Refugees Itamar Mann

1. Introduction

This definition is meant to intervene in the globalized conversation on the nature of the nation state. Whether in political theory, the social sciences, or law, this conversation has already internalized processes which, during the 20th century, have turned the Earth into one political unit.[1] Numerous commentators have repeatedly declared the death of the nation state. This political formation, a relatively new one, the advent of which can be traced to the 19th century, has ostensibly been replaced by global mechanisms of governance and force. Whether characterized by global financial or labor markets, intergovernmental organizations such as the EU, or activities of NGOs, such mechanisms fundamentally transform basic political categories such as citizenship. This essay aims to intervene in this familiar conversation with an attempt to answer the question: "who are refugees?" I will argue that in order to understand the word *refugees* and explain how contemporary states work, it is necessary to understand how refugees have been defined in international law. Particularly salient are the ways these definitions have conditioned the relations of states to refugees. The State of Israel, which I will discuss toward the end, will not merely provide an example in this context. Rather, I will try to define refugees through a specifically local consideration of the refugees whose plights are irrevocably bound to this geographic space (but not necessarily to its *territory*, which is a category of the state.)

Hannah Arendt famously positioned the relations of states to refugees as a central question in the theory of the nation-state. Arendt's discussion appears mainly in her ***Origins of Totalitarianism***, in a chapter she dedicates to the predicaments of refugees in Europe in the interwar period.[2] Her critical analysis of the nation-state is intertwined with a critique of "The Rights of Man." My own attempt to follow Arendt will also juxtapose a theoretical critique of the nation-state with a jurisprudential critique of the concept of rights.

From this perspective, the distance between the present account and Arendt's analysis can also be described. When Arendt wrote her book, the role of legal institutions governing "the refugee problem" was marginal enough for her to nearly ignore it. However, since then the attitude towards refugees has shifted considerably, largely reoriented by the post-war institutions of international law. Instead of analyzing the relatively abstract concept of *rights*, it therefore makes sense to discuss what is now called *refugee law* in some more detail. Arendt thought of Israel as an attempt to create a state of refugees, which merely perpetuated "the refugee problem" with another wave of refugees.[3] In this respect too, I will try to update her discussion from a standpoint that is quite literally situated within this failed attempt.

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For these reasons this definition is based on a range of texts from the humanities, law and the social sciences. First, it will perhaps be possible to contribute to the understanding of "who are refugees" through a short genealogy of the concept during the 20ᵗʰ century and the beginning of the 21ˢᵗ. In the late 19ᵗʰ century the refugee was imagined as the bearer of individual agency. If perceived as a friend, he was typically imagined as an opponent of an illegitimate regime. If perceived as an enemy, he was typically thought of as the perpetrator of a politically motivated crime.[4] However, with the development of European emergencies in the early 20ᵗʰ century, and particularly with WWI, refugees came to be understood in the multiple: they were thought of as small organs in a human mass or swarm. *The contemporary refugee regime*, based on the 1951 Refugee Convention, brought about a new individuation of the refugee. This is a new kind of individual divested of agency, a product of a regime Giorgio Agamben characterized as a *politics of death* (*thanato-politics*).[5] Towards the end of the 20ᵗʰ century, and particularly since the 9/11 attack on the World Trade Center, we have witnessed a third shift in the relations of states to refugees. This shift activates a political imagination that represents the movement of refugees as *infiltration*, which is comparable with certain aspects of the earlier imagination of the swarm. Unlike the swarm, which simply flooded states with an uncontrolled tide, here refugees are understood as a continuous permeation into the state, leaking through illegal cracks. Today, states in the Global North no longer perceive refugees as pests that should be reduced to a level that does not threaten them, but oftentimes as terrorists employed by irrational forces, threatening to wreak boundless havoc. As one witness argued in the imagined tribunal staged at the center of Abdelrakhmane Sissako's *Bamako*, "the two greatest fears the West has brought upon itself are terrorism and migration."[6] As she insinuates, these two fears are today more connected than ever.

First, this essay will describe *legal iterations* that constituted, in the interwar period, the category of refugees through a legal form of knowledge, which will be characterized as a regularized state of emergency. Then, it will offer an alternative understanding of the concept of refugees. This understanding will be based upon a brief phenomenological account of the moral obligation citizens owe to refugees. Beyond law and politics, this moral obligation, the limits of which are as of yet unclear, will hopefully open a space for refugees and citizens to rethink and retell the meaning of displacement *together*. This meaning will be suggested as a shared critique of the state, and of the ways in which it differentiates between refugees and citizens, through a certain history of differentiations between them.[7]

2. How Do We Say "We?"

To contrast a colloquial definition of *refugees* with the legal term of art assumes that there are gaps between the ways states define something or someone using law, and the definitions that we use for our own needs. Such gaps can sometimes teach us important lessons on the nature of political life.[8] Considering that the capability to christen phenomena with a

name may indeed be a capability to exert force, law is a mechanism of force *par-excellence*: through law states engage in naming all the time, *literally* exerting force for needs which, in the liberal mind, are understood as self-conscious and transparent. The definitions built into many statutes are used primarily for technical purposes. However, liberal political theory assumes that at least in some cases, the political purposes that a statute realizes are embodied in it and in the way it defines a word. Such definitions create legal statuses that affect the management of bureaucracies and grant them normative legitimacy. Such legitimacy is then supposed to justify the way the state distributes wealth and potentials, as well as limitations, injuries and danger.[9]

Definitions cast in the "black letter" of law give rise to new discourses on what is long familiar to us from our daily lives. Sometimes they displace existing modes of communication. At other times they foster the emergence of wholly new objects for discussion. In such cases, the legal definition presumably reflects a popular political aspiration. Therefore, the sense that the legal definition attempts to stabilize "overflows" technical legalistic use. The law defines words for the needs of legal practice, but such definitions influence what happens on street corners, at home, in the workplace. Definitions are at the heart of law. Legal texts specify them, but intricate textures constantly connect them to the words of other legislation, to administrative routines, and to the laboring hands of state officials stamping letters or sealing them at the customs. Such webs extend beyond government offices and are attached, at least partially, to our bodies. They regulate behavior, while fashioning ways to know the world and talk about it.

Liberal democracy assumes that citizens-interlocutors have real capacities to influence the purpose and content of law. Among other things, they may shape the ways in which the rights to such influence will be endowed to members of their communities, or revoked from them. Jürgen Habermas expresses this assumption when he writes that "Today legal norms are what is left from a crumbled cement of society; if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces. Law stands as a substitute for the failures of other integrative mechanisms – markets and administrations, or values, norms, and face-to-face communications."[10] Articulating the liberal ideology imbued in this picture of living with law and against it also allows us to contrast it with at least two other important philosophical accounts of political life. Unlike Habermas's picture of a common space of communication, these accounts reveal a radical gap and indeed a disjuncture, between the functions of law and colloquial modes of expression and iteration.

One such account is epitomized by Carl Schmitt's understanding of politics.[11] One might illustrate Schmitt's point in the context of Israeli law by considering the words *Enemy* and *Jewish*, both of which have formal legal definitions. Assuming that the Israeli regime is governed by these definitions, ostensibly authored in the public sphere, ignores ad-hoc declarations of who are "us," and who are "them." But political power often makes the latter, without necessarily regarding the legislature. In his book ***Being Singular Plural***, Jean-Luc

Nancy suggests yet another account of how iterations produce political associations.[12] According to Nancy, *Being-With* is the basic category of political existence. As such, it has priority over any kind of subjectivity, whether of the individual, the state, or any other legal or linguistic entity. Every time we talk in the first person plural, our iteration is a speech-act reconstituting *Being-With*; there is no transcendent sovereign regulating such iterations, and there is definitely no monopoly on the ways such associations are formed into a certain regime, or on the ways we talk in the first or third person plural. From Nancy's perspective, even the ways in which the law defines inclusion or exclusion, allies and adversaries, are merely formal abstractions, and do not necessarily have any bearing on the constitution of political communities.[13]

Thus, in measuring the gaps between colloquial language and the language of law, we find ourselves facing three options. In the liberal mind, tentatively referred to here through the example of Habermas, political association and membership are regulated by law and defined in law. The purposes of law are not opaque to members of the political community. This transparency turns legal definitions, in various ways, into speech-acts constituting political life above and beyond the formal functions of law, but always in relation to them. For Schmitt, such a description can only be secondary: sovereignty and membership develop in an autonomous political sphere, in which the declarations of the sovereign erect a larger-than-life distinction between "us" and "them." Nancy, on the other hand, believes such characterizations are inaccurate, because today there is no actual mediation between the laws of states and politics, here and now: within a thick web of multiple associations, some of which are contradictory, interlocked and global.

Schmitt and Nancy therefore provide analytical instruments for a critique of the liberal understanding of the state. Using these instruments, it is possible to take a closer look at other definitions, which in the liberal mind govern relations between "citizens" and "foreigners"; between those who are included as members of a social contract, and those who, according to a certain accepted story, are not members, and therefore are not granted state protection. The definition I would like to call attention to is the definition of the refugee.

At first blush, the refugee is a kind of intermediate category between "us" and "them." No immediate classification as a friend or enemy is available. As a liminal category, the refugee is particularly important for understanding the ways in which liberal democracies structure inclusion and exclusion, as well as the moral sensibilities they have or claim to have. The refugee is perceived as foreign and is not a member of the group of interlocutors who constitute the state through life in the public sphere. And yet, there are diverse and changing forms of responsibility towards refugees.

This essay suggests a brief historical study of the development of the definition of "the refugee" as a perspective from which the liberal worldview, and the role of the state within it, can both be reexamined. The contemporary refugee regime will reflect how we are indeed "beyond the liberal horizon" in a rather sad way: the liberal worldview does not

correspond to existing international law, which is nevertheless often praised by liberal commentators as a model of participation and a universalized citizenship. Rather, the way that Schmitt conceptualizes the suspension of law in states of emergency, and the way that Giorgio Agamben (following Walter Benjamin) describes the ways in which emergencies have been regularized, better capture the *emergency iterations* that define who receives the protections of a "refugee."

Perhaps this brief survey of the legal definition of the refugee will allow us to take a better look at how refugees appeared as a phenomenon in political life: what does it mean to point to people and say that "they are refugees"? The question, as Nancy may have put it, is: how do we say "refugees"? This, of course, is not in order to ascertain a primordial moment of original creation. As anthropologist Liisa Malkki stresses "There is no 'proto-refugee' of which the modern refugee is a direct descendant, any more than there is a proto-nation of which the contemporary nation form is a logical, inevitable outgrowth."[14] As she argues, instead of constructing false continuities, we might do better to locate historical moments of reconfiguration; moments in which "refugees" were defined and then redefined once again.

The Making of a Modern "Refugee Problem"

The point of departure, which Arendt identifies in her **Origins of Totalitarianism**, is the Bolshevik revolution and WWI. The tides of refugees after WWI were triggered primarily by the disintegration of two empires after the war: the Ottoman Empire and the Austro-Hungarian Empire. Millions left their homes and began to move all over Europe. Among the displaced were many Russians, who fled during the 1917 revolution, or who were forced to leave their homes during the war. In addition to them, there were Poles, Germans, Armenians, Greeks, Turks and Hungarians – more than a million of each.[15] Following this period, a new and radically different world order was constituted: since the 1880s, European states had not limited immigration. Now, the meaning of citizenship changed, tying people to particular territories.[16]

Arendt writes this history of refugees using both the labels "refugees" and "stateless people", two terms that for her are interchangeable. The legal history of the definition of the refugee can be told as the history of the appearance of this overlap - and its cancelation.[17] For Arendt, the refugees or the stateless are those who, following political events, have been divested of the protection of the law and have remained excluded from it; those who have been denaturalized and have therefore lost their rights as citizens, remaining protected by "The Rights of Man" alone. As the fate of refugees was massively abandoned and disregarded, these rights proved worthless. Ironically, she emphasizes, just when the ideal of self-determination, originating from the French Revolution, had reached its climax with revolutions all over the continent, many were forced to leave their homes and flee to other countries. The constitution of new states also signified the birth of a new kind of

state, a state that preferred to sacrifice parts of its population in order to be established.

Arendt explains that receiving states during this period found themselves in a double bind. Not only was it impossible to repatriate refugees; often they did not even have the will to naturalize in their new states of residence.[18] The difficulty in repatriation did not necessarily stem from a fear they would be harmed, but rather from the ways their home countries stubbornly rejected them. Often, they belonged to unwanted populations: members of ethnic and religious minorities, who were driven out for political reasons. Arendt describes in this context how police agencies in receiving countries were "forced" to smuggle refugees back across the border by night. Thus, policing was transformed into a kind of criminality.[19] Another typical "solution," was lengthy detention or incarceration for crimes of illegal entry, which mushroomed on the pages of criminal codes. Arrests and incarceration also strengthened the autonomy of police: on the eve of WWII there was tight cooperation between security agencies of diplomatically hostile countries, solely for the purpose of coping with refugees crossing the border. Hence, for example, under Leon Bloom's anti-Nazi regime, the police forces of Germany and France enjoyed unprecedented cooperation, which enabled the French police to deal with the refugee flow caused by the Nazi rise to power.[20] With the rise in the number of refugees, Arendt explains, the police became more and more involved in illegal activities, which now constituted a new form of law:

> This was the first time the police in Western Europe had received authority to act on its own, to rule directly over people; in one sphere of public life it was no longer an instrument to carry out and enforce the law, but had become a ruling authority, independent of government and ministries. Its strength and its emancipation from law and government grew in direct proportion to the influx of refugees. The greater the ratio of statelessness to the population at large – in prewar France it had reached 10 per cent of the total – the greater the danger of a gradual transformation into a police state.[21]

Although various actors announced that the influx of refugees had created a new *nation of refugees*, a nation of stateless people scattered all over Europe,[22] many refugees not only rejected naturalization; apparently, they did not even express an interest to unite with each other, let alone push for common political interests. They preferred to stay with their fellow expatriates.[23] Thus, the continent was full of small national groups, whose identities did not correspond with any existing government.

Paul Weis, legal consultant for the United Nations High Commissioner for Refugees (the UNHCR, later to be established as the UN refugee agency that became part of the contemporary refugee regime), compared the European refugee to a flagless mast on a ship travelling the open seas.[24] This image, presumably meant to invoke a well-known dilemma in international law, indeed illuminates the legal dilemma refugees presented. At the same time, however, the image purges it of any sign of the harsh realities in which refugees actually lived. In fact, nowhere did refugees appear in such shining solitude. Their

suffering always appeared in groups. Responding to this crisis, Arendt thought of the interwar period as an indicator of the death of the right to asylum, and with it - the ideal of rights at large. This is how she describes the decision made during this period between two analytically possible models of the state - until then two potential expressions of the same political formation:

> […] the transformation of the state from an instrument of the law into an instrument of the nation had been completed; the nation had conquered the state, national interest had priority over law long before Hitler could pronounce 'right is what is good for the German people.'[25]

What Arendt and others describe amounts to a refugee emergency which developed in Europe from WWI and endured till the end of the first half of the century. Journalist Arthur Ruhl depicted the refugees from Belgium as a procession that included humans alongside animals, all of which were in need of food.[26] Similar and even more striking images arise when describing refugees in Eastern Europe, which he portrayed as a cloud or swarm of locusts, consuming produce and vegetation alike, leaving behind a trail of barren land.[27] These images of a procession or a swarm reappear when refugees are described as the recipients of assistance (in The Netherlands), as well as in reports of abandoned corpses (in Russia). This political imagination of a swarm of humans is fundamental in understanding the birth of the new legal refugee regime, out of a state of emergency.

Arendt thinks of refugees as a category that exposed a lawless lacuna at the heart of the nation state: the revolutions and the conflicts in Europe during WWI and following it had created a lawless human mass. However, the transformation of the refugee problem into a distinctly *legal* one started as early as the 1920s. This occurred in several institutions, most of which were organs of the League of Nations or satellite organizations. The first of these was the High Commissioner of Refugees, established as part of the League of Nations. The High Commissioner was not regulated by rules that could in principle be applied universally, on an individual and equal basis. The League's mandate was, rather, applied discriminately to certain groups – ostensibly according to the intensity of the catastrophe they had suffered. In 1926, stateless Russians and Armenians were for the first time legally defined as refugees. However, this definition still reflects Arendt's intuition, according to which refugees and stateless people belong to the same category - and require only that the specified group not enjoy the protection of a state:

> Russian Refugee: Any person of Russian origin who does not enjoy the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired any other nationality.
>
> Armenian Refugee: Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy the protection of the Government of the Turkish Republic and who has not acquired any other nationality.[28]

During the 1920s, 1930s, and 1940s, definitions structured in the same way were reapplied

when people fled from different regions, including from the Nazi regime in Germany.[29] Refugee status was determined for large groups collectively, without any reference to the individual asylum seeker. Hence, a unique synthesis emerged between factual iterations, according to which a certain group suffered a calamity, the intensity of which justified recognizing it as a group of refugees, and legal iterations, which were the definitions. This was true even if the definitions operated circularly, as they manifestly referenced the group they were meant to assist, without any sort of grounding in a "higher" norm.

Existing literature explains the birth of a transnational bureaucracy dealing with refugee issues in various ways. Most commentators tell us of a catastrophe that "necessitated" intervention that would nonetheless acknowledge state interests. The rhetoric here is typically one of balancing state interests and "humanitarian" concerns.[30] Nevzat Soguk, on the other hand, argues that the states of the League of Nations established the Commissioner as part of the invention of the new refugee category. This was an element of a system that was designed to assure the division of Europe into nation-states with fixed populations post WWI.[31] This was not yet taken for granted and was anything but a natural development. In the present context, however, the truly relevant issue is the connection between this legal-bureaucratic regulation and the conceptualization of the refugee problem as *a problem of a swarm*.

A fundamental shift regarding the question "who is a refugee" started in 1938, when for the first time refugees came to be legally understood as *individual* asylum seekers. Here we witness the birth of a new kind of individual. The first document capturing this change established the Intergovernmental Committee on Refugees, and dates back to 1938. The intergovernmental committee limited the possibilities of obtaining assistance for asylum seekers leaving Germany because of persecution for *political opinion, religious belief, or race*. These reasons corresponded, to an important degree, to the reasons for leaving Germany as a result of state persecution, that is, persecution by the Nazis. This document, therefore, signifies the construction of "refugees" in a category separate from the "stateless".

The establishment of the UN was a platform for the establishment of another international body for refugee management, the International Refugee Organization (IRO). Above and beyond the protection of stateless people who lacked the protection of their own states, the protection of political opposition solidified here as the ideology of the refugee regime. In the UN rhetoric of the time, this protection came to be perceived as an essential function of the UN and as a fundamental right.[32]

A survey of international events from the 1920s until the end of WWII shows that during this period a rich toolbox of inter-governmental measures coping with the European refugee problem was created. It is important however to emphasize, as Arendt does, that outside the conference rooms, these intergovernmental measures did not really function: reality more closely resembled the chaos and abandonment of life that she describes.[33] The travel documents and the social assistance that were to be provided by international bodies rarely reached their destinations. The gap between refugees *de-facto* and refugees *de-jure* remained great, and grew larger during WWII.

As Malkki acknowledges in an essay on the disciplinary history of "refugee studies", the primary form of knowledge during WWII and immediately after it, in which the category of the refugee was constituted, was not law. What came to the fore in this period was rather military knowledge.[34] The question that was often asked was how to harness refugee flows towards military objectives. Furthermore, this period was characterized by a rather ambiguous division of labor between military and civilian authorities. Thus, it was not always easy or indeed possible to decide if governments authorized military powers, or militaries authorized governments.

The refugee camp developed under military administration, and with it appeared mechanisms of medical assistance, policing, and at times education, for refugees. Particularly in the last two years of WWII, military discourse on "the refugee problem" developed; concerns were expressed about what will happen after the fighting ceases. There were real concerns that a massive displaced population will present dangers of social upheaval in many places. In this context, Malkki quotes plans the allied forces prepared, illustrating the military point of view from which European refugees were regarded:

> The problem of displaced persons is likely, within a matter of days, to assume vast proportions before the ground organization for dealing with it will be fully established… Uncontrolled self-repatriation of displaced persons who might form themselves into roving bands of vengeful, pillaging looters on the way to their homes… revolutions, or the partial or complete breakdown of central or local government authority in Germany concomitant with surrender or collapse would endanger millions of Allied nationals [whose] fate will be regarded as a gauge of Allied capacity to deal effectively with major European problems.[35]

The passage Malkki cites in this context echoes once again the description of refugees above. It brings to mind the devouring swarm invading the Russian plains. When uncontrolled repatriations are at issue – the descriptions of damage are similar, and so are the descriptions of the "displaced persons who might form themselves into roving bands of vengeful pillaging looters on the way to their homes." The urgency here is clearly reflected by the need to deal with a problem which can potentially bring about serious danger "within a few days."

However, it is necessary to acknowledge a certain ambiguity in the passage. It is unclear who or what exactly is put in danger by this migration back to permanent residences. First, the passage warns of "revolutions or the partial or complete breakdown of central or local government," a call that is clearly addressed to the government; military authorities - in themselves organs of the government – warn it of its own disruption – temporary, local, or wholesale. This seemingly changes when a warning is directed at the citizens of the allied forces. However, it immediately becomes clear that the citizens' wellbeing is simply regarded as "a gauge of Allied capacity to deal effectively with major European problems." The quoted passage, starting with a concern with the preservation of central or local government, thus continues with a concern with the wellbeing of the allies. It

concludes however with a proposition that reads as constitutive of new political power, rather than as one seeking preservation of the old. This situation is defined as a kind of test for a new transnational regime, a European regime of states, which emerged victorious in the war. The image of the swarm is coupled with an iteration signifying an international state of emergency.

Agamben too emphasizes the importance of the camp in the formation of the category of the refugee. In the concluding chapter of his **Homo Sacer**, titled "The Camp as the Nomos of the Modern,"[36] he offers a very general sketch of the development of the camp. Particularly, he describes how colonial military camps, in which the martial law of emergency was regularized, later became a model for refugee residence during WWI; later, the same model was employed by the Nazis in their extermination camps.

As the title of his chapter indicates, Agamben's analysis of the camp extends far beyond the present context, describing the way the category of the refugee was constructed in military knowledge, before it could be formulated in law. The camp is presented as the paradigm of modern political existence. Thus, Agamben disqualifies the possibility of thinking the uniqueness of refugees as separate from other forms of subjugation, oppression, or exclusion from the public sphere. Contrary to Agamben, I am interested in rethinking a specific definition for refugees. As will become clear, this definition cannot overlap with legal definitions. And yet, Agamben's formulations remain relevant, primarily because of his emphasis on the coupling of the spatial structure of the camp with the juridical structure of emergency. Both the legal and the spatial structures have remained fundamental aspects of the refugee regime that developed later. These aspects are particularly noticeable nowadays, with increased incarceration that does not rely on criminal convictions.[37]

The Refugee Convention, RSD, and the Contemporary Refugee Regime

Starting from the end of the 1930s, various commentators called for a formalized international refugee regime, which would require a universal definition of the refugee. Louise Holborn, a British historian recognized as an authority on refugee issues, tended to integrate social policy recommendations in her writing. Holborn was one of the first to articulate the need for a "clearly defined status". As early as 1938,[38] she had written an essay advocating assistance for refugees in ways that would allow them temporary integration in the general population.[39] Particularly, she was concerned with job opportunities and with education. Alongside the moral reasons, she also enumerates the benefits that governments would accrue from such assistance.

On the one hand, writes Holborn, this will reduce the probability of subversive activity against the governments the refugees had fled from. On the other hand, governments hosting refugees will also gain from such a regime, particularly if "technical" support will be provided by "local offices"; these should have the authority not only to grant refugee

status but also to deny it. Furthermore, the cooperation of governments from both sides of the border may prevent conflicts between them, which refugee flows are likely to ignite, particularly if relations are tense. The admission of refugees according to an agreed, legal definition may also prevent it from being understood as political support for the opposition in a neighboring state. As Holborn puts it:

> Disorganized groups of refugees are more difficult for hospitable countries to deal with than are organized groups, even if the latter are larger in number. A clearly defined status for refugees would aid efforts to make refugee status transitory in character and would facilitate settlement. If coupled with adequate technical organization, refugees would be under more direct control than at present, and the possibility of subversive political activity against governments responsible for their exile would be greatly lessened. The political complications often connected with aiding refugees would be practically eliminated also, particularly if local offices concerned with refugees were qualified to decide which people fell within the accepted definition of "refugee".

Hence, we find a text that while trying to solve "the refugee problem" in the most benevolent way, explains how helping refugees will at the same time allow governments to tighten their control over them. This reasoning is a far cry from an alternative reasoning, which could conceivably rely on moral considerations, or on the rhetoric of "The Rights of Man." Rather than reflecting on rights, Holborn economizes the forces at work in the international arena and tries to foresee their effects: the probability refugees will rebel against their states of origin; the probability for employment difficulties, disease, or political opposition to the local or central government; the probability of diplomatic crises resulting from the decision to admit refugees; the effect refugees may have on the distribution of resources. In the mechanics she suggests, all of these forces are brought into consideration. In an optimal balance they cancel each other out in a way that results in what is considered as public safety. However, the most important characteristic of the mechanism taking shape in this text appears in the first sentence quoted above. This sentence reflects how the formalization of refugee status was supposed to operate. Even if the number of individual asylum seekers would grow, their relative weight within the population would diminish; the "weight", from the perspective of the policy maker, is not measured by simple arithmetic. It is a function of the relation between state resources invested in the management of a certain population and the number of individuals in it. As we will see below, the full implementation of such a function entails a division of the stateless population into two different groups (with a later division between "refugees" and "asylum seekers.")

Alongside these delicate mechanics, Holborn's essay is interestingly silent on the substance of the definition. From her perspective, the most important aspect of this definition is the fact that it allows government officials to determine whether a particular applicant is included or excluded from the definition. Theoretically, an arbitrary distinction between

individuals is enough; it is essential however to create separate, discrete units within a given population (thus, Holborn's distinction in the beginning of the paragraph, between "organized groups" and "disorganized groups," does not reflect the true nature of the determination, which will be applied to single individuals.)

At the time of Holborn's writing, there was no international, legal instrument for refugee management that applied to individuals. The first refugee definition that applied to the individual was the IRO definition from 1947.[40] On 14 December, 1950, The United Nations High Commissioner for Refugees (UNHCR) was established. The purpose of this new institution was initially defined as providing individual assistance to refugees based on uniform individual criteria.[41] Similar to other aid organizations for refugees, the UNHCR's mandate was initially defined as temporary - for three years. Six months later, in July 1951, the Refugee Convention was signed, and a new definition of the term "refugee" was included in it. This definition is at the core of the contemporary refugee regime. For the first time there was a formal definition, which later became globally applicable. The principle part of the definition appears in article 1(2) of the Convention, according to which the term "refugee" would apply to any person, who:

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

The most important right provided by the convention is "non-refoulement" – the right not to be returned to the state the refugee has come from. The non-refoulement provision was qualified, however: return would not be prohibited for reasons of national security or public order. As will become clear, the refugee convention had attained the double purpose of aiding refugees while controlling them. First, famine, disease, natural disasters and wars, were all not included as bases for refugee claims in the convention. Second, it was precisely the silence of the convention on issues of Refugee Status Determination which endowed the refugee definition with most of its significance. The procedure according to which it would be determined who suffers from a "well founded fear" for one of the reasons recognized in the convention was intentionally left by the framers of the Convention to the discretion of the state. This procedure is central in the contemporary refugee regime precisely because the framers refrained from regulating it. The culmination of this procedure is an interview with the refugee in which she is asked to tell her life story. If she has documents, she presents them at this point. Following this interview, an official or a team of officials determines if the refugee suffers "well founded fear" of persecution for one of the reasons enumerated in the convention. Among other things, the credibility of the refugee is measured, and the information she presents about her country is corroborated with external information.

As Hathaway, Steinbock, and others show in their respective readings of the *travaux perparatoires*, the reasons for choosing the "five bases" for refugee claims – religion, ethnicity, nation, particular social group or political opinion – were directly based on the events of the time: from the persecution of Russians and Armenians and of the opposition in Spain, and especially of Jews and other groups in Nazi Germany, to the developing politics of the Cold War – with particular view to the persecution of the opposition to the new communist regimes in Eastern Europe.[42] Steinbock explains that the categories of ethnicity, religion and nationality were all fashioned around the "archetypical" example of the persecution of Jews by the Nazis.[43] The fifth category, *political opinion*, was influenced by the Cold War. The ideology of protecting political opposition was seriously criticized by the Soviet government, which declared it a Western conspiracy designed to provide incentives for treason, and boycotted the Convention negotiations.[44] The United States, for its own part, decided to apply a presumption of persecution according to which anyone from the Soviet bloc would be considered as suffering from political persecution.[45]

The protection for *particular social groups* has for many years raised questions of interpretation in courts around the world. Through the interpretation of this clause, judges in many places were able to provide protection for gender based persecution, even though such persecution is not expressly included in the Convention. During the framing negotiations, Sweden suggested adding such gender persecution, which was left unmentioned in the first drafts of the Convention. When the Swedish representative was asked to explain the need for including a clause on gender, he simply explained that such persecution in fact exists: Sweden would not be able to sign a convention that is not "precise enough" to include it. The Swedish representative also saw to it that a clause excluding from the definition of a "refugee" anyone who left for reasons of "personal comfort," would be removed. Such a clause, explained Sweden, is indeed meant to prevent exploitation of the Refugee Convention simply for improving economic conditions. However, it is bound to cause problems, as it is difficult to measure a person's motives.[46] Notwithstanding the Swedish proposals, it is important to emphasize that there was an agreement – very much in place to this day – that economic migrants would not be considered refugees. This includes people who left their countries because of hunger, lack of medical treatment or disease, and lack of education.[47] People leaving their countries under the circumstances of war, including civil war, would not be able to enjoy the status of refugees, whether they held citizenships or not.[48]

The question of the relations between statelessness and refugee status, two categories that developed separately even before the Convention, had concerned its framers. Contrary to Britain's position, which supported adding a category of "unprotected persons", it was decided not to provide protections to people who did not fit into one of the five bases enumerated in article 1 of the Convention. At the same time, The Soviet Union expressed a particular interest in protecting the stateless.[49] During their meetings, the framers expressly considered the relations between the two categories and consciously decided to separate them.[50]

Like Holborn, Paul Weiss, a legal consultant to the UNHCR writing 20 years later, uses language that combines protections for refugees with their control. In a paragraph summarizing what the Convention aimed to do to the international refugee regime, he emphasizes the need to provide far more "detailed" regulation of refugees:

> The Convention relating to the Status of Refugees, adopted in Geneva on July 28, 1951, by the United Nations Conference of Plenipotentiaries, is designed to consolidate existing international instruments relating to refugees and to extend their scope to further groups of refugees. It aims at regulating their legal status in far greater detail than previous instruments, and thus should establish within the contracting states a uniform legal status for existing groups of "United Nations protected persons.[51]

In 1967, the invasion of the Soviet Union into Hungary created a new flow of refugees into Europe, most of whom fled into Austria. At the same time, many refugees from Africa, India, Pakistan and South-East Asia started to seek entrance into Europe. On this backdrop, the UN decided in The Protocol Relating to the Status of Refugees to make two amendments to the Convention, which finally turned it into the main, international, legal instrument for determining the fate of refugees. Limitations of time and space previously set into the Convention were lifted, and it was applied to the whole world, without temporal limitations. For the first time in history, a formal, global regime for the management of refugees and for allocation of refugee rights was created. The double purpose Holborn and Weiss had discussed, aiding refugees while controlling them, was not directly addressed by the Refugee Convention. It was precisely the silence of the Refugee Convention on anything that had to do with procedure - Refugee Status Determination (RSD) - that was the most crucial part of the Convention. Thus the framing states intentionally left the procedure in which a refugee is determined to have a "well-founded fear" to the separate discretion of each country.

The UNHCR, for its part, published guidelines describing what due process of Refugee Status Determination should look like.

In light of the wide variety of state practices in this area, the procedure will be outlined here only very roughly. This procedure has several characteristics which are recurrent in the Global North, and which were decided upon while consulting the UN. These will be described only inasmuch as they illustrate how the contemporary refugee regime works. But before that, it is necessary to discuss one last aspect of the Convention's definition of the refugee, which is essential to understanding the mechanism it put in place. This is the first component of the definition, that of "well-founded fear." What exactly is a "well-founded fear"? How was this requirement interpreted by the principle actors in this area?

The language of the Convention seemingly points to the asylum seeker's emotional condition, ostensibly meaning that an asylum seeker must entertain an authentic, bona fide feeling of *fear*. The most important international instrument in which this idea appeared

before the Convention was the IRO refugee definition, with its doctrine of "valid objection" to return to a persecuting state. At the time, just like during the Cold War, protection from political persecution was an ideology the refugee regime had incorporated. This ideology entailed the use of the word "fear", which was related to the existence of regimes that were thought of as terrifying; and during the IRO period the question whether a refugee was afraid was indeed the most important question for determining if refugee protections would be available or not. Contemporary RSD procedure is therefore once again central, precisely because it was not subject to international regulation.

In his essay *Asylum*, Otto Kirscheimer explains that the Refugee Convention was understood as the first legal instrument which created international obligations of protecting refugees.[52] However, he thinks of these obligations as fragile. Under circumstances of mass displacement - or in other words in states of emergency - they may be revoked, and they do not belong to customary international law, even if in the near future they may indeed emerge as customary prohibitions on returning people to persecution. He writes:

> It is possible, then – barring a sudden and overwhelming influx – to bring political refugees under the protection of the law. The Geneva Convention of July 21, 1951, gives this possibility some wider recognition. Though prudently refraining from touching in its operative part more than very slightly on the crucial point, the admission of refugees, it clarifies and limits the meaning of the term refugee, sets up procedures to determine his status under a regime of prescribed cooperation between the UN High Commissioner and the national authorities, and settles in some fashion the rights and the personal status of the persons concerned in the country of asylum. From the viewpoint of this study, its most important result rests in the fact that articles 32 and 33 codify, and therewith in a vague way also limit, the reasons for which a refugee may be expelled. Experiences of some European nations which date back to the 1930s and 1940s suggest, however, that countries adjacent to areas of cataclysmic social and political upheavals will not guarantee refuge nor even be likely to grant as much as temporary asylum to huge numbers of escapees from revolutionary turmoil.[53]

Kirscheimer's words were written in 1959, but they still ring true: the Refugee Convention, a product of an international state of emergency, has always remained under the threat that an additional emergency will cancel state obligations.

How Does the Law Say "Refugees?": The Refugee Convention as a Thanato-Political Arrangement

When Arendt wrote about the crisis of the nation state through her discussion of refugees, it was still possible to describe historical developments while almost ignoring the legalization

of the category of the refugee. However, since the Refugee Convention was signed, "the refugee problem" has been recast as a problem of international law. As Malkki writes, since the Refugee Convention, law is what makes refugees appear as a meaningful epistemic category. At the same time, the group Arendt labels as one – *refugees* and *the stateless* – has been divided into two separate groups. On the one hand Convention "refugees", which the state is obliged to protect; on the other hand economic refugees, survivors of war, and the persecuted by hunger or disease, which the state is allowed to return to their countries without considering whether they might find their deaths as a result. They are not refugees, tells us the regime; they are migrant workers.

RSD has been developed in order to determine who the state is obliged to protect and who it is permitted to send to possible death. This procedure joins together indivisibly legal and professional determinations. It culminates in an event orchestrated to allow state officials to measure the intensity of the danger a refugee can expect, and to ascertain the source of this danger. This role is ostensibly supplemented by a capability to identify the level of fear the refugee experiences, and to identify the signs of lying, if indeed such exist.[54] RSD procedures realized the merger Giorgio Agamben described in **Homo Sacer**, between the law of emergency and *biopolitics*,[55] in what appears as a new kind of politics, the organizing principle of which is not life but death (thanato-politics). In the small rooms where RSD typically takes place, whether they are located in the corridors of a governmental office, in a detention cell, in a temporary camp run by an international organization, or at the airport, the law functions in a role far removed from the "integrative social mechanism" that Habermas ascribes to it. For if a necessary condition of such integration is the existence of society, or a social contract, in this situation there is not even the illusion of political participation. Humans are put under magnifying glasses designed to show if they are *afraid enough*, and if they are *afraid for the right reasons*. Agamben draws a line between the RSD situation, and the emergency regime of the camp:

> The stadium in Bari into which the Italian police in 1991 provisionally herded all illegal Albanian immigrants before sending them back to their country, the winter cycle-racing track in which the Vichy authorities gathered the Jews before consigning them to the Germans, the *Konzentrationslager für Ausländer* in Cottbus-Sielow in which the Wiemar government gathered Jewish refugees from the East, or the *zones d'attentes* in French international airports in which foreigners asking for refugee status are detained will then equally be camps.[56]

Most characteristics of this regime were already in place before the Refugee Convention was signed. The contemporary international refugee regime gradually developed since the interwar period Arendt describes, even though she pays only scant attention to international law. This development started during times of war, which were thought of as emergencies, and the iterations that were deployed by states and transnational institutions to justify the refugee regime were *emergency iterations*. Often, this period involved declarations of emergency that resulted in divesting refugees of all their rights.[57] Only under such

circumstances could the regime of the Third Reich transform into a forum for adjudicating which life is relevant, as Giorgio Agamben proclaims. The question "which life is relevant", is however, also central to a convention determining what are relevant dangers and fears, and to a regime that adjudicates such questions in an RSD interview. And this remains true even if a certain part of the women and men that go through RSD procedures, are in fact identified as victims and are provided with invaluable remedies. For the state of exception, as Agamben emphasizes, is not simply a situation in which the regime divests citizens of their rights and abandons them. It is a situation in which the regime can also decide to grant life in a way that is not reducible to the application of a rule.[58] This twofold predicament is expressed through the etymology of the word *Homo Sacer*, which Agamben insists upon – the abandoned, exposed human, but also the sacred human.

Just as Agamben describes in the opening of his **Homo Sacer**, in contemporary politics it is no longer possible to differentiate between fact and norm; refugee law has developed into a global regime of indistinction between the two. Before the Convention was signed several different legal regimes were applied, each one of them ostensibly as a response to a new emergency. The Convention too was initially designed for three years, as an emergency measure, but what started as a response to an emergency then stabilized and regularized. In the political imagination of the formative period of the contemporary refugee regime, refugees first appeared as a mass of nondescript population. Only when a new kind of individual, who is not a citizen-participator and to whom participation is available only through exposure to danger (and expression of fear), the temporary arrangement became a regular one. Later, under the Refugee Convention, the idea that such fear would have to tie the refugee somehow back to her country had stabilized as well.

During the lengthy discussions leading to the formalization of the Refugee Convention, and today, when the number of asylum seekers aspiring to enter Europe is growing, the Convention's protections have been praised. Such voices are heard primarily as a response to a decline in performance according to the obligations the Convention creates, in places where the image of the swarm is constantly redeployed. And again, as throughout the history of the refugee regime, the image of the swarm is coupled with emergency iterations which aim to suspend the law. This time, however, it is not the law of the state, but that of the Convention. A state of emergency is inherent to the Convention: it is an international norm that was created in the context of exception, through the suspension of "the rights of man," the rights of the French revolution. These are therefore emergency iterations which create further emergencies within emergencies which have already consolidated into a norm, in a kind of regression.[59] The new emergency iterations that entail new states of emergency in the context of the regime that the Convention has established, do not however necessarily have to do with refugees. Numerous commentators have discussed, for example, the connection between the events of 11 September 2001, and an unprecedented suspension of refugee rights enumerated in the Convention.[60] This emergency truncated the rights of refugees in the United States, but also outside of it. This discourse of security has had particular influence in Britain, when for the first time an upper limit was set for

the number of refugees that could be admitted.[61] Other typical examples are Berlusconi's declaration of emergency in light of the growing number of African refugees who landed on the shores of Islands like Lampeduzza, "exploiting" RSD procedures in order to stay on European soil.[62]

Sometimes the new emergency iterations find more sophisticated justification mechanisms and stick, as if naturally, to the original signs of emergency embedded into the texture of the Convention. Yet still they are emergency iterations. Unsurprisingly, the stickiest text in the original language of the Convention, which new emergency iterations are drawn to like flies, is the discretion in security matters that is still afforded to government. Such discretion is the easiest material for ad-hoc reinterpretation, in light of newfound emergency needs.[63] Such, for example, was the Israeli declaration of the Sudanese Refugees as "enemy nationals," a declaration that ostensibly rests on the discretion Israel has under the Convention in security matters. Such a declaration inserts the image of the swarm into the articles of the Convention, against the grain of the refugee regime premised by the Convention, organized around radical individuation. When Sudanese refugees are defined as "enemy nationals," and the image of the swarm is attached to them, it is no longer possible to detect where a "ticking bomb" may appear among them. But of course, among the "infiltrators" crossing the desert of Sinai at night between the bullets of Egyptian security, evidence of such a danger was never found. These components of a security emergency, which really no longer appear as a swarm but rather as clandestine infiltration, are captured in the words of Yochi Genessin. Genessin is a government lawyer for the Israeli Justice Department, and she is in charge of administrative issues. As part of her job, she defends Israeli asylum policy at the Israeli Supreme Court. In a conference on asylum policy held at Tel Aviv University in April 2008, she said the following:

> Through the Egyptian border there is a mass movement of infiltrators. This movement is a movement of people, but also of arms and explosives. Wanted terrorists from the Gaza Strip are also using this border in order to infiltrate Israel, instead of using the fenced border between Israel and Gaza. Drug dealers pass this border as well. In the future Israel will have to confront, as it did in the past, infiltrators who use this border for the purposes of terrorism. Terrorist organizations have bases in Africa, including in Sudan and in Somalia, and they can use this border in order to enter into the heart of Israel and the citizens of Israel (sic). Israel has to use various means of prevention against this danger. That is the current situation at the southern border.

> The tremendous gap between Israel's right to security and Israel's international obligations are very familiar. Israel fulfills all of its international obligations. But such obligations should not come in place of Israel's right to security. According to Intelligence sources, there is tremendous potential for dangers to security, stemming from the infiltration of enemy nationals who come to Israel from enemy states such as Sudan and Somalia, and other states that are hostile to Israel, who host AlQaeda and Hamas bases.

This massive movement of infiltrators can include infiltrators with terrorist objectives. It is also a threat to Israel's sovereignty. There is a need to deal with such threats very seriously, while balancing between threats to Israel's security and its obligations under international law.

The words aim to justify a sweeping policy of denying access to the right provided by the Refugee Convention to "enemy nationals." The rules enumerated in the Convention, which were designed as an emergency measure and that put into place an autonomous order of thanato-political law, are suspended once again: even though Israel was among the first to sign the Convention, international law is not perceived as a balance between various purposes and interests, but rather as one of the interests to be weighed against sovereignty while "tremendous gaps" differentiate between them. The individuation that the convention regime had solidified is no longer possible, because the newcomers from Africa are once again rendered into one nondescript mass. This is an objectified mass, which is perceived as part of nature and as governed by causality but never by purpose. It is a mass of enemy-infiltrators, ethnically colored, and Arabic speaking. A mass that presents a security risk that is not attached to any particular individual, but which, as in the case of the swarm, hovers like a cloud in the infiltrating body.

The thanato-political regime of the Convention is thus subject to repeated attacks: an attack by Berlusconi, an attack by Genessin – all of which aim to point to an emergency that might suspend a norm, which in and of itself incorporates an emergency. This in turn creates a space for a regime that widens and incessantly engenders states of emergency from within themselves.

At the prospect of these states of emergency, some liberal commentators defend the regime the Convention has created. They imagine that the Convention is a liberal legal instrument that enjoys the legitimacy of a general and formal norm, a result of rational deliberation in an international public sphere ("democratic iterations," as philosopher Seyla Benhabib writes).[64] Hence, Christina Boswell defended the Convention in light of the gradual deterioration of refugee rights.[65] These commentators describe the Convention as a legal instrument of utmost legitimacy, and sometimes even bring it as an example for the ways in which international law, sometimes considered to be fragile or even fictitious, can in fact efficiently grant remedies that save many lives around the world.

On the other hand, many liberal commentators understand that the regime created by the Convention is not a liberal one, that it is located, with Schmitt's state of emergency, far beyond the horizon of liberal thought, that it's birth from a context of emergency brought about what is labeled, perhaps in a gentle euphemism, a "politicization" of international law. In this understanding, the Western bloc, which at the time was poised against the Soviet bloc, cloaked its own particularist interests so as to be set as an international standard. These commentators understand that the five bases of persecution, which still aim to connect between the refugee and a government agency persecuting her, discriminate by their very nature against refugees of the Third World. They are the largest group of

refugees, but they often come from "failed states" whose de-facto existence is questionable. These commentators understand that the dangers that most of the residents of the Global South are exposed to – hunger, disease, natural catastrophes and civil wars – do not grant remedies under the Convention, and that the scope of human rights, as recognized in the international covenants for human rights (civil-political, as well as social-economic) is much wider than the scope of rights granted by the Refugee Convention. The result of this, as they understand it, is that the Refugee Convention permits the violation of the rights of refugees, including their "right to have rights," and indeed their right to life.

Along these lines liberal commentators seriously criticize the Convention, calling for amendments that would make it truly universal and would provide protections for the fundamental human rights of all the citizens of the world. A good representative of such criticism wrote her PhD in Tel Aviv University. Tally Kritzman-Amir from the law faculty wrote her thesis on "Social-Economic Refugees." She argues that protections for social and economic reasons should be added to the Refugee Convention. Her position is that it is possible to formulate a precise analytic definition for such claims in a way that would differentiate them from the claims of migrant workers, for example. This would grant refugee protection only to claimants whose fundamental rights would be harmed otherwise. She responds to a concern that is often expressed in this context, that recognizing economic refugees would flood states of the Global North with economic refugees and disintegrate them. The scope of protection to economic refugees, she argues, can be limited "to the specific needs of various states," in a way that would on the one hand provide protections to those in danger of starvation or of being denied medical treatment, and on the other hand not present challenges to the state's existence.[66] In other words, it would be possible to design procedures for realizing refugee protections in ways that would be sensitive the states' needs to protect the integrity of their populations and their interests. According to this argument, the repeated warnings of a flood of refugees are ideologically driven. They do not express a real threat to existence, but economic interests. They therefore do not present a real challenge to liberal approaches that accept a need for redistribution.

Hathaway presents a somewhat more radical liberal approach. Rather than an amendment to the Convention, he thinks it should be revoked, while putting in place an alternative regime based on Human Rights Covenants, which would be, as he says, "a needs-based refugee regime." Today, as Hathaway writes quite clearly, refugee law is nothing but a veil placed over state interests.

> Refugee law is often thought of as a means of institutionalizing societal concern for the well-being of those forced to flee their countries, grounded in the concept of humanitarianism and in basic principles of human rights. In practice, however, international refugee law seems to be of marginal value in meeting the needs of forcibly displaced and, in fact, increasingly affords a basis for rationalizing the decisions of states to refuse protection.[67]

In order for refugee law to realize human rights rather than simply remain a gatekeeper,

Hathaway suggests replacing the Refugee Convention with an alternative order which would not have such universal aspirations. The guidelines for such a law are still unclear, but they will probably somewhat resemble the regional protections that were granted during the early formative period of refugee law. Hence, one can assume, the artificial differentiation that the Convention created between refugees and the stateless will be canceled, and protections will be available to whoever may be lacking the protection of a state. Regional protection agreements will be tailored for the needs of various populations, and it will be possible to adjust them according to various cultural commitments and changing economic conditions. Instead of legal arrangements that resulted from a particular historical conjuncture and which don't correspond with the situations of refugees around the world, international law will emerge, as is traditionally required, from custom.

I do not oppose such attempts to mend the disjuncture that occurred, as Arendt writes, in the interwar period, between the state as an instrument of the nation, and the state as an embodiment of the law. Quite to the contrary, I would like to support them, particularly the efforts to formalize social-economic refugee status, in the way that Kritzman-Amir suggests. At the same time, it is important to point out the principle similarity between these arguments and the regime that the Convention has created. This similarity shows that even if such proposals might in the future be instrumental in reducing the pain and suffering of refugees in the world, they do not solve the principle problem that nation states have when they confront the claims of refugees: the problem that Arendt formulated in the most accurate way.

In order to explain the commonality these liberal criticisms have with the Convention's refugee regime, one must recognize that all of the sides in the debate thus far regard the state as "a real entity with its own claims." In liberal theory, which "has internalized [...] the existence of the state as a fact"[68] it is impossible to find categorical rejections to compromising refugee rights in the name of the rights of states.[69] For even if a social-economic right to asylum were recognized, the same logic of emergency that has brought about a thanato-political refugee regime, will continue to be operative. This will remain true as long as it will remain possible to reject an asylum claim of someone who is exposed to grave danger, but who cannot be included in a quota of refugees that a state can receive (according to its own account).

The definition of refugees in international law first appeared following WWI and has since then gone through several shifts that can now be summarized. The first period, which Arendt wrote about, was characterized by particular ethnic or national groups that had become stateless. Such groups gradually widened with additional waves of refugees, particularly after the Nazis took over political power. As more groups were included in the refugee protections, criterions began to appear which served to differentiate between different kinds of stateless people – those who are and those who are not refugees. Later, this regime was characterized by a radical individuation of the criteria, fitting the single asylum seeker. During WWII a mass of refugees was subjected to a military regime, which

did not grant formal status and which was a mechanism of managing populations in the theatres of war.

With the Refugee Convention, when the refugee regime was first constituted as properly legal, the category of statelessness was in effect erased.[70] People who in the past were regarded as refuges or stateless were no longer included in these categories. Under the Convention's regime they became illegal migrants. When they submitted asylum claims they became "asylum seekers," and refugee status determination procedures would commence. This procedure was shaped as an only partially legal one, and it heavily employs knowledge from disciplines such as social work and psychology, particularly with respect to trauma. This disciplinarization of law recalls the form of government which Foucault called bio-politics. However, the authority an RSD committee has to decide who is to be granted life and who will potentially be exposed to death, shows that it is not a politics of life that is involved, but a politics of death. At the conclusion of this procedure, those granted a charitable judgment will be entitled to the status of a "refugee"; those not granted such a status return to their initial position as illegal migrants, and it is possible to deport them, even if in their countries their rights may be seriously violated. In addition, in granting temporary protection status and its termination, the sovereign has political discretion in states of emergency. The chain of iterations that is employed through the Refugee Convention corresponds to Schmitt's general characterization of political existence. As the sovereign voices the iteration that differentiates between "us" and "them", the sovereign points to individuals and decides who is a "refugee". The process of legalization of this determination is a process in which states of emergency and the norm entangle, and distinctions between them are once again impossible. Liberal commentators who try to reclaim the law's legitimacy as an iterative process in which values are publicly agreed upon are not able to do so with respect to refugee law.

How Do We Say "Refugees": Refugees as an Emergency Iteration

While Yochi Genessin from the Israeli Justice Department reflects upon the gaps between Israel's security and its international law obligations (between emergency and emergency), I would like to account for the gaps between refugees according to legal definitions (none of which is liberal) and "refugees" as they might be discussed in colloquial language, while disregarding the sovereign position of the state.

To answer the question how do "we" say "refugees," we must examine the extra-liberal critique of law, suggested in the beginning of this essay through the example of Jean-Luc Nancy. Following Nancy, the answer can perhaps be inspired by the observed behaviors of citizens in their daily lives, but cannot be "empirical" or rely on "measurements" of such iterations, such as might be conducted through questionnaires in which citizens would be asked who they think refugees are. The category "we" cannot be thought of as pre-existing. It appears with every iteration, and must be thought of as something that is

yet to appear until someone says it again, in language or in behavior. If every time we say "we," being-with is constituted anew in the first person plural, every limitation of a certain set of appearances would subordinate what will be to what was within that particular limitation.

In order to solve this problem, I suggest, in the first phase, to think through an example of saying "we" which is also saying "refugees." This example does not take into account state interests, which cannot be the interests of any person in particular. The example is taken from a conversation that I had with Ahmed (real name withheld), a Sudanese refugee. I discussed with him the question of this essay in his room in the infamous building at number 1 Finn St. I started by asking Ahmed: "Who are the African refugees in Israel?" Ahmed responded by enumerating several groups: Sudanese, Eritreans, Ivory Coasteans, Ethiopians.[71] I remarked that some of the Ehtiopians are different: they received citizenship, they are Jews. Ahmed rejected this argument, claiming that they are refugees just like all the others. The only difference, said Ahmed, is that unlike other groups they had luck. Everyone knows, he explained, that following the war between Ethiopia and Eritrea certain groups were forced to leave their homes. These groups were first concentrated in refugee camps in Africa, and later Israel bought them as part of a weapon deal, and brought them into Israel. This is how they got their citizenship.[72] In order to define who are refugees, it might be useful to consider the gaps between the story told by Ahmed and the story that I had told; to consider the political imagination that is reflected in both stories.

Ahmed's decisive statement may raise questions. Regardless of its historic accuracy (which I am not able to assess), I believe that its location within an inner-African context comes with a certain understanding of what it means to be a refugee. This understanding is radically different from the one constructed by international refugee law: the latter creates an impervious barrier between the categories of citizen and refugee. The things that Ahmed said about Israelis with Ethiopian background reflect a regime that is different from the one that made a sharp distinction between refugees and citizens in the beginning of the 20th century. This is a regime under which the legal categories of "refugee" and "citizen" are inferior to historical and personal narratives. Narratives that had perhaps been composed of rumors, stories and half-stories that had been told in a certain moment, in the context of daily life, within a certain community. No less importantly, this is a conversational answer. It appeared casually, in response to a question that was part of a conversation that had addressed many other things: who are refugees. I was surprised because my own thoughts about this issue corresponded more substantively with the refugee regime constituted by the **legal** status of asylum seekers in Israel. This status is very different from the legal status of Israeli citizens with Ethiopian background. However, it is clear that my language is also imbued with rumors and half-stories, as well as a certain ideological perspective that construes refugees and citizens as two categories that are sealed off from one another.

Perhaps it is possible to find out if Ahmed's account is historically valid (did Israel indeed pay with arms in return for Ethiopians that were declared Jewish?). Such a story can

provide material for investigative journalism, or for a fascinating historical research. Such a research would not, however, shed light on the gap between two different understandings of refugee and citizen statuses. In the way that each interlocutor constructs his identity, inclusion in a certain articulation in the form of "we," is assumed. This articulation is not manifested during the conversation.[73] We both agree that there is a certain group (in this case, "African refugees in Israel") which one of us belongs to, and the other does not. But there is also a third group, in respect to which the difference or disagreement between us is exposed. This group belongs to the "we" that is assumed in Ahmed's position; my response shows that it also belongs to the "we" that is assumed by me. However, at least for me, the category I use in addressing Ahmed, ("refugees") cannot overlap the "we" that I ascribe to myself: a native of the land. What can we learn from the way that Ahmed says "refugees" in the first person plural?

Not everyone who is abandoned by the regime is a refugee. Unlike the abandonment of women (which is described, e.g., by Azoulay)[74] or animals (which is described, in a different tradition, by Nussbaum),[75] and unlike the abandonment Giorgio Agamben conceptualizes, this abandonment is not the result of exclusion from the political sphere. To the contrary, this is abandonment of those who have a political, public, or communal sphere *in their past*. This sphere is a presence that existed but has disappeared, has been destroyed, or that has transformed from a sphere of salvation to a sphere of catastrophe (in Ophir's terminology[76]).

The Hebrew word "Palit" points to the same direction, as it is associated with expulsion, emission or escape. In the Bible too it signifies survivors who have fled the dangers of war. It is thus different from the word "Ger," which relates to foreigners who have already acquired status (See Joshua 8, 22; Amos 9,1). In this respect, it is different from the Arabic word (لاجِئ) and the English word "refugee", both of which allude to shelter or refuge, rather than to displacement. Such is Ahmed's idea of "Ethiopian refugees," who were part of a political context in Africa that existed and is now gone. In their very existence refugees embody political associations that have become extinct and can tell a "history of the downtrodden."

We are likely to say "plitim" when met with a fragile presence, like that of three Iraqis who found themselves on a boat that anchored at the port of Haifa on one day in the beginning of this millennium, on its way from the Persian Gulf to Europe. Three men in their fifties, two of them Arabic speaking, one Kurdish speaking, were rushed ashore by a security official, who quickly opened for them an illegal corridor to the police station on the beach and back into the boat. "Plitim" may also refer to a presence such as that of dozens of Eritrean men who sleep together in an underground shelter close to the central bus station in Tel-Aviv, after having escaped from a mandatory military service that does not have any determinable end date, or a presence such as that of a citizen of Ghana who reached Tel-Aviv about two years ago, after having walked across Africa, and ended up submitting his hopeless request for asylum, which he based on a curse that had already killed his family.

All of these people have in their past a public sphere that has been destroyed. Such figures immediately expose that both the Refugee Convention and its liberal critique do not comply with the ways in which the word "refugees" can be said, with the recognition of people who have remained without membership. All of the people described above, who are called "refugees", will not receive the protections of a refugee under a legal definition (particularly not in Israel).

This use of the label "refugees" stands in opposition to the legal definition of refugees, as it is not required to calculate how many refugees a state is interested in or willing to receive. It does not entail any kind of numerical calculation of refugees in relation to territory or population. It therefore does not weigh human rights against the rights of an abstract entity like the state. The terms of use of the word "refugees" therefore point to a moral dilemma about somebody; this dilemma remains, regardless of the possibility that it may lead to the collapse of the existing state-centered political order. Saying "refugees" in this way therefore denies that the threat of the dissolution of the nation-state can be a reason for exclusion from the definition of a "refugee." Liberal theory thinks of refugees through the obligation to save humans from violations of their rights. The limits of this obligation are drawn, in the most generous version, where saving someone presents a danger to the existing political order. The looser use of the term "refugee" that joins together Iraqis, Eritreans, a Ghanian and a Palestinian, all of whom have been tied for a moment to this place, does not make use of the concept of rights, and the danger to the survival of a certain political order is not thought of as relevant to it. It seems that this use is not affected by the content of legal iterations on who are refugees. As Nancy wrote, when "we" say "refugees," international law is a senseless formulation.

Outside of liberal thinking and outside of legal definitions, how might one formulate the terms of use for the word "refugees"? Clearly, this is not simply a move from refugees de-jure to refugees de-facto. For other than a human presence that expresses a certain loss, it is impossible to think of factual features that are common to all refugees. Even though it may seem like many of them are characterized by a bare human presence, lacking property, passport and wallet; presumably the Palestinian refugee who visited her home town of Jaffa, has come there using all of the above, which doesn't exclude her from the category of a refugee. Just like in liberal theory centered on the ideal of human rights, outside of it too the word "refugee" retains its normative value. It creates a moral obligation towards whoever it refers to, and its conditions of use have to be understood with regard to that word. One must account for its essence. This obligation does not have the same implications in each and every case. As opposed to the "right" in its institutional form in the liberal state, which is supposed to be protected on a general and equal basis, it does not rely on states. Rather, it is addressed to an individual or a community, who are required to make a particular determination, respond to a particular claim or request. Such a determination is never made according to a general rule that is equally applied to one and all: it is a result of its moral character, which is that of concrete involvement.

As opposed to the position of the liberal critics, any regime that allows people to perish while weighing their rights against the rights of an abstract entity called "the state" is illegitimate, and there there is justification to resist it. For, if indeed it is possible to justify not protecting the life of certain people (e.g., by limiting public access to health care), such justifications do not hold with regard to refugees. As opposed to other contexts, refugees are exposed to a violation of rights, while it is impossible to argue that they had an opportunity to influence the conditions of their exclusion. This is in sharp contrast to the liberal logic that has been presented here through the example of Habermas. Those who expose this, more precisely, are all the refugees that the law refuses to call "refugees"; refugees that are not recognized by the Convention. These are refugees we must now think of on a personal level, against the state and beyond its liberal horizon, and they are the refugees this essay is dedicated to. It is perhaps possible to argue that the refugees who have been recognized in the Convention have escaped neglect in the age of international law. But the lives of refugees who have not been recognized by the Convention are not only lives of bare existence, they present lives that bear witness to the undeniable failures that still remain in the juridical and political foundations of the nation state.

Furthermore, the presence in their past of a political entity that existed but is no longer existent, allows us too to think beyond what is permitted in the liberal framework: our own political form of living can displace others and itself be displaced, or simply cease to exist. The word "refugees" can thus function as a civilian emergency iteration (as Azoulay shows, when she writes about the Palestinian refugees).[77] Such an iteration can empower citizens to suspend the law through a kind of civilian emergency that is initiated "from below."[78] The presence of a political community in their past can perhaps also render their abandonment more visible than other cases in which no responsibility is taken for moral harm, where the victims have no language in which they can be publicly articulated, whose fate therefore in principle cannot become an emergency-iteration.[79]

When we say "refugees" without considering the requirements of liberal theory (or the state), our iteration turns the absence of political protection that has existed but has vanished, into the formulation of a moral question. This moral question ignores existing political powers' claim to continuity, their self-justification, and indeed the very fact of their stability. Talking about "refugees" is therefore a speech-act that can signify whoever was previously protected by a certain form of "Being-with" but for whom such protection is no longer available, and to present such a loss.[80] This is important, on the one hand, because such emergency iterations can be useful in advocacy within the state mechanism and within the law. That is what Tally Kritzman-Amir does when she names a new kind of refugee. The title of her dissertation, "Social-Economic Refugees," stands in direct opposition to existing law in order to change it and positions a new kind of refugee that it will now be possible to speak of. On the other hand, saying "refugees" provides grounding for political action that ignores the law, in the shadow and under the auspices of a civilian emergency. Through such activity it may be possible to continue thinking and imagining what kind of an emergency could materialize moral obligations towards others who were

silenced, thus doing away with political space as it is today. Perhaps that is what Agamben means when he writes that as long as the nation state has not deteriorated, the figure of the refugee is what allows us to think of the forms of the political community to come.[81]

Endnotes

1. For a survey of the conversations on the end of the nation-state, and their intellectual sources see: Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Cambridge: Harvarvard University Press, 2006).

2. Hannah Arendt, *The Origins of Totalitarianism* (San Diego, New York and London: Harcourt, 1985), pp. 267-302.

3. Ibid., p. 290.

4. Otto Kirscheimer, "Asylum", *The American Political Science Review* 53(4), 1959, pp. 985-1016.

5. Giorgio Agamben, **Homo Sacer: Sovereign Power and Bare Life**, translated by Daniel Heller-Roazen (Stanford University Press, 1995), pp. 129-180.

6. Abderrahmane Sissako (2006), Bamako (film).

7. Ariella Azoulay, *Constitutive Violence 1947-1950: A Genealogy of a Regime and "A Catastrophe from their Point of View* (Tel Aviv: Resling, 2009) [in Hebrew].

8. Marianne Constable, "Law as a Profession of Words", in *Reflections on Justice and Power in Sociolegal Studies*, edited by Bryan Garth and Austin Sarat (Northewestern University Press, 1998), p. 19.

9. Ulrich Beck, *Risk Society: Towards a New Modernity*, translated by Mark Ritter (London: Sage, 1992); Adi Ophir, "The Two-State Solution: Providence Catastrophe", *Theoretical Inquiries in Law* 8(1), 2007, pp. 117-160.

10. Jürgen Habermas, "Between Facts and Norms", *Denver Law Review* 76, 1999, pp. 937-942.

11. Carl Schmitt, *The Concept of the Political*, translated by George Schwab (Chacago: University of Chicago Press, 1996).

12. Jean-Luc Nancy, *Being Singular Plural*, translated by Robert Richardson and Anne O'Bryne (Chicago: Univeristy of Chicago Press, 2000), Chapter 1.

13. Ibid., p. 47.

14. Liisa Malkki, "Refugees and Exile: From 'Refugee Studies' to the National Order of Things", *Annual Review of Anthropology* 24, 1995, pp. 495-523.

15. Nevzat Soguk, *States and Strangers: Refugees and the Displacement of Statecraft* (Minneapolis: University of Minnesota Press, 1999), p. 57.

16. James Hathaway, "The Evolution of Refugee Law", *International & Comparative Law Quarterly* 33, 1984, pp. 348-380. See also the Burlingame treaty (1868), which refers to a kind of natural right to emigrate: "the inherent and inalienable right of man to change his home and allegiance".

17. Giorgio Agamben, "We Refugees" (Roundtable: Research Architecture, 1994). See: (http://roundtable.kein.org/node/399).

18. Louise Holborn discusses a similar phenomenon in an article from 1938. She shows that interestingly, Russian Tsar loyalists, who became refugees after the Bolshevik revolution, refused to naturalize in foreign countries pledging loyalty to their old Russia – which in their minds continued to exist even without the Tsar. See: Louise W. Holborn, "The Legal Status of Political Refugees 1920-1938", *American Journal of International Law* 32, 1938, p. 682.

19. Arendt, *Origins of Totalitarianism*, p. 284.

20. Ibid., p. 289.

21. Ibid., pp. 287-8. See also: Walter Benjamin, "Critique of Violence", in *Selected writings,* vol. I, edited by Marcus Bullock and Michael W. Jennings (Cambridge, MA: Harvard University Press, 1996), pp. 277-300.

22. Thompson writes in 1938: "A whole nation of people, although they came from many nations, wanders the world, homeless except for refuges which may any moment prove to be temporary. They are men and women who often have no passports… This migration – unprecedented in modern times, set loose by the World War and the revolution in its wake – includes people of every race and every social class, every trade and every profession" (quoted in Soguk, *States and Strangers: Refugees and the Displacement of Statecraft*, p. 112).

23. Ibid., p. 282.

24. Paul Weiss, "The International Protection of Refugees", *American Journal of International Law* 33, 1954, pp. 193-221.

25. Arendt, *Origins of Totalitarianism*, p. 275. See also Arjun Appadurai, "Disjuncture and Difference in the Global Cultural Economy", *Public Culture* 2(2), 1990, pp. 124; and Chea, *Inhuman Conditions*, pp. 17-79.

26. Arthur Ruhl, *White Nights and Other Russian Impressions* (New York: Charles Scribner's Sons, 1917), p. 92.

27. Arthur Ruhl, *Antwerp to Gallipoli: A Year on The War on Many Fronts* (New York: Charles Scribner's Sons, 1916), p. 109.

28. Quoted in: Hathaway, "The Evolution of Refugee Law", p. 374.

29. Hathaway, "The Evolution of Refugee Law".

30. Guy Goodwin-Gill, *The Refugee in International Law* (New York: Oxford University Press, 2007); James Hathaway, *The Law of Refugee Status* (Canada: Butterworths Law, 1991); Ved P. Nanda (ed.), *Refugee Law and Policy* (New York: Greenhouse Press, 1989).

31. Soguk, *States and Strangers*.

32. Hathaway, *The Evolution of Refugee Law*, p. 378.

33. Agamben conceptualizes this reality with the figure of "Homo Sacer", who is defined in the most general way as a person that can be killed with impunity.

34. Malkki, "Refugees in Exile", p. 499.

35. Ibid., p. 500.

36. Agamben, *Homo Sacer*, pp. 166-180.

37. Jacqueline Bhabha, "The 'Mere Fortuity of Birth'? Children, Mothers, Borders and the Meaning

of Citizenship", in: ***Migrations and Mobilities: Citizenship, Borders and Gender***, edited by Seyla Benhabib and Judith Resnik (New York: New York University Press, 2009); Vicki Squire, ***The Exclusionary Politics of Asylum*** (London: Palgrave Macmillan, 2009).

38. Louise Holborn, ***The Legal Status of Political Refugees***.

39. See also: James Hathaway, "Reconsideration of the Underlying Premise of Refugee Law", ***Harvard International Law Journal*** 21, 1990, p. 140.

40. Daniel J. Steinbock, "Interpreting the Refugee Definition", ***UCLA Law Review*** 45, 1998, p. 806.

41. Soguk, ***States and Strangers***, p. 166.

42. Hathaway, ***The Evolution of Refugee Law***; Steinbock, "Interpreting the Refugee Definition"; and Christina Boswell, "European Values and the Asylum Crisis", ***International Affairs***, 76(3), 2000, pp. 537-557.

43. Steinbock, "Interpreting the Refugee Definition", p. 766.

44. See Hathaway, "Reconsideration of the Underlying Premise of Refugee Law", p. 145. The countries that partook in the formulation of the convention were Belgium, Brazil, Canada, China, Denmark, France, Great Britain, Israel, Sweden, Turkey, The United States, and Venezuela.

45. Hathway, "Reconsideration of the Underlying Premise of Refugee Law", p. 150.

46. Steinbock, "Interpreting the Refugee Defintion", pp. 812-813.

47. Hathaway, "Reconsideration of the Underlying Premise of Refugee Law", p. 150.

48. Ibid., p. 146.

49. Steinbock, "Interpreting the Refugee Definition", pp. 812-813.

50. Weiss, "The International Protection of Refugees".

51. Ibid., p. 194.

52. Kirscheimer, "Asylum".

53. Ibid., p. 994.

54. For a broader discussion of the kind of expertise wielded by UNHCR, and its meaning for the understanding of the regime the convention put in place, see: David Kennedy, ***The Dark Side of Virtue: Reassesing International Humanitarianism*** (Princeton: Princeton University Press, 2004), pp. 199-234.

55. The reference of course is to the concept of biopolitics, coined by Michel Foucault. See e.g.: Michel Foucault, ***Security, Territory, Population: Lectures at the College de France 1977-1978***, translated by Graham Burchell (New York: Picador, 2007); Michel Foucault, ***The History of Sexuality Volume 1: An Introduction***, translated by Robert Hurley (New York: Vintage Books, 1990).

56. Agamben, ***Homo Sacer***, p. 174.

57. For a critique of this position, see Itamar Mann "We Refugees or: What is a Jewish Political Space", ***Teoria Uvikoret*** 37 (Fall, 2010) [in Hebrew].

58. Aihwa Ong, ***Neoliberalism as Exception: Mutitations in Citizenship and Sovereingnty*** (Durham: Duke University Press, 2006), pp. 21-24.

59. Compare: Peter Fitzpatrick and Richard Joyce, "The Normality of Exception in Democracy's

Empire", ***Journal of Law and Society*** 34(1), 2007, pp. 65-76.

60. See Benjamin Muller, "Globalization, Security, Paradox: Towards a Refugee Biopolitics", ***Refuge*** 22(1), 2004, pp. 65-76; Squire, ***The Exclusionary Politics of Asylum***; Mai Kaneko, "Evaluating the Free Afghans/Refugee Law Reform Campaign after September 11", ***Refuge*** 21(3), 2003, pp. 34-44.

61. See Tories Say, "Terrorists Posing as Refugees", ***The Guardian***, 29 January 2003.

62. See http://www.guardian.co.uk/world/2008/aug/04/italy, and compare: http://english.aljazeera.net/news/europe/2008/12/200812301249580983.html. Philosopher Slavoj Žižek called what is going on in Italy (Slavoj Žižek, "Berlusconi in Teheran", ***London Review of Books***, 23 July 2009).

63. For more on the importance of the security rhetoric before 9/11 see: B.S. Chimini, "Globalization, Humanitarianism and the Erosion of Refugee Protection", ***Journal of Refugee Studies*** 13(3), 2000, pp. 243-263.

64. Seyla Benhabib, ***The Rights of Others: Aliens, Residents, Citizens*** (Cambridge: Cambridge University Press, 2004), Chapter 5.

65. Christina Boswell, "European Values and the Asylum Crisis".

66. Tally Kritzman-Amir, ***Socioeconomic Refugees*** (PhD dissertation, Faculty of Law, Tel-Aviv University, 2009).

67. Hathaway, "Reconsideration of the Underlying Premise of Refugee Law", p. 128.

68. Adi Ophir, "State", ***Mafte'akh: Lexical Review of Political Thought*** 1e, 2010, http://mafteakh.tau.ac.il/en/2010-01/05/.

69. Soguk has written things that are similar to Ophir's, in the context of a discussion of refugees. See: Nevzat Soguk (1996), "Transnational/Transborder Bodies: Resistance, Accommodation and Exile in Refugee and Migrant Movements on the US-Mexican Border", in: ***Challenging Boundaries: Global Flows, Territorial Identities***, edited by Michael J. Shapiro and Hayward R. Alker (Minneapolis: University of Minnesota Press, 1996).

70. The Stateless reappeared in a separate convention which gave them far more limited rights, the Convention Relating to the Status of Stateless Persons (1954).

71. Apart from about five hundred of Sudanese, which Israel has recognized as protected under an administrative humanitarian decision without processing their asylum requests as international law requires, no one of the members of these groups received refugee status in Israel.

72. Later I heard the same story from other refugees I discussed this with, a fact that shows that is a common story, even if it is impossible to say if it is true.

73. I would like to think of this association as the product of the imagination, in the way that David Hume thinks of imagination, as an association of concepts that have certain proximity, and together construct a complex concept ("we" or "refugees").

74. Ariela Azoulay, ***The Civil Contract of Photography*** (Cambridge: MIT Press, 2008), chapters 1, 5.

75. Martha Nussbaum, ***Frontiers of Justice*** (Cambridge: Harvard University Press, 2006), pp. 325-407.

76. Adi Ophir, "the Two-State Solution: Providence and Catastrophe".

77. What I think is particularly compelling about the framing of the idea of civilian emergency

iterations, is the way that it highlights a structural resemblance between situations of civilian resistance and states of emergency. Agamben writes about this resemblance in his book about states of exception, and concludes: "The fact is that in both the right of resistance and the state of exception, what is ultimately at issue is the question of the juridical significance of a sphere of action that is in itself extrajuridical. Two theses are at odds here: One asserts that law must coincide with the norm, and the other holds that the sphere of law exceeds the norm. But in the last analysis, the two positions agree in ruling out the existence of a sphere of human action that is entirely removed from law". Giorgio Agamben, State of Exception (trans. Kevin Attel) (The University of Chicago Press, 2005) pp. 27 - 28.

78. Azoualy, *The Civil Contract of Photography*, chapters 3, 4.

79. Ibid., p. 67.

80. For a discussion of naming as a mode of inclusion/exclusion, see e.g. Jean Comaroff and John L. Comaroff, "Naturing the Nation: Aliens, Apocalypse and the Postcolonial State", in *Sovereign Bodies: Citizens, Migrants and the State in the Postcolonial World*, edited by Thomas Blom Hansen and Finn Stepputat (Princeton: Princeton University Press, 2005).

81. Agamebn, "We Refugees".