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In February 2014, more than 60 asylum seekers detained in a camp run by Australia on Manus Island, Papua New Guinea were badly beaten and slashed with knives and machetes. One man was shot and Reza Berati, a 23-year-old Iranian man, was killed. Media reports suggest that camp guards employed by the security contractor G4S were responsible for the attacks, supported by members of the PNG police. There are conflicting accounts of what sparked the violence, with the Australian government claiming asylum seekers at the centre were engaged in a protest that led to a riot. The asylum seekers themselves claim they were 'pulled from their rooms, beaten and told by their attackers: "You want freedom? We'll give you freedom tonight"' (Gordon and Ireland 2014).

According to the Universal Declaration of Human Rights (UDHR), 'all human beings are born free and equal in dignity and rights' (Art. 1). Wealthy liberal democracies claim to recognise the innate freedom and equality of all people and to uphold human rights but also spend billions fortifying their borders and incarcerating refugees. Written by a citizen of a wealthy liberal democracy (Australia), this book is an attempt to 'think what we are doing' (Arendt 1998, 5) and to explore the likely consequences of our actions. It examines the theoretical and institutional commitments that undergird the liberal democratic state, including its commitment to human rights, and considers to what extent contemporary border policing regimes are consistent with these commitments.

The idea that humans are naturally endowed with dignity and rights and are by nature 'free and equal' is what I call 'the myth of human rights'. This myth plays an important and dangerous role in the liberal democratic state by obscuring the political effort and commitment necessary to the realisation of freedom, equality, dignity and rights. The problematic character of the myth of human rights becomes apparent when we consider the position of refugees who arrive without lawful authorisation in the state. These people cannot make rights claims based on membership of the state or their lawful right to remain; they have only their human rights to fall back on.

How they are treated by the liberal state suggests that human rights are worth very little, and indeed I argue in this book that within a liberal democracy an appeal to human rights is evidence in itself that the person making the appeal is neither free nor equal. Worse than this, the appeal is likely to provoke hostility rather than evoke a sense of solidarity. These people do not stand respectfully at a distance, pleading for assistance from their home countries or camps in Africa, Asia and the Middle East and prepared to wait indefinitely for our charity and perhaps the prospects of resettlement. Instead they directly engage the law of the state, which says they must not come, pitting their bodies and their human rights against its border policing regime. Although they are often repaid for this affront with calculated brutality they are not usually deterred. The problem that they pose for the liberal democratic state and its avowed commitment to rights will not go away, no matter how high the fences it builds or how numerous the guards at its frontiers. Around the world, millions of people are prepared to suffer and to risk death in search of a better life because staying where they are seems simply untenable: '[t]his is the subtext to the plight of every [exile]: Whatever hardship he endures, he

endures because it beats the hardship he escaped. Every story of exile implies the sadder story of a homeland' (Mogelson 2013).

In 2013, the number of people of concern to the Office of the United Nations High Commissioner for Refugees (UNHCR) reached an 'all-time high', coming close to 39 million (UNHCR 2013, 6). The majority were displaced within the borders of their home country; most of the rest were living in camps in neighbouring countries in the developing world – nevertheless, asylum claims in wealthy liberal states also surged (UNHCR 2013, 6; 2012b). Data compiled by UNHCR shows considerable fluctuations in asylum seeker numbers. Despite recent increases in protection applications, the total number of people seeking asylum in industrialised countries was greater in the early 1990s and at the turn of the century than it is currently. War in the former Yugoslavia contributed to an increase in protection applications in the 1990s, the invasions of Afghanistan and Iraq helped account for another increase in the early 2000s and the North African revolutions and continuing conflict in the Syrian Arab Republic largely explain current figures (see UNHCR 2012b, 7 and 12). In the future, asylum applications in wealthy liberal democracies and global refugee numbers will continue to fluctuate in response to persecution in various regions and as violent conflicts ignite or are resolved. Overall, though, internal and cross-border migrations are likely to increase as people affected by poverty as well as by natural disasters and climate change leave their homes and search for new ones.

Only a relatively small proportion of these people fall within the definition of a refugee outlined in the United Nations Convention Relating to the Status of Refugees ('the Refugee Convention'). Article 1 of the Convention provides that refugees are persons who are outside their country of nationality or, if stateless, of habitual residence and unable or unwilling to return to it because of a 'well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group, or political opinion'. In the concluding chapter of this book I suggest that liberal democracies may be justified in drawing distinctions between some refugees, but my argument throughout employs an expansive refugee definition going well beyond that contained in the Refugee Convention.

I apply the term 'refugee' to all those who have left home because their national state is unable or unwilling to secure the conditions necessary for living what Dummett describes as 'a decent human life' 'without the threat of an unnatural death' (2001, 32), 'free from terror and allowing ... a basic dignity' (2001, 34). A state's failure to secure the conditions necessary for a decent life may relate to a range of factors, including persecution of various forms, but also starvation, civil war and poverty (see Dummett 2001, 32–7). Although unable to live a decent life in their home country, if refugees have moved outside its borders their presence under the laws of the country in which they reside is either unlawful or 'legally qualified' in the sense that punitive conditions such as restrictions on freedom of movement are attached to their right to remain. This definition of what it is to be a refugee thus includes asylum seekers who wish to claim protection under the Refugee Convention but who are unlawfully present in the country in which they have applied for protection. It also includes individuals living in camps or otherwise precarious circumstances who have been assessed as 'Convention refugees' by UNHCR but who do not have stable resettlement options. For the purposes of my discussion I exclude individuals who have successfully claimed protection under the Refugee Convention and have been resettled, as long as they have permanent residency and there are no conditions attached to their residency that make it more difficult for them, by comparison with other permanent residents, to apply for and obtain citizenship.

Although the definition employed here encompasses refugees wherever they are found, my discussion is concerned solely with how wealthy liberal democracies respond to refugees, and predominantly those refugees at the state's borders or living on its territory. A state's constitutive commitments are drawn into question by what happens beyond its borders, particularly given the existence of a global institutional structure – something I discuss in Chapter 9, so the position of refugees who are unable to escape their home state or are confined in camps in neighbouring regions is relevant to my argument. Existence for these refugees is precarious and they are often the target of state sanctioned discrimination and violence (see UNHCR 2006, 22–4). Nevertheless, the liberal state's commitments are most obviously and directly engaged by actions in which its agency is indisputable. In relation to refugees, these actions usually occur within the borders of the state and in the course of preventing access to its borders. There is a risk that my focus on the liberal democratic response to refugees will obscure the plight of those refugees living in other parts of the world but in my final chapter I make recommendations that apply universally.

The refugee definition outlined above is expansive but it is not arbitrary. As Dauvergne (2005, 82–3) points out, the *Oxford English Dictionary* defines refugee to include individuals 'driven from ... home to seek refuge, esp. in a foreign country, from war, religious persecution, political troubles, natural disaster, etc.' (citing the fifth edition of the *Shorter Oxford English Dictionary*). Furthermore, while it is common in the Western media to characterise refugees who arrive in a state without lawful authorisation as cynical adventurers, seeking to evade legal controls and orderly migration processes in a spirit of callous defiance, it is implausible that many people take lightly the decision to leave their homes and attempt to find new ones without official assistance or protection. An expansive refugee definition reflects this. In this book, an expansive definition is also justified by the fact that regardless of the circumstances they left behind, people who attempt to enter a liberal democracy without lawful authorisation pose a challenge for the state and its commitment to human rights that goes to its very foundations. It is with this challenge that the book is primarily concerned.

The liberal democratic world has closed down avenues of lawful access to refugees, forcing them to rely on criminal smuggling networks known for their exploitative and abusive practices. The anodyne language of 'deterrence' that is used to justify border policing regimes masks the disturbing reality that these regimes are designed to inflict the greatest harm possible on anyone who challenges them. As a consequence, hundreds of thousands of people die en route to or while attempting to enter liberal democracies, or languish in appalling conditions in the detention camps run and financed by them. The stony logic behind the militarised protection of borders – reflected in this respect quite accurately by the language of militarisation, with border 'security' and 'protection' supplemented by border patrols,<sup>1</sup> 'operational cooperation',<sup>2</sup>

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<sup>1</sup> Conducted in the USA by the Border Patrol agency, a sub-agency of the Department of Homeland Security's Customs and Border Protection agency (Amnesty International, USA 2012, 7).

<sup>2</sup> Widely known as 'Frontex', the official name for the EU's border protection agency is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (see the Frontex website: <http://frontex.europa.eu/about-frontex/origin>).

‘Rapid Intervention’ teams,<sup>3</sup> and ‘Operation’: ‘Sovereign Borders’,<sup>4</sup> ‘Hold the Line’ and ‘Gatekeeper’<sup>5</sup> – is that refugees can be contained in their own countries or regions or ‘deflected’ to other destination countries with less aggressively punitive regimes. It is misguided to think that refugees can be deterred – as I have said, it will always be the case that for many the costs of remaining where they are outweigh the risks of leaving. It is also misguided to think that refugees are free to choose between destination countries – the realistically available options are, for most refugees, extremely limited (Spinks 2013). Nevertheless, there is some evidence to suggest that if a country’s border regime is particularly harsh it can have a deterrent effect (UNHCR 2012b, 12), and there is little doubt that more open access generally would lead to a significant increase in the numbers of people moving to wealthy liberal democracies. The question is whether limiting such movement justifies current policies.

Prior to World War One territorial borders around the world were relatively porous. Border controls proliferated globally during World War One, and have been tightly managed ever since. Individual states and regional groupings attempt to regulate immigration and border crossings in their own interests. In the wealthy Western world, demands for labour have often led to a relaxation in immigration policy, but Wilsher (2012, 57) argues that the 1970s marked the emergence of a ‘new and diffuse climate of fear over migration’, during which anyone arriving in a state without legal authorisation, ‘whether seeking asylum or economic opportunity, became seen as a “security” threat’.

Since the 1970s skilled and other forms of labour immigration have been encouraged when labour markets require it, but these policies co-exist alongside the vigorous policing of borders. Punitive border regimes have been defended by demonising refugees, who are now so routinely vilified that the term ‘illegal’ has ‘broad popular and political currency’ (Dauvergne 2008, 4) regardless of whether or not the person to whom it applies is seeking protection under the Refugee Convention. Although tinged by what Dauvergne (2008, 4) calls ‘xenophobic paranoia’ and often highly racialised, there is a calculation underlying this vilification that is at least superficially rational. Having bundled the myriad causes of refugee displacement into one, the calculation assumes that any relaxation of border controls will lead to wealthy democracies being swamped by the world’s needy. Against this ‘threat’, liberal democratic governments, which since the 1970s have progressively dismantled social welfare safety nets and ceded power to transnational organisations and corporations, act to secure the nation through the militarised protection of borders.

Refugees bear the immediate brunt of border militarisation, while global security companies and organised crime groups engaged in people-smuggling are the clearest winners from ‘the worldwide panic about illegal migration’ (Dauvergne 2008, 10) and corresponding border policing regimes. Politicians and nationalist political parties who gain credibility by

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<sup>3</sup> ‘Rapid Intervention’ teams are squads of border guards deployed by Frontex in response to ‘urgent and exceptional pressure’ resulting from ‘large numbers of third country nationals trying to enter the territory of a [European Union] Member State illegally’ (see the Frontex website: <http://frontex.europa.eu/operations/rapid-intervention>).

<sup>4</sup> The Australian government has branded its current border policing regime ‘Operation Sovereign Borders’. The regime is under the command of an Australian Defence Force Lieutenant General.

<sup>5</sup> ‘Operation Hold the Line’ and ‘Operation Gatekeeper’ were conducted on the USA’s border with Mexico (Amnesty International, USA 2012, 20).

appearing to act decisively ‘in the national interest’ and whose popularity rests on stoking xenophobic nationalism and inflaming distrust of refugees also gain from their promotion of border militarisation. Contrary to the arguments of the nationalists, however, most citizens of liberal democracies are not well served by the current approach.

It is true that there are significant differences between the particular refugee policies pursued by liberal democracies and their regional groupings, just as the rights traditions within these states diverge considerably, as evidenced by their varied approaches to the constitutional and legislative protection of rights. My focus here, however, is on features of the liberal democratic nation-state that are shared. A key argument pursued throughout the book is that tension between the universalism of human rights and the sovereignty of ‘the people’ or ‘the nation’ arises within all modern liberal democracies, including pluralist and multi-nation-states. Although this tension has been mediated in different ways, the issues it poses for how the state engages with refugees and for its own rights-based democratic commitments are similar. My argument that the liberal democratic state is deeply hostile to the human rights claims made by refugees at its borders or in its territory (it can simply ignore the human rights claims made by refugees on the other side of the world) holds for all such states. This hostility is explicable not only with reference to features internal to the liberal state and its political traditions, but also with reference to structural features of international law, *including* the international human rights system.

This argument can be contrasted with the now popular suggestion that human rights are gradually ‘humanising’ international law (see, for example, Benhabib 2005 and Sicilianos 2012). It is certainly true that international human rights treaties have proliferated since the signing of the UDHR in 1948. It is also true that international law has been increasingly concerned to ensure that human rights are secured by states and that states are held accountable for rights infringements. At the same time, however, international law affirms and upholds the sovereignty of independent nation-states, defending the principle of sovereignty as a precondition for recognising and securing the political self-determination of independent peoples. While the forces of globalisation have eroded genuine sovereign autonomy, the sovereignty of states in relation to membership, immigration and border control continues to be aggressively asserted by states and upheld by international law. The result is that the international human rights regime may assist the realisation and extension of rights to citizens and those lawfully present within states but, as I demonstrate in this book, it supports the denial of rights to refugees.

Within wealthy liberal democracies refugees live ‘outside the pale of the law’. This phrase is used by Hannah Arendt in *The Origins of Totalitarianism* (*Origins* 1968, 277, 283, 286) to describe the plight of refugees who sought protection in the liberal democracies of Western Europe (and beyond) in the aftermath of World War One. The phrase has several layers. To be ‘beyond the pale’ is to be outside the bounds of the acceptable or conceivable, it is a transgression both ridiculous and unworthy of serious consideration. The experience of the post-World War One refugees was certainly one of being treated as objects of derision – the popular press referred to them as the ‘scum of the earth’, but the abuses inflicted on them were more grave than this, as I describe in Chapter 1. Arendt argues that the refugees were reduced to ‘a condition of complete rightlessness’ (1968, 296) involving their expulsion ‘from humanity’ (1968, 297). The word ‘pale’ in the expression ‘beyond the pale’ refers to a stake or fence paling, and historically ‘the pale’ fenced or demarcated an area within which a particular legal system was recognised as valid and upheld. Exclusion from the pale thus entailed exclusion from legal recognition. In Arendt’s locution, to be within the pale of the law is to be recognised as a subject of law and to be protected by the physical boundary established by law.

Arendt would also have been aware of darker territory delineated by the pale of the law. A 'pale of settlement' was established along the western frontier of the Russian empire in the early 1800s, establishing a vast ghetto into which millions of the empire's Jews were forced (Davitt 1903). The settlement's inhabitants had no right to roam beyond the pale, and within it they were subject to punitive laws. The pale of the law established by the liberal democratic state, on the other hand, is a privileged space within which citizens appear before each other as equals and rights bearers – as subjects and authors of the law that protects them but also sets them apart from outsiders. In an international system in which sovereign states police their borders and recognise duties to admit only their own nationals, people who have lost or been denied the protection of their own state may find themselves excluded from legal recognition and standing wherever they go. The dark side of the liberal democratic 'pale' is thus not only that those within it turn their backs on the appeals made by those outside, but that its protective boundary does not provide guaranteed assurance even to some of those within. I explore the difficulties this presents for the integrity and durability of the law itself throughout the course of this book.

Using Arendt's discussion in *Origins* as a starting point, Chapter 1 describes the experience of Europe's post-World War One refugees and their legal position in the democracies of Western Europe. Although the refugees were the objects of a complex legal regime that is virtually ignored by Arendt, she is nevertheless correct to characterise them as living outside the pale of the law, as well as to highlight the corrosive impact that this had on the rule of law and rights recognition in Western Europe. Chapter 1 concludes by introducing Arendt's curious 'right to have rights' – a right that one can have while lacking all other rights but which if denied negates all the other rights that one has.

Chapter 2 discusses Arendt's depiction in *Origins* of a distinctively modern nation-state in which rule is based on 'right' rather than 'might' and equality before the law assured. According to Arendt, sentimental nationalism undercut the revolutionary promise of the modern nation-state and helps explain its subsequent failure in Western Europe to treat refugees as the subjects of rights. As well as discussing the historical significance of nationalism, Chapter 2 introduces Arendt's critique (in *Origins* and elsewhere) of the concept of natural or human rights and the role this concept plays in legitimating the modern nation-state, as well as its reliance on the nation. Chapter 2 also considers Arendt's opposing characterisation of rights as the outcome of a certain kind of political commitment.

Chapter 3 develops the preceding chapter's account of the role of the nation in the history of human rights. It builds on that chapter's discussion of Arendt's rights critique, and introduces her distinctive understanding of politics and the public realm. It argues that Arendt's invocation of a public sphere of action provides an appropriately political basis – by contrast to sentimental conceptions of the nation – on which to establish civic solidarity in modern pluralist societies. The claim of this chapter is that an Arendtian brand of solidarity may encourage citizens of contemporary liberal democracies to uphold each other's rights and to extend legal recognition and therefore rights to outsiders.

The lineage of key concepts introduced in Part I is considered in depth in Part II. Chapter 4 focuses on the idea of the ancient 'cosmopolis' constituted by a divine law of nature. While the natural law established a universal moral community, early natural law theorists took for granted a distinction between this universal sphere of morality, governed by natural law, and the limited sphere of justice that was governed by civil law. In Parts II and III of this book, I argue that this distinction continues to have significant implications for refugees. As the

subjects of human rights, refugees are relegated to a moral sphere within which they are not considered subjects of justice.

While the legitimacy of government in modern liberal democracies can be theorised in many different ways, the account of political legitimacy developed by John Locke in his *Second Treatise of Government* encapsulates the standard conceptual apparatus for theorising the modern nation-state and exemplifies the conundrums into which the state is drawn through its dual commitment to universal rights and to the sovereignty of the people. The presuppositions that inform Locke's account of political legitimacy also structure modern international law, within which the characterisation of human rights and the importance of sovereign states as mechanisms for securing rights is distinctively Lockean. By comparison with Locke, other well-known political philosophers such as Hobbes on the one hand and Rousseau on the other have far less contemporary relevance. Chapter 5 challenges Locke's individualist and universalist credentials, demonstrating the role played by 'the public good' (as stand-in for 'the nation') in his account, and emphasising the distinctive difference that he – like his natural law predecessors – draws between the universal sphere of morality and natural rights, and the bounded sphere of justice and citizens' rights.

Immanuel Kant's political philosophy echoes Locke in many respects, but Kant goes beyond Locke in his articulation of the conditions necessary to the achievement of international peace and in his identification of 'cosmopolitan right'. It has been suggested that Kant inaugurated a new era of liberal cosmopolitanism. In Chapter 6 I argue that Kant, like Locke, in fact characterises justice, law and right as internal to the political community or the state. Chapter 6 also argues that Kant accords a privileged role, hitherto ignored by Kantian scholars, to the nation. As in the ancient global cosmopolis, cosmopolitan right and the now much discussed 'right to hospitality' establish the foundations for communicating with strangers but do not provide a basis on which political outsiders can be recognised as subjects of justice or of the rights that are secured and accorded by a rights based political community.

In the years since 1945 we have witnessed a 'rights revolution' and individuals are now accorded standing and recognition in international law to a degree unknown prior to World War Two. Chapter 7 argues that regardless of this, contemporary refugees are still consigned to live outside the pale of the law. The chapter considers how contemporary refugees are treated within liberal democracies and analyses their legal position, drawing significant parallels with the experience and position of Arendt's post-World War One refugees, and reaching similar conclusions concerning the impact of their anomalous legal status on the rule of law within the liberal state.

Chapter 8 develops the preceding chapter's explanation of how international law constructs individuals as legal persons and subjects of human rights. It also emphasises the importance of state sovereignty and considers the historical and moral foundations on which sovereignty rests. It argues that the principle of sovereignty entrenches the privileged role occupied by the nation in the history of modern nation-states, and trumps human rights in international law.

We now live in a global community. Chapter 9 considers the character of this community and supports Arendt's claim that we must assume political responsibility for all that goes on within it, while at the same time resisting the institutionalisation of a global state. The chapter discusses the conditions necessary to the adoption of global responsibility within liberal democracies, and considers the implications of recognising a universal 'right to have rights'. As a right to legal personality and political membership I argue that the right must be

enforced in the form of a global Citizenship Convention. Within liberal democracies, an understanding of the significance of a right to have rights – and of what the deprivation of this right entails – should spur recognition of wide-ranging obligations to refugees, to be met in part through a multi-lateral refugee resettlement treaty between wealthy liberal states, as well as through recognition of global distributive justice obligations.

My account of the obligations owed by the liberal state to refugees will undoubtedly be considered unduly expansive by many. It may also be considered outside the realms of political possibility given how members of contemporary liberal democracies conceive of their right to police their borders, as well as the widespread – although certainly not pervasive – political inertia within these societies. A revival of political engagement is possible, however, and represents our best hope for protecting the revolutionary promise of equality on which liberal democracies are based. We take responsibility for the world we share through action in a public political sphere, and this action engenders a form of solidarity free from the taint of xenophobic nationalism. It is the only manner in which to defend political plurality while at the same time recognising and affirming our shared membership of a human community. I do not intend to downplay the hurdles to the introduction of a global Citizenship Convention along the lines I discuss in Chapter 9, nor the difficulties involved in administering and enforcing such a Convention. Similar obstacles arise in relation to forging a multi-lateral refugee resettlement treaty between liberal democracies, encouraging recognition within these democracies of global distributive justice obligations and extending legal recognition to all who come before their law. Nevertheless, the interests of the citizens of liberal democracies as much as those of all humanity lie in these achievements.