, 10.

40 Louis Henkin, 'That S Word: Sovereignty, and Globalization, and Human Rights, et cetera' (1999) 68 Fordham Law Review 1; Michael Doyle, 'The Model International Mobility Convention' (2018) 56 Columbia Journal of Transnational Law 219; Harold H Koh, 'Why Do Nations Obey International Law? (Review Essay)' (1997) 106 Yale Law Journal 2599; Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005); James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 JRS 113.

41 Hathaway (n 40) 113.

42 ibid.

43 Louis Henkin, 'Refugees and Their Human Rights' (1994) 18 Fordham International Law Journal 1079, 1080.

44 ibid.

45 Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273.

46 Henkin (n 43) 1081.

47 Hathaway (n 40) 122.

48 See also Andrew E Shacknove, 'Who Is a Refugee?' (1985) 95 Ethics 274.

49 Hathaway (n 40) 120.

50 James C Hathaway, 'Is Refugee Status Really Elitist? An Answer to the Ethical Challenge' in Jean-Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge* (Kluwer Law International 1997) 86.

51 ibid 85.

52 James Souter, 'Towards a Theory of Asylum as Reparation for Past Injustice' (2014) 62 Political Studies 326, 340.

53 ibid 339.

54 See Section 3.c of this chapter for further discussion. Note that postcolonial approaches to the ethics of refugee protection are not uniformly liberal internationalist. While Souter treats reparative justice as a mechanism to prioritize amongst those who meet the Refugee Convention's eligibility criteria for refugee status, other postcolonially oriented scholars deploy reparative justice to reject the legal distinction between refugees and other migrants entirely. See eg Tendayi E Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review 1509.

55 Serena Parekh, *Refugees and the Ethics of Forced Displacement* (Routledge 2017) 52.

56 For a political-theoretical discussion on the long-range history of migration, see eg Thomas Nail, *The Figure of the Migrant* (Stanford University Press 2015); Thomas Nail, *Theory of the Border* (OUP 2016).

57 See Immanuel Kant, 'Perpetual Peace' in Hans Reiss (ed), Lewis White Beck (tr), *On History* (Library of Liberal Arts 1957). Kant criticizes the idea of a 'world State' and unbounded political communities.

58 See Section 4 for a discussion of Benhabib's views on agency-centric cosmopolitanism.

59 Hannah Arendt, *The Origins of Totalitarianism* (New edn, Harcourt Brace & Company 1973) 296–7.

60 For a detailed critique of natural rights theory, see ibid 297–9.

61 Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (OUP 2015) 13.

62 ibid 56.

63 ibid.

64 ibid 58.

65 ibid 116.

66 ibid 143.

67 ibid 168.

68 ibid.

69 Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP 2016) 13.

70 ibid 145.

71 ibid 54.

72 ibid 145.

73 ibid 42. For Mann, the high seas serve as a 'global, ever-present state of nature' insofar as they are 'outside of all sovereign territories and free for the navigation of all'. The figure of the 'universal boatperson' is analogously tied to the image of the 'flagless vessel', which lies beyond the customary legal obligation of rescue.

74 ibid 71–2.

75 ibid 44–5.

76 ibid 101.

77 See Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978* (Michel Senellart, François Ewald, and Alessandro Fontana eds, Graham Burchell tr, Picador 2009) 108. Foucault defines 'governmentality' in part as the 'ensemble formed by the institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument'.

78 Jacques Rancière, 'Who Is the Subject of the Rights of Man?' (2004) 103 *South Atlantic Quarterly* 297, 298.

79 ibid. For an extended discussion, see also Seyla Benhabib, *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton University Press 2018) 115–18.

80 Rancière (n 78) 304. By 'dissensus', Rancière means action by the 'rightless' to contest their exclusion from political life. Dissensus is 'a dispute about what is given, about the frame within which we see something as given'.

81 ibid 306.

82 ibid.

83 ibid. For a similar discussion, see also Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration' (2019) 47 Political Theory 447.

84 Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (University of California Press 2011) 4.

85 ibid 110.

86 ibid.

87 ibid 128.

88 ibid.

89 See Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2006).

90 See eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005).

91 See Sankar Muthu, *Enlightenment against Empire* (Princeton University Press 2003); David Harvey, *Cosmopolitanism and the Geographies of Freedom* (Columbia University Press 2009).

92 See Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Brill 2008) 23–56.

93 Hathaway (n 50) 87. Hathaway also acknowledges that his defence of the Refugee Convention assumes the malleability of the membership of a particular social group category to track non-enumerated forms of disenfranchisement 'on such bases as sex, sexual orientation, age, and disability'.

94 UNHCR, 'Global Trends: Forced Displacement in 2018' (2019) 2.

95 ibid.

96 See Lisa Anderson, 'Creative Destruction: States, Identities and Legitimacy in the Arab World' in Seyla Benhabib and Volker Kaul (eds), *Toward New Democratic Imaginaries: Istanbul Seminars on Islam, Culture and Politics* (Springer 2016) 21.

97 Achiume (n 54) 1517–21.

98 ibid 1535–6.

99 ibid 1544.

100 ibid 1544–5.

101 ibid 1548.

102 ibid 1549.

103 Robert Cover, ‘Forward: *Nomos* and Narrative’ (1983) 97 Harvard Law Review 4, 18.

104 Seyla Benhabib, ‘Critique of Humanitarian Reason’ *Eurozine* (18 July 2014).

105 Gündoğdu (n 61).

106 Seyla Benhabib, ‘Democratic Iterations: The Local, the National, and the Global’ in Seyla Benhabib and Robert Post (eds), *Another Cosmopolitanism* (OUP 2006) 48.

107 ibid.

108 ibid.

109 ibid.

110 ibid 50.

111 See eg Liz Fekete, ‘Migrants, Borders and the Criminalisation of Solidarity in the EU’ (2018) 59 Race & Class 65. See also the texts of the EU agreement with Turkey and the EU-endorsed bilateral agreement between Italy and Libya: ‘EU–Turkey Statement’ (*European Council*, 18 March 2016); ‘Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic’ (2 February 2017).

112 See eg Andrea Silva and Maura I Toro-Morn, ‘The Paradox of State Control in the Global Age of Migrations: The 2018 Central American Immigrant Caravan’ in Cara E Rabe-Hemp and Nancy S Lind (eds), *Political Authority, Social Control and Public Policy* (Emerald Publishing Limited 2019). For an extended discussion, see Seyla Benhabib, ‘The End of the 1951 Convention? Dilemmas of Sovereignty, Territoriality and Human Rights’ (2020) 2 Jus Cogens: A Critical Journal of Philosophy of Law and Politics 75 (forthcoming).

113 Benhabib (n 79) 120.

114 ibid.

115 ibid 114.

116 ibid 121.