# The Human and the Rights-Bearer. A Philosophico-Juridical Analysis of the 'Refugee Problem'

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*Articolo sottoposto a double blind review. Ricevuto: 05/05/2018 – Accettato 30/06/2018*

Abstract: This paper examines the distinction between two categories of subjects – legal subjects and merely-human subjects – and the figure who today concretizes the distinction between the two: the refugee. By illuminating the disparity between rights-bearing and non-rights-bearing persons, I hope to illustrate the legal implications of this distinction – and concomitantly, our understanding of legal responsibility – through an analysis of the refugee. Drawing on Hannah Arendt, Giorgio Agamben, and Seyla Benhabib as my main interlocutors, I ultimately aim to provide an analytic platform from which to approach modern refugee crises. In so doing, we are better able to conceptualize the 'problem of the refugee' as both a consequence of and necessary condition for the juridical logic of the nation-state. I conclude with two theoretical 'solutions' to the 'problem of the refugee' – the first drawing from the theory of 'relational autonomy' presented by Jennifer Nedelsky and the second drawing from contemporary critiques of nation-statehood – and demonstrate how each takes as its ultimate aim the total elimination of the category of 'refugee'. Ultimately, however, I intend more modestly to give voice to a philosophically underemphasized catastrophe that is plaguing our sociopolitical spheres today, and which will doubtlessly dominate political discourse in the years to come.

Keywords: refugees, rights, philosophy of law, nation-state, international law

The philosophical paradox of human rights and legal rights is one that, more often than not, emerges within discourses on «stateless» persons. Often, the possessor of legal rights is the «citizen» – or more generally the «rights-bearing person» under legal jurisdiction – while human rights should, theoretically, belong to and be upheld for all peoples, irrespective of one's citizenship status. This reality, however, is contested by such thinkers as Hannah Arendt and Giorgio Agamben, who hold that the paradigmatic stateless person, the refugee, has effectively lost all claims to rights in tandem with nationality and with it, legal protection. Indeed, we might interpret the need for humanitarian aid organizations as the

need to «step in», so to speak, precisely in instances where the law has failed to protect such vulnerable subjects. To be sure, the law's failing might be that it has recognized the violation of the group members' rights but has done nothing to prosecute the violators or better the conditions of the violated. We should wonder, however, whether the law has rather failed to recognize that the group members *have* rights (or attribute to group members the status of rights-bearing persons) that it is legally bound to protect. If this is the case, the rights-less person – exemplified by the *stateless* person – is that figure who dispels the illusive universality of the rights of the human.

In this article I analyze and critique the figure of the «rights-bearing person» – who I call the «legal subject» – against the figure who lacks legal rights – who I call the «human subject». Accordingly, I draw on Joel Feinberg's examination of harm in the context of the «human subject» so described. Two other points should be mentioned. First, I take *legal* subject to mean a subject possessing an individual humanity that is *legally recognized*; any separation or removal of the legally recognized humanity (called «juridical humanity» by some) from the subject transforms her into a «merely-human» subject.[1] Second, my generalization of legal systems, unless otherwise specified, is a generalization inspired by Anglo-European and American legal systems. I make this disclaimer for two reasons: one, because questions of UN authority and international security often fall to the U.S., the U.K., and European members; and two, although hugely important within refugee discourse, an analysis of country-specific and non-Western legal systems lies well beyond the scope of this investigation. Indeed, it is a topic that, in tandem with human rights discourse, deserves attention in a separate analysis altogether.

It is the element of «legally-recognized humanity» that is crucial within this paper: more explicitly, I interpret the individual in possession thereof to be a legal subject, in contrast with one who lacks «legally-recognized humanity» or who is, more simply, a merely-human subject; as such, I focus on the *refugee* as the paradigmatic, merely-human subject within the context of law. By illuminating the disparity between rights-bearing and non-rights-bearing persons I hope to illustrate the legal implications of this distinction – and concomitantly, our understanding of legal responsibility – through an analysis of the refugee. Drawing on Arendt, Agamben, and Seyla Benhabib as my main interlocutors, I ultimately aim to provide an analytic platform from which to approach modern refugee crises. In so doing, I hope to give voice to a philosophically underemphasized catastrophe that is plaguing our sociopolitical spheres today, and which will doubtlessly dominate political discourse in the years to come.

I begin with an elaboration of how I conceive of the legal subject contrasted with the human subject and the place of legal rights within this context so as to contour the scope of this analysis. Accordingly, I take up the figure of the refugee

[1] Throughout this paper, I invoke the terms «merely-human» and «human» interchangeably; the former is simply utilized for purposes of emphasis in certain contexts.

as she is traditionally understood in contemporary philosophy – as a subject who has been forced to abandon or flee the state to which she formerly had legal residence or citizenship – and illustrate the paradox of rights that emerges through her confrontation with law. I conclude by briefly exploring the implications of this verdict in terms of contemporary theories of autonomy and offer possible steps that may be taken to address this problem, of which the current 'European Migrant Crisis' is the paradigmatic actualization demanding our attention today.

## 1. *Rights and Wrongs*

The concept of «rights» is famously obscure, though for our purposes it is enough to demarcate *moral rights* – those that other individuals are duty-bound to uphold (such as, for example, my right not to be cruelly insulted) – from *legal rights* – those that the state is duty-bound to uphold (such as my right to freedom of religious expression). In *Harm to Others*, legal theorist Joel Feinberg offers a detailed account of the distinctions and points of overlap between these two categorizations, which, taken together, he further classifies into three groups: moral rights merely, legal rights merely, and rights that are both moral and legal. In all cases, the rights are possessed by the rights-bearer, and all other agents have a duty (whether positive or negative) not to violate or to uphold them. Because we are looking at two classifications of subjects – human subjects and legal subjects – we may rearticulate Feinberg's distinctions not by type, but between rights-bearers:

1. The *legal subject* possesses legal rights, or those that are recognized and protected by legal institutions and those that other agents are required to respect. To emphasize legal right is to emphasize a «claim against all other citizens to their noninterference and a claim against the state to its protection»[2].

2. The *human subject* possesses, at best, only merely moral rights, or those that are founded on ethical grounds, but are *not* claims that the state is legally obligated to address. Merely moral rights are typically categorized as «welfare rights», but we may consider them more simply as the «human rights» of contemporary political discourse.

In both cases, rights grant the rights-bearer the capacity to *file claims*, whose terms the addressee – whether an individual, an institution, or a state – has a sub-

[2] J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law*, Oxford University Press, Oxford 1984, p. 109. Feinberg also notes that those that are additionally «backed by valid reasons and addressed to the conscience of the claimee or to public reason» are both moral and legal (ibid. p. 110). For our purposes, the essential component of these rights is their status as legal, and we may consider «moral and legal» rights as superfluous for this analysis.

sequent *duty* to fulfill. There exists, then, an essential reciprocity between claims and duties. Following Feinberg's distinction, an Agent *A* can appeal to either ethical claims or legal claims, which agent *B* subsequently has either a moral duty to fulfill or a legal duty to fulfill. Seyla Benhabib draws a similar distinction in *The Rights of Others*, dividing rights into those that elicit a moral imperative and those that elicit a juridico-civil imperative. Accordingly, moral rights are those which invoke a «moral claim to membership and a certain form of treatment compatible with the claim to membership»[3]. Possessors of moral rights are thus entitled to moral claims and their reciprocal fulfillment. It is only in the case of juridico-civil usage, however, that one is entitled to *legal rights* claims, which

> entitle persons to engage or not in a course of action, and such entitlements create reciprocal obligations. Rights and obligations are correlated: rights discourse takes place among the consociates of a community. Such rights, which generate reciprocal obligations among consociates, that is, among those who are *already recognized as members of a legal community*, are usually referred to as 'civil and political' rights or as *citizen's rights*.[4]

The complicated relationship between rights, claims, and duties are ultimately contingent upon one's status as either a merely-human or legal subject: «the asymmetry between [them] … derives from the absence in the first case of a specific juridico-civil community of consociates who stand in a relation of reciprocal duty to one another»[5].

To clarify this division concretely, we might say that certain legal duties are perceived as transnational, such as duties not to kill, rape, or torture persons[6]. These are duties that a state is *legally obligated* to abide; failing to do so may result in legal ramifications to be 'settled' in a court of law such as, for example, the International Criminal Court or other ad hoc legal tribunals[7]. Certain other legal rights and duties are contingent upon the formal laws of any given political system, such as traffic laws, contract laws, and legal rights that apply to criminal suspects (in the context of the U.S., we might consider Miranda rights). Moral rights and duties, however, often extend beyond those rights that are legally enforced. I may believe myself to have a moral duty to volunteer at my local soup kitchen five hours per week, for example, but I am certainly not *legally* mandated to do so.

It is in cases where rights are *violated* that the question of 'harm' and 'wrong' come to the fore. In such cases, the violation results in a *harm* done to a subject

[3] S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens*, Cambridge University Press, Cambridge 2004, p. 56.
[4] Ivi, p. 57, emphasis added.
[5] Ivi, p. 58.
[6] It should be noted that this is not to advance a moral or metaphysical theory that undergirds these legal laws. Discussions of law or legal matters in this paper make no attempt to identify or articulate any moral claims unless explicitly stated.
[7] This is not to overlook the efficacy and bias of these systems; however, such an analysis goes beyond the scope of this paper and merits separate investigation.

by the violator, and Feinberg holds this to be the case whether the violated right is moral or legal. Speaking once again of our rights-bearer *A*, we can more simply define a harm as a violation of *A*'s right(s)[8]; concomitantly, our agent *B* has a *negative duty* to not violate *A*'s rights. In the context of legal and human subjects, then, the following may be said: a violation of the rights of a legal-rights-bearing person, or legal subject *A*, is a legal (and sometimes also moral) harm; while the violation of the rights of a merely-moral-rights-bearing person, or human subject *B*, is at most a moral harm. The distinction between legal subjects and moral subjects, however, draws an important criterion in our interpretation of harms and wrongs. Although both moral and legal subjects can be harmed, it is only *legal subjects* – meaning, those subjects with the capacity to file claims – that can be *wronged*. It is not the moral violation alone, but the moral and/or *legal* violation of a right that has the capacity to become a wrong against which the victim can file a claim to a court of law or other judicial apparatus. The Judicial Branch of the United States, for example, utilizes the language of 'wrong' in its description of juridical duties: «If a party believes that it has been wronged, it can file suit in civil court to attempt to have that wrong remedied through an order to cease and desist, alter behavior, or award monetary damages»[9]. Similarly, in its 2004 *Report of the Security-General*, the United Nations defines «justice» as «an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs»[10]. As such, we may say that *wrongs* are those harms that the state (or legal apparatuses thereof) has a duty to address, and the perpetrators thereof are legally punishable. To be sure, violations of moral rights are those which the state may or may not be obligated to address (depending on whether the moral right is also a legal right), but they are harms which may nonetheless inspire reciprocal action by other agents or institutions, such as NGO's and peacekeeping forces. Having now given substance to these concepts, we may reconceptualize our understanding of the refugee therewith.

## 2. *The Refugee: Legal Ambiguities and Philosophical Critiques*

Before turning to contemporary philosophical approaches to the refugee, it will do us well to address the formal, legal definition of the refugee and the appli-

[8] Feinberg himself gives an exhaustive list of the different types of harms that may be committed against an agent. For our purposes, rights-violation is a sufficient condition for an agent being harmed, without needing to delve into Feinberg's nuanced hypothetical scenarios. See Feinberg's *Harm to Others* (1984) for an overview.

[9] *Our Government: The Judicial Branch*, «The White House», accessed 19 October 2018, https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/.

[10] *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, «United Nations Security Council», 23 August 2004, accessed 19 October 2018, http://archive.ipu.org/splz-e/unga07/law.pdf.

cability of the 1951 *Convention Relating to the Status of Refugees* today[11]. Article 1A(2) of the Convention defines the «refugee» as one who

> 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.[12]

There are two elements to note: one, the refugee is defined as an individual who is outside her country of nationality or lacks nationality status due to a *fear* of *persecution*; and two, the emphasis throughout is on *nationality* and the possession or recognition thereof. In other words, it is only when an individual flees persecution and consequently loses her claim to nationality – when she is, more simply, an alien – that she can be recognized as a refugee. The explicit connection between persecution and nationality further indicates that nationality is a precondition for ones' ability to claim persecution at all: it is only when a national of a state is unprotected *by that state* that she can fall under consideration for refugee status. We immediately notice that these criteria discount those who identify as environmental migrants, climate refugees, internally displaced persons, and persons fleeing due to war or terrorism, and as such are much narrower in scope than those that characterize the refugee as a theoretical or philosophical figure of analysis[13].

[11] Bracketing the legal criteria, the historical context surrounding the drafting of the Convention itself is noteworthy. The Convention was approved in 1951 as a means to account for refugees resulting from World War II and, especially, the Holocaust. Until the 1967 Protocol, however, the Convention applied *exclusively* to the protection of European refugees prior to 1951. The UN General Assembly's rationale for the Protocol came as a result of «considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention» and of «considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951» (*Protocol Relating to the Status of Refugees*, «UN General Assembly», United Nations Treaty Series 606, 1967, pp. 267–76, at p. 267). It should be noted that the Protocol makes no change to the definition of the «refugee» as originally drafted.

[12] J. C. Hathaway, M. Foster, *The Law of Refugee Status*, Cambridge University Press, Cambridge 2014, p. 2. We should further note that the rights outlined in the Refugee Convention apply «until and unless an individual is found not to be a refugee» (ibid. p. 1). As such, there is – or at the time of the Convention's drafting, was – an understanding that refugee status is a *temporary status*. Considering that many of today's 66 million refugees are unlikely or unable to return to their countries of origin, legal scholars James Hathaway and Michelle Foster recognize that «there is legal uncertainty as to what status is required to be accorded […] either on the basis of non-Refugee Convention international legal norms or on humanitarian grounds» (Ivi, p. 2).

[13] The implications of this on philosophical approaches to the refugee are magnanimous, and often overlooked. Though any discussion thereof goes well beyond the scope of this paper – and would require a broader analysis of the limitations of philosophical methodologies – it is worth making explicit.

The Convention itself is a «multilateral treaty» and, as such, can require from signatories no more than interpretation and application «in good faith»[14]. Though we may refer to the duties outlined in the Convention as «international laws», these duties are not binding, nor are the «legal» rights properly speaking. As such, because states (or legal institutions more broadly) are only duty-bound to protect and uphold legal rights, there is no *legal obligation* to uphold the Convention or recognize stateless individuals as refugees. Questions of treaty interpretation and scope have received close scrutiny since the drafting of the 1969 *Vienna Convention*, with the ambiguity of implementation of particular interest. James Hathaway and Michelle Foster state that

> even where an important subset of state parties takes a view on interpretation of the refugee definition – as is the case in the European Union, where the Qualification Directive sets minimum standards for its member states – there is no basis to view such positions as necessarily amounting to authoritative understandings of the Refugee Convention.[15]

Legally speaking, the status of the refugee *qua refugee* appears as unclear as her status as a rights-bearing subject. Because the refugee is not a legal subject proper, she cannot be «wronged» such that any state has a legal *duty* to her. Any obligations owed to the refugee are borne from a sense of moral responsibility in the face of harm more generally, whose force is never legally binding and is, instead, entirely contingent upon the actors within its particular context. As such, signatories of the Refugee Convention have, at most, a *moral* impetus to uphold the Convention, even if this impetus does not extend to the states' handling of refugees once recognized.

Additionally, the legislative actors who have the capacity to uphold and enforce the *Refugee Convention* itself remains obscure: in other words, there is still a question of the scope of legal jurisdiction between states *themselves recognized as states* and those that are not given the classification of states proper[16]. The issue of legitimacy is one which sometimes diffuses into ambiguity, as seen today in *de jure* or partially-sovereign states, with Palestine as the paradigmatic case. Because Palestine is considered occupied territory rather than an independent nation-state by Israel, the United States, and the United Nations more broadly, its legal capabilities are forfeited to such bodies as the International Criminal Court, and Palestinians residing in the occupied territories have little recourse to claim human rights abuses. Indeed, any claim to persecution itself – and subsequent refugee status – becomes precarious: because refugee status as defined in the Refugee Convention is so tied to the unwillingness of states to protect («since logically a state that is persecuting its citizens is unwilling to protect them»[17]), more common iterations of

[14] J. C. Hathaway, M. Foster, *The Law of Refugee Status*, cit., p. 5. This and similar guidelines regarding treaties are explicitly codified in the 1969 *Vienna Convention of the Law of Treaties.*
[15] Ivi, p. 12.
[16] Though it goes well beyond the scope of this paper, the sovereign status of refugee *camps* further complicates the question of legal jurisdiction and merits acknowledgment.
[17] J. C. Hathaway, M. Foster, *The Law of Refugee Status*, cit., p. 303.

persecution today come not from the state's *unwillingness*, but *inability*. Variations of this phenomenon emerge from territories governed by non-state actors (such as insurgent groups) as well as «failed» states. Nonetheless, although it is increasingly accepted that «the source of the persecution is irrelevant so long as the state is unable or unwilling to provide protection»[18], whether or not persecution and lack of protection are *recognized as such* remains ambiguous[19]. More broadly, if there is no legitimate legal body to whom an individual may appeal to for protection, does that body have the capacity to confer onto her legal status *at all?*

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Let us, however, bracket the legal framework of refugee status, given the frequent absence thereof in philosophical considerations of who 'counts' as a refugee or stateless person (the two terms often used interchangeably)[20]. The normative and theoretical implications of refugee status and management have been taken up at length by continental philosophers since the era of the World Wars. Hannah Arendt provides possibly the most prominent critique of the «refugee» – which she reframes as the normative problem of «the right to have rights» – and her analysis is taken up, to this day, by scholars of refugee studies and political theory. Italian philosopher Giorgio Agamben notes that, even before the Holocaust, «many European states began to pass laws allowing the denaturalization and denationalization of their own citizens» which in turn «divided German citizens into citizens with full rights and citizens without political rights»[21]. It was this process of denaturalization – rendering Jews 'citizens' without legal rights – that would later allow German Jews to be sent to the extermination camps not where they were killed, but where their corpses were «produced». On this reading, the link between rights and nationality are explicitly concomitant upon one's status as a citizen; once that status is removed, *even if one continues to reside in that nation*, any legal (and moral) obligation owed to the mere human subject dissolves[22]. Accordingly, the denationalized loses her capacity not only to file claims against her state, but also to accuse the state of failing to protect the rights which we imagine all persons, *prima facie*, to hold: «the inextricable connections between human rights and citizenship, [suggests] that it becomes very difficult for those deprived of membership in a political community to be recognized as human beings entitled to rights»[23].

[18] Ivi, p. 305.
[19] We might here refer to sexual violence, sex trafficking, or criminal child labor laws.
[20] See footnote 11.
[21] G. Agamben, *Beyond Human Rights*, in «Social Engineering», XV, 2008, pp. 90–95, at p. 91.
[22] We may also here consider Michel Foucault's analysis of «biopower», or the state's demotion of its populace to the status of mere bodies, as articulated in the *Society Must Be Defended* lecture series (2003).
[23] A. Gündo ̈du, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants,* Oxford University Press, Oxford 2015, p. 26.

Arendt acknowledges and discusses the phenomenon of denaturalization in *The Origins of Totalitarianism*, but writes, as well, of the legal paradoxes embedded in the international community's handling of the post-WWII refugee crisis, during which time the Minority Treaties were drafted in order to organize and control the mass influx of stateless peoples on the continent. The Treaties, Arendt notes, only became a priority for international bodies because of «the trend of international negotiations simply to ignore the existence of refugees» altogether[24]. Writing as a resident alien in America several years later, Arendt recognized that

> only nationals could be citizens, *only people of the same national origin could enjoy the full protection of legal institutions*, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin... [but] [the European powers] were neither willing nor able to overthrow the laws by which nation-states exist.[25]

Arendt is, technically speaking, here referring more to resident aliens than refugees proper, but the question of vulnerability is shared across both categories: only those individuals who are recognized as *legal subjects* are protected by the state, and the state has a duty only to the legal subjects it recognizes. Because the legal subjects under the jurisdiction of the state are classified as either nationals or citizens, any individual who does not fit either category becomes, at most, a merely-human subject.

Agamben has more recently taken up Arendt's examination of the refugee as a figure he refers to as *homo sacer* – or the «sacred» man stripped of all legal rights and protections – presented simply as «bare life». Following Arendt's description, Agamben declares that

> [t]he concept of the refugee (and the figure of life that this concept represents [i.e. bare life]) must be resolutely separated from the concept of the rights of man, and we must seriously consider Arendt's claim that the fates of human rights and the nation-state are bound together such that the decline and crisis of the one necessarily implies the end of the other. The refugee must be considered for what he is: nothing less than a limit concept that radically calls into question the fundamental categories of the nation-state, from the birth-nation to the man-citizen link, and that thereby makes it possible to clear the way for a long-overdue renewal of categories in the service of politics in which bare life is no longer separated and excepted, either in the state order or in the figure of human rights.[26]

[24] H. Arendt, *The Disenfranchised and Disgraced*, in *The Jewish Writings*, eds. J. Kohn and R. H. Feldman, Schocken Books, New Yoirk 2007 [1944], p. 234.
[25] H. Arendt, *The Origins of Totalitarianism*, Harcourt Brace Jovanovich, Orlando 1979, p. 257; p. 273, my emphasis.
[26] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen, Stanford University Press, Stanford 1998, p. 134.

Although the Refugee Convention defines a refugee as a victim of political persecution, Arendt's and Agamben's analyses illuminate the originary producer of the refugee *qua* political category: the contemporary nation-state system itself, which has monopolized the power to ontologize persons as either legal subjects or merely-human subjects. Indeed, it is only within this system that one's citizenship status carries more ethico-legal weight than one's status as a human being; even the concept of welfare rights – of *human* rights – itself loses meaning, its pretense revealed «to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to citizens of a state»[27].

## 3. *The Paradox of Humanitarianism*

Humanitarianism and its derivatives – such prison reform movements, NGOs, humanitarian aid organizations, and military humanitarian intervention (or «humanitarian war») – have always been, ostensibly, connected to the belief that human rights are universal to all persons, regardless of any and all differences that may exist among them *qua* individuals. What is particularly striking about humanitarianism on an international scale is its force in driving legal bodies and political procedures to better the social, economic, and political conditions of oppressed peoples[28]. It is largely due to humanitarian concerns, for example, that such events as the Nuremberg trials, ad hoc military and international tribunals for the persecution of war criminals, and the 1990–1993 negotiations to end apartheid became legal issues to be addressed by means of due process. Appeals to fundamental human rights, as such, developed as the positive counterpoint to the ethical catastrophes and militarized racism of the 20th century. Three years before the ratification of the Refugee Convention,

[27] Ivi, p. 126.

[28] Though it will not be addressed here, I do want to acknowledge the implicit imposition of a particular understanding of "humanity" that, subsequently, can alter our political and ethical interpretations of *liberation* movements. Robert Meister addresses this phenomenon in *After Evil* (2011), in which he notes that «today's human rights establishment speaks with increasing hostility toward social movements that might once have been described as enemies of the new Human Rights Discourse insofar as they engage in acts of 'terror' or hesitate to condemn such acts elsewhere» (R. Meister, *After Evil: A Politics of Human Rights*, Columbia University Press, New York 2011, p. 21). We should further recognize that in many cases, and especially in the past several decades, humanitarian relief workers have taken advantage of the vulnerability of refugees – particularly refugee women – through sexual exploitation: «Governments and aid agencies are failing to provide even basic protections to women refugees traveling from Syria and Iraq... women and girl refugees face violence, assault, exploitation and sexual harassment at every stage of their journey, including on European soil» (J. Weiss, *Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe*, «Amnesty International», 2016, https://www.amnesty.org/en/latest/news/2016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe/). Although the analysis offered in this paper is primarily conceptual in nature, it is imperative that we recognize these material realities and resist indulgence in mere idealizations and abstractions for the sake of theoretical simplicity.

the UN General Assembly in 1948 drafted the *Universal Declaration of Human Rights*, a concrete articulation of those rights to which all human beings are decreed to be entitled. Much like the Refugee Convention, the UDHR emerged from the ashes of the two World Wars and the European collective memory of a genocide from which it was still in shock.

Although international and humanitarian aid organizations alone have not (thus far) managed to concretize human rights as *legal* rights, they have certainly established legal and ethical norms that sovereign bodies are now expected to uphold. The problem lies, once again, with the legal enforcement thereof. The irony of humanitarian aid mirrors the paradox of human rights: both operate conditionally, insofar as they are founded on the extralegality of what it means to be entitled to the rights of the *human*. In other words, they recognize that the establishment of the nation-state system has generated an antinomy between the ethical and political that, in practice, is increasingly incommensurable.

The modern nation-state system, largely a product of the dissolution of global empires at the onset of the World Wars, is «based upon tension and at times outright contradiction», Benhabib notes, «between human rights and the principle of national sovereignty»[29]. Due primarily to the drawing of state borders and consequent demarcation of nations, the primacy of citizenship over other manifestations of group membership has become both the measure and the limit of the law. As such, the boundaries of legal rights, so to speak, are no more than the boundaries of the nation-state. Therebeyond, one's entitlement to legal rights loses its guarantee, and within this «beyond», the only protection one is granted as a mere human is the protection offered by humanitarian efforts. More simply, human rights are recognized only by the humanitarian, and the conceptual reality of «human rights» emerges as, contradictorily, a privilege: *humanity itself* becomes an object of law to be conferred or removed at the discretion of the sovereign. Especially paradoxical is that the mark of political and ethical progress of nation-states in an increasingly liberal international imaginary is «their subscription to common values and principles, *such as the observance of human rights and the rule of law* and respect for democratic self-determination»[30].

It is through her lack of nationality – her lack of citizenship – that the refugee is disbarred from human rights, legally speaking. Whatever protection she receives is offered through a sense of moral responsibility, which, owing to its contingency upon external actors, leaves her deeply vulnerable to violence both direct and indirect[31]. As we have seen, however, it is violence that can never demand legal attention; it is violence that is never legally interpreted as a *wrong*. The ethico-political repercussions are, as history has shown us, catastrophic:

[29] S. Benhabib, *The Rights of Others*, cit., p. 61.
[30] Ivi, p. 41, my emphasis.
[31] I refer here to the negligence of protection or assistance of the oppressed – when such protection is requested – as an indirect violence.

once a person is no longer capable of being wronged, an essential component of her humanity has also been denied[32]. She becomes, in other words, a human who no longer has a claim to human rights. Her death, too, loses the respect and grief owed to the human, loses its significance, and gains the fungibility of the disposable. It was only after they were denationalized, after all, that the Jews were, not killed, but «*exterminated* … in a mad and giant holocaust»[33].

The fungibility of today's refugee is apparent in the way she is talked about: at most, as a member of a homogenized collective, or, more often, as a number. In the eyes of nation-states, refugees are accounted for not normatively, but statistically: they are classified in numbers and charts that demarcate by geographic location; in terms of their economic burden as non-tax-payers; in quantities of victims drowned in the Mediterranean Sea. That nationality is such an integral facet of identity constitution delegates the refugee, effectively, as a figure who no longer has an *identity* that is recognized. Without this identity, the refugee further loses her capacity for self-determination and, consequently, stands outside of the «democratic»: democratic values of equality, fairness, and respect are no longer owed to her, nor can she claim them by right. Simultaneously, however, the refugee – this figure of unbelonging – is integral to the identity constitution of democratic society and democracy more generally. There cannot exist democratic citizens and states, after all, unless there are non-democratic persons against whom the ideals of democracy are measured. As such, the existence of the refugee is, we might say, *necessary* for the survival of the nation-state system: the existence of one ensures the existence of the other, and the erasure of one contains within it the obliteration of the other:

> If the refugee represents such a disquieting element in the order of the nation-state, this is so primarily because, by breaking the identity between the human and the citizen and that between nativity and nationality, it brings the originary fiction of sovereignty to crisis... [she] [is] nothing less than a limit-concept that at once brings a radical crisis to the principles of the nation-state and clears the way for a renewal of categories that can no longer be delayed.[34]

It is not just the fiction of sovereignty, however, but the illusions of law itself that has emerged as the problem of the refugee continues without foreseeable resolution. If the refugee is not a legal subject, how can we charge state actors with criminal negligence? Indeed, if refugees stand external to the sphere of law, how are we to truly address supposed «crimes against humanity»? If the

[32] For example, we never utilize the term 'wrong', in a legal sense, for non-human subjects such as animals or environmental bodies.
[33] G. Agamben, *Homo Sacer*, cit. p. 114, my emphasis.
[34] G. Agamben, *Beyond Human Rights*, cit., p. 93; p. 95. It should be noted that Agamben utilizes the masculine pronoun in all discussions of both homo sacer and the refugee; I utilize the female pronoun here to draw attention to the significant population of refugee *women* whose experiences and subjectivities are largely erased in totalizing theories of the 'refugee' as an ontological category.

humanity of the refugee is no longer legally recognized, crimes against humanity become, at most, moral tragedies. It is time now, more than ever, that we acknowledge these questions – these ethical antinomies and legal antagonisms – and confront them without pretense or denial.

## 4. *Rights of Autonomy, Claims to Recognition*

To conclude this analysis, I turn briefly to Jennifer Nedelsky's conception of autonomy, which I believe to be conceptually consistent with our examination of the refugee and which may also create new platforms from which scholars address these ethico-legal discussions in novel ways. In *Law's Relations*, Nedelsky outlines a quasi-Hegelian theory of *relational* autonomy to highlight the interdependence of the individual on her peers – family, friends, colleagues, employers, strangers – as constitutive of her autonomous self. Our social worlds, she argues, shape who we take ourselves to be and, crucially, how we consider ourselves in relation to others. This sense of self is not unidirectional, however; there is an element of reciprocity in our self-constitution such that who we are is shaped by *how others relate to us*. Because the legal system (which for Nedelsky is exemplified by the U.S. system) does not principally view the individual as *relational*, however, there exists a space for power asymmetries and «permissible» harm: «the intrinsic harm to others is important», she writes, «because in many cases our societies permit harm to 'others,' whom members of the dominant group have no potential of becoming»[35]. Indeed, rights themselves are relation-structuring, constituting not only legal but also social and economic institutions that subsequently contour the limits of our relational capacities, and these limits are variable among different groups of individuals (women, queer and trans individuals, minorities, etc.). Nedelsky's analysis is motivated largely by feminist relational theory and accordingly focuses primarily on gender constitution within the North American legal system, though she holds that her theory is broadly applicable to other contexts.

Nedelsky follows other feminist and egalitarian liberals in her prioritization of individual autonomy as central to an individual's flourishing in a given society. Although autonomy is relational – insofar as «we are dependent on others for the social world that enables us to develop all of our core capacities»[36] – it is certainly not entirely *determined* by relations; rather, Nedelsky aims to offer an alternative to the highly individualistic notion of autonomy – exemplified by the «rational individual» dominant in liberal political discourse – principally to open a space for discussions of power asymmetries that effect certain individuals' capacities to fully develop or express their autonomy. Framing this space in a politico-legal

[35] J. Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, Oxford University Press, Oxford 2011, p. 26.
[36] Ivi, p. 18.

context allows us to more clearly examine «how the way one assumes, sees, uses, or challenges conceptual and institutional frameworks depends in part on *one's location within these power structures*»[37].

Beyond mere relationality, however, part of what constitutes one's autonomy is one's capacity to *interact* with others in constructive and creative ways: «the processes by which we make something our own are always enabled by the relations of which we are a part»[38]. Because our relations govern the scope of our space of autonomy, it is integral that others – or, those in the social world which constitutes the «relations of which we are a part» – *recognize* us as autonomous. Our interactions must be reciprocal in nature, in other words, if they are to be meaningful indications of the scope of our own autonomy. This is not only necessary in purely sociopolitical terms, but also legal terms, particularly in such pertinent cases as women's access to abortion. The rights and liberties we have and the space we are allotted in which to express these rights and liberties are, thus, dependent not only on our status as autonomous subjects, but the *degrees* to which this autonomy is recognized[39]. In all manifestations, nevertheless, autonomy itself becomes an essential condition for being a rights-bearing subject and, consequently, an integral criterion of citizenship-constitution.

If we extend this conceptualization to the refugee, it becomes immediately apparent that she has lost any claim to autonomy that she may have, under other conditions, possessed. Neither is she recognized by others as a self-determining agent, nor does she possess the relevant legal status to make rights claims against legal and political bodies. Essentially, then, the refugee lacks all capacities to claim *recognition* as it pertains to either moral duties or legal duties. Because autonomy has become absorbed into the contemporary understanding of liberal values as a central component of liberal democracies, the lack thereof widens the gap between citizens and non-citizens. Autonomy, tied so intimately with one's status as a legal subject, has become a defining feature of identity. As a corollary, identity itself is predicated on a sense of belonging.

Beyond legal technicalities, however, autonomy is exemplified by and exemplifies nationality; it is from one's membership in a social body – of which the political is paradigm – that her autonomy is recognized as legitimate. Indeed, the perceived legitimacy of her membership is, in a way, autonomy-granting. This generates a significant normative implication, however; membership, on the state model, has come to manifest in extremes as fundamentalist nationalism aimed at reinforcing the unicity of identity among citizens. On an Habermasian account,

[37] Ivi, p. 37, my emphasis.
[38] Ivi, p. 49.
[39] It follows that the scope of legal *recognition* of our rights is also variable and dependent on a number of relational factors, including socioeconomic status and place of residence as well as agent-specific characteristics (as gender, race, religious affiliation, etc.). A black man in today's United States, for example, may be perceived as threatening or as a potential criminal deserving of physical reprisal for exercising his right to carry a firearm, in a way that a white man in a similar context may not be.

we can conceptualize this pathology as a type of *ethno-nationalism* borne out of the existential fear of loss of autonomy: it is the «we-consciousness», which is «founded on an imagined blood relation or on cultural identity of people who share a belief in a common origin, [and] identify one another as 'members' of the same community»[40]. If membership is denied, so too is autonomy. Given that the contemporary refugee crisis is largely engendered by the confrontation between the *non-European* refugee and the European citizen, assumptions of the refugee as illiberal, dangerous, and disruptive have space to flourish; within the context of the European Migration Crisis, the refugee becomes, more simply, the «other» that doesn't belong[41].

I propose that discourses on solutions to «the problem of the refugee» take one of two forms. The first, in keeping with Nedelsky's support of autonomy, requires the construction of a formal, international legal body to which all nation-states are accountable. The capacities of the United Nations, limited as they are to the drafting of statutes and treaties, are unequipped to enforce the recognition of such doctrines as the UDHR, relying instead on the «good faith» of its signatories. The contingency of legal humanity recognition, however, becomes particularly divisive when ethno-nationalist considerations are prioritized. The only manner of overcoming these biases – which are the natural byproduct of the current state-centric system – is through the formal recognition of the autonomy of all persons by a legal institution that transcends the capacities and jurisdiction of the nation-state. International law, in other words, «ultimately requires a connection between the legal subject and the (human) subject»[42], and the broadening of autonomy recognition is perhaps the solution to «freeing people from social subordination and domination»[43]. Put otherwise, only an international regime that «decouples the right to have rights from one's nationality status» is one that can reestablish the primacy of the *human*.

The second possibility is the dissolution of borders – and, thus, the nation-state system itself – in order to eradicate the material conditions that make possible the production of the «refugee». The idea of the inevitable ruination of the nation-state is one that, since the latter half of the 20th century, has been taken up by neo-Marxists and poststructuralists who view the inherent contradiction between legal and human rights as fundamentally inextricable. On Agamben's

[40] J. Habermas, *The Inclusion of the Other*, The MIT Press, Cambridge 1998, p. 130.
[41] Charles Mills, in his analysis of the «racial contract» and ethno-nationalist identity, goes so far as to declare that «[t]he Jewish Holocaust is by no means a bolt from the blue, an unfathomable anomaly in the development of the West, but unique only in that it represents the use of the Racial Contract against *Europeans*» (C. Mills, *The Racial Contract*, Cornell University Press, Ithaca 1997, p. 103). Indeed, on Mills' account, «the racial mass murder of Europeans is placed on a different moral plan than the racial mass murder of non-Europeans» (Ivi, p. 104).
[42] J. E. Nijman, *Paul Riceour and International Law: Beyond 'The End of the Subject'. Towards a Relational Theory of Legal Personality*, in «Leiden Journal of International Law», XX, 2007, pp. 25–64, at p. 27.
[43] M. Friedman, *Relational Autonomy and Individuality*, in «University of Toronto Law Journal», LXIII, 2013, pp. 327–41, at p. 331.

account, for example, it is only when «the spaces of states have been thus perforated and topologically deformed» that all peoples can «recognize the refugee that he or she is» and the «political survival of humankind today thinkable»[44]. Through the annihilation of borders and the realization of the Arendtian «decline of the nation-state», citizenship, already arbitrary in its assemblage, becomes an archaic delineation of identity, and with it the criteria for the classification of the «legal subject» altogether. In other words, we must move toward a cosmopolitan world in which all peoples are stateless and we are recognized as the *human* subjects we fundamentally are.

In both cases outlined above, it is clear that the final aim is the elimination of the category of the «refugee» altogether. Put simply, the ambiguities and insufficiencies of international law cannot be overcome unless the conditions of their insufficiencies are removed. As long as we hold on to such a destructive concept in any of its manifestations, sovereign entities will continue to have the capacity to advance discourses of otherness and self-preservation as a means of classifying and dominating individuals. Ultimately, it is only through the destruction of the «refugee» herself that the paradox of legal and human rights can be overcome and the humanity of all persons can fully be recognized. It is towards this global order, I hold, that philosophical and legal theories must orient themselves such that the refugee crises of today, too, can become a thing of the past.

[44] G. Agamben, *Beyond Human Rights*, cit. p. 95.