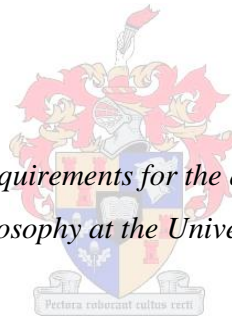


The Refugee as Citizen: the possibility of political membership in a cosmopolitan world

by

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Abstract

The aim of this thesis is to determine what responsibilities democratic states have toward refugees. This problem is stated within the broader framework of the tension inherent in all democratic states: on the one hand, the sovereign right of a state over its territory and, on the other hand, the cosmopolitan or universal human rights norms upon which the state's constitution is founded. I argue that this tension is brought to the fore when refugees cross borders and enter into democratic territories, asking for protection and claiming their human rights. The sheer magnitude of the refugee crisis makes this an issue every state should address. My answer to the question of state responsibility is worked out in four phases. Firstly, I give a conceptual clarification of refugeehood, sovereignty, and cosmopolitanism. I show that neither absolute sovereignty (which implies closed borders) nor extreme cosmopolitanism (which implies no borders) is desirable. Secondly, I draw on Immanuel Kant's cosmopolitan theory as a possible solution. Kant proposes a world-federation of states in which right is realised on the civic, international, and cosmopolitan level. Kant also insists that every individual has the right to hospitality – a right which foreign states should recognise. Thirdly, I examine three prominent theories which could offer us a way to address the refugee crisis. I argue that the first two – multiculturalism and John Rawls' 'law of peoples' – are not adequate responses to the refugee crisis, but that the third – Seyla Benhabib's cosmopolitan federalism – is more promising. Hospitality is the first responsibility states have toward refugees, and Benhabib proposes that it be institutionalised by (i) forming a federation of states founded on cosmopolitan principles, (ii) revising membership norms through the political process of democratic iterations, and (iii) extending some form of political membership to the state to refugees. Lastly, I justify the claim that political membership should be extended by referring to Hannah Arendt's argument that the ability to speak and act publicly is part of what it means to be human. If we deny refugees this ability, or if we deny them access to political processes, we deny their humanity. Benhabib proposes institutional measures to ensure that this does not happen, including allowing for political membership on sub-national, national, and supranational levels. Ultimately, I argue that democratic states have the responsibility to (i) allow entry to refugees, (ii) give refugees legal status and offer protection, and (iii) extend political membership to them on some level.

Opsomming

Die doel van hierdie tesis is om te bepaal wat die verantwoordelikhede van demokratiese state teenoor vlugteling is. Ek plaas hierdie probleem binne die breër raamwerk van die onderliggende spanning in demokratiese state: die soewereine reg van 'n staat oor sy grondgebied, aan die een kant, en die kosmopolitiese of universele menseregte-norme waarop die staat se grondwet berus, aan die ander kant. Ek argumenteer dat hierdie spanning na vore gebring word wanneer vlugteling, op soek na beskerming, grense oorstek, demokratiese state binnetree en aanspraak maak op hulle regte. Ek bespreek die vraagstuk in vier stappe. Eerstens verduidelik ek die begrippe van vlugtelingskap, soewereiniteit en kosmopolitisme. Ek toon aan dat nóg absolute soewereiniteit (wat geslote grense impliseer), nóg ekstreme kosmopolitisme (wat geen grense impliseer) 'n wenslike ideaal is. Tweedens kyk ek na Immanuel Kant se kosmopolitiese teorie vir 'n moontlike oplossing. Kant stel voor dat state saamkom in 'n wêreld-federasie, om sodoende reg te laat geskied op die plaaslike, internasionale, en kosmopolitiese vlak. Kant dring ook aan daarop dat elke individu die reg tot gasvryheid besit, 'n reg wat ook deur ander state buiten die individu se staat van herkoms erken behoort te word. Derdens ondersoek ek drie prominente teorieë wat moontlike oplossings bied vir die vlugtelings-krisis. Ek argumenteer dat die eerste twee – multikulturalisme en John Rawls se '*law of peoples*' – nie voldoende is om die vlugtelings-krisis die hoof te bied nie. Die derde teorie, Seyla Benhabib se kosmopolitiese federalisme, blyk meer belowend te wees. Benhabib stel voor dat die staat se verantwoordelikheid om gasvryheid te toon geïnstitusionaliseer kan word deur (i) 'n federasie van state gegrond op kosmopolitiese beginsels te vorm, (ii) lidmaatskap-norme te hersien deur 'n politieke proses genaamd demokratiese iterasie, en (iii) politieke lidmaatskap van een of ander aard aan vlugteling toe te ken. Laastens regverdig ek die aanspraak op lidmaatskap. Ek verwys na Hannah Arendt se argument dat die vermoë om in die publieke sfeer te praat en dade te kan uitvoer, deel uitmaak van wat dit beteken om 'n mens te wees. As ons verhoed dat vlugteling hierdie twee vermoëns kan uitleef, ontken ons hulle menslikheid. Benhabib stel sekere institutionele maatreëls voor om dit te voorkom. Dit sluit politieke lidmaatskap op 'n sub-nasionale, nasionale, en supra-nasionale vlak in. Uiteindelik argumenteer ek dat demokratiese state se verantwoordelikhede teenoor vlugteling uit die volgende bestaan: (i) toegang tot hierdie state se grondgebied, (ii) wetlike status en beskerming, en (iii) politieke lidmaatskap op een of ander vlak.

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Introduction

The movement of people across borders is nothing new. Indeed, history can be written from the perspective of migrations and conquests, dispersals and diasporas. Individuals and groups migrated to warmer or colder climates, conquerors invaded new territories, colonies were established in foreign lands, and diasporic peoples, exiled from their homelands, sought refuge. There is also nothing new in people being forced or coerced to move, or in people fleeing from danger. This raises the question of how the situation of the refugee, asylum seeker or other displaced person today differs from the situation of those who sought refuge in the past. While refugees in pre-modern times also often entered territories ‘belonging’ to others, a development of the modern age makes the situation of refugees today different from the situation of refugees in the past: the entire surface of the earth has been divided into different territories, each piece of land belonging to some or other state. Many of these states are, or claim to be, democratic states. Seyla Benhabib (2005: 673) writes that the influx of refugees and other displaced persons into these democratic states casts a light on the constitutive dilemma facing every liberal democracy: the tension between sovereign self-determination claims and adherence to universal human rights principles. In broader terms, underlying every democracy is a tension between sovereignty and cosmopolitanism. In what follows, I investigate this tension with specific reference to the plight of refugees. The rights claims made by refugees exacerbate this inherent tension in democracies, calling upon democracies to address the question of refugees. The question of how a democracy should resolve, or at least deal with, the tension is also the question of a democracy’s responsibility to those who seek refuge within its borders.

Before addressing the problem, however, it is necessary to justify the claim that it *is* a problem – that the movement of people across borders, and the claims they make, is really on such a scale that it could be seen to threaten the (seeming) stability of many democracies. While the question of whether refugees pose a *threat* to democracies remains open for the time being, the sheer scale of the movement of people across borders makes it obvious that democracies will be, in some way, impacted. If someone flees *their* territory, they necessarily enter someone else’s. This has far-reaching implications. The influx of groups of people into foreign territories destabilizes communities that are very often already in a precarious

balance. People need to be fed, they need to be housed, and they want to work and to play and to move about. They want to be treated as equal human beings and therefore they lay claim to rights and entitlements. Refugees bring with them not only their bodies, but also their ideas, cultures, religions; in so doing they impact or confront the cultures of the countries they enter. The movement of people across borders has social, political and economic repercussions. Any problem facing an existing community, whether it is poverty, shortage of resources, joblessness, cultural or racial tensions, is aggravated by the influx of aliens into that community.

While it is not only refugees and other stateless persons who cross borders (one can think of seasonal migrant workers and immigrants, for example), the plight of the refugee deserves our specific attention because, as Benhabib (2006: 46) writes, “the condition of undocumented aliens, as well as refugees and asylum seekers [...] remains in the murky domain between legality and illegality”. Refugees, situated in this “murky domain” – or in what Hannah Arendt (1973: 459) calls “holes of oblivion” – are in an extremely vulnerable position. While the fact that people find themselves in this position is not an unknown phenomenon, the sheer scale of today’s situation is unparalleled to any of the refugee crises in the past. The United Nations High Commissioner for Refugees (hereafter the UNHCR) has identified the problem of the displacement of peoples (both individuals and groups, within a circumscribed territory and across borders) as “the new 21st century challenge”, stating that “2012 was marked by refugee crises reaching levels unseen in the previous decade” (2013: 5). According to Carlos Forment (1996: 314), peripheral peoples (those who are marginalized in our societies – this would include refugees and other displaced persons) are emblematic of contemporary public life.

Recent statistics released by the UNHCR support this claim: on average, the amount of people granted refugee status daily increased fivefold from 2010 to 2012, with 23 000 persons forced to flee their homes every day. By the end of 2012, 7.6 million people were newly displaced. There were 10 million stateless persons, almost 900 000 asylum claims globally, and of all those, almost 22 000 were children unaccompanied by any adults. There were a total of 45.2 million people worldwide who were forcibly displaced due to persecution, conflict, generalized violence and human rights violations (UNHCR 2013: 2). This increased to 51.2 million people by the end of 2013 (UNHCR 2014: 2). The sharp increase in numbers is mostly due to conflicts in the Democratic Republic of the Congo, Mali, and between Sudan and the newly formed South Sudan, as well as the war in Syria.

Since 2006, South Africa has been the host country with the highest number of asylum seekers, but in 2012 the United States topped the list (UNHCR 2013: 25), and in 2013 South Africa came third (following the USA and Germany), with 70 000 asylum claims made (UNHCR 2014: 3).

The years 2008-2010 saw around 200 000 asylum claims per annum being handled in South Africa. This number decreased sharply in 2011, mainly due to the closure of several refugee reception offices across the country, and the fact that the Cape Town office no longer deals with new asylum claims. The South African Department of Home Affairs wishes to curb the amount of asylum claims they deal with. Part of the problem is that a large amount of people seeking asylum in South Africa are so-called 'economic' refugees, and do not therefore have the same rights as refugees who flee from life-threatening situations (a distinction that will be discussed in Chapter 1). To dissuade these economic refugees (or economic migrants) from entering South Africa, Home Affairs is making it hard for them to attain refugee status. The upshot of this is that refugees who are in need of protection are also prevented from attaining that status:

The refugee system is meant to stand separate from and parallel to the system of immigration control. However, gaps in immigration law and policy have been felt in the refugee system, hindering this system from fulfilling its protective function. Instead, it too has become a mechanism of immigration control, at great cost to genuine asylum seekers, who are unable to avail themselves of the rights provided to them under refugee law. (Amit 2011: 486)

Despite the immigration laws put in place to prevent people from streaming into South Africa, and despite Home Affairs' inadequate and problematic response to the problem, the Government of South Africa remains the largest asylum body in the world, with 778 600 claims processed in the last five years, outranking even the UNHCR (UNHCR 2013: 27).¹ UNHCR statistics (2013: 11) also show that most refugees live in developing countries: they host roughly 81% of the world's refugees, with the 49 least developed countries hosting 24% of the global total. These staggering statistics show us why, as Goodwin-Gill (1983: v) pointed out, refugee law, and the protection of refugees, displaced persons, the stateless, and

¹ See Amit (2011) on the failures of South Africa's refugee system, and specifically the flaws in status determination applications processed by the Department of Home Affairs.

asylum seekers, continues to occupy a place in the international regime, and remains an important issue for every state.

Faced with such large numbers of people moving across borders seeking protection, the question is whether other states and the citizens of those states have a responsibility toward refugees and asylum seekers and, if so, what their responsibility is. This is what I want to investigate in this study. Given that many of the receiving or host countries, including South Africa, are democracies, I focus on the responsibility of the democratic state toward refugees.² I also start from the assumption that we, as human beings, are holders of certain fundamental rights. Given the limited scope of this study, the debates surrounding the justification of rights and the content of rights will largely be set aside. My starting assumption is grounded in the fact that there are international and national documents of law which prescribe that we are bearers of human rights, and that the constitutions of democracies are founded on the notion of human rights. This notion of rights for all on the basis of their humanity is a cosmopolitan notion (or value), and stands in tension with the democratic value of self-determination and the notion of the sovereignty of the state. Therefore, in asking what responsibilities democratic states have toward refugees, I am also asking how this tension should be resolved.

What is needed to answer these questions is, firstly, an adequate understanding of the three main concepts involved: refugeehood, cosmopolitanism, and sovereignty. I investigate and explain these concepts in the first chapter, tracing the development of each concept from its origins to how we use it today. As hinted above, we can distinguish between refugees, immigrants, migrants, etcetera, while also linking refugeehood to stateless people, displaced persons, and asylum seekers/asylees. The South African refugee system conflates the issue of immigration control with asylum which leads to asylum seekers not being given refugee status and, with that, the rights accorded to refugees in international law. Refugees in South Africa are therefore situated in the murky domain Benhabib speaks of – according to international law, they have certain rights (and are therefore ‘legal’), but according to Home Affairs they, like economic migrants, are ‘illegal.’ If, then, our aim is to address the refugee crisis – to help them out of the murky domain – a clear definition of refugeehood needs to be formulated.

² It is interesting to note, as I have above, that most refugees flee to developing countries. While proximity probably explains this phenomenon, one could question why Western democratic (and developed) countries do not share more of the responsibility.

Following the vast numbers of people left homeless or stateless by the destruction of the First World War, the League of Nations defined a refugee as a person outside of their country of origin, unprotected by their state (Goodwin-Gill 1983: 3). Over the course of the twentieth and twenty first centuries, this definition was expanded to meet changing circumstances: more destructive wars on a global scale, more refugees, and increasing international interdependence. I show how the concept of refugeehood developed over the last century, how it was incorporated into documents of international law, and how refugee rights are protected by international bodies such as the UNHCR. As Andrew Shacknove (1985: 276) writes, it is vital that we have a clear conception of refugeehood:

A proper conception of refugeehood is an important matter [...] the problem is only partially attributable to political conflicts and resource scarcity, for conceptual confusion – about the meaning of refugeehood, its causes, and its management – also contributes to the misery of both refugee and host and to the inflammation of international tension.

If refugeehood is clearly defined in international law, those who qualify as refugees have more support when claiming protection and rights from sovereign states. If the definition is vague, a state (like South Africa) could put refugees into the same category as (illegal) immigrants, thus avoiding its responsibility toward refugees. My discussion relies on Shacknove's conception of refugeehood. I show how the defining characteristic lies in the political relation between a citizen and a state; the refugee is the individual who has lost the protection of his or her state, where the political bond is severed. This characteristic is added to the ones provided in international law. I therefore frame the refugee crisis as primarily a political crisis (although it has economic and social repercussions) and one that therefore calls upon states to take responsibility.

This raises a problem: where states refuse entrance or protection to refugees, they are left rightless. It is precisely this problem that Hannah Arendt addresses in her discussion of statelessness. We, as human beings, have the *right to have rights*, which means “to live in a framework where one is judged by one's actions and opinions” and includes “the right to belong to some kind of organized community” (Arendt 1973: 296-297). Every individual has the right to legal personhood, and the right to the basic human rights. However, this right is only inalienable in theory, as it falls on states to guarantee and protect these rights. Where a person is left without the protection of their own state, and refused protection by a foreign

state, they are in effect rightless. Developments in international law since Arendt's time have tried to counter this problem; the UNHCR's (as well as non-state actors like NGOs) mandate is to protect the lives and rights of refugees across the globe. It seems that states are no longer necessary to provide rights for refugees. However, this is not quite true. Even international bodies like the UNHCR rely on the cooperation of the states in which refugees find themselves, and even though states are dictated to act in certain ways by treaties and protocols, they still retain some degree of a sovereign right to decide what happens within their territories.

The next question I address in Chapter 1 is that of the extent of the sovereign's power. One response to the refugee crisis could be to give states the freedom to decide how they respond to it – to give them absolute sovereignty over their territories. I discuss how the notion of sovereignty developed; looking at the distinctions between different forms of sovereignty such as absolute sovereignty and popular sovereignty. I then consider the possibility of states reacting to the refugee crisis by claiming their right to sovereignty and closing their borders – what Benhabib (2009: 692) calls the sovereigntist territorialist position. From this position, any claims made by international law are seen as violations of the sovereignty of the state. The state serves to protect its people and their culture, values, religion, and so forth. If it is forced to open its borders to foreigners – even foreigners whose lives are in danger – it would be a violation of the right of that state to control its own territory.

As a proponent of this view, I discuss the work of Michael Walzer (1983). Walzer argues that the distinctiveness of a culture relies on closure, and a community retains the right to decide who it includes and excludes. A community can choose to exclude individuals or groups if it sees them as a threat to its culture. I show how this argument rests on a view of culture that ignores the ways in which different cultures came into being. Throughout history, different cultures have interacted with one another in various ways, learning, borrowing, and stealing each other's cultural practices in the process. Arguments for the protection of a specific culture fail to see this history of development and the ways in which the culture is still open to change.

Another argument for closing borders, not unlike the first, is that it is in the 'national interest' to do so. Foreigners entering a country not only threaten the cultural practices of that country, but also its political stability and the lives of its citizens. This argument has become especially prominent following the 9/11 terror attacks in the USA. As a counter to this view, I

discuss Allen Buchanan's (2005) argument that 'it is in the national interest' is *not* a legitimate reason for closing borders, precisely because such action conflicts with the human rights norms upon which democracies are founded. The last argument for closed borders rests on the democratic right to self-determination – the notion that a group of people have a right to establish themselves as a people separate from others. This argument can be countered by pointing out that the constitutive act of establishing a political community is not democratic unless it is justified to those being excluded. Democracies may have the right to establish borders, but those borders must be in principle justifiable to non-members, and they must in principle be open to potential members. Sovereignty can no longer legitimately exist in its absolute form, and if it is to exist at all, it has to be pliable and adaptable to developments in the international sphere.

If absolute sovereignty is not a justifiable position, can cosmopolitanism offer a viable perspective? To answer this, I follow the development of cosmopolitan thought from its origins in Ancient Greece to its various forms and meanings today. I then consider the possibility of a world-state – cosmopolitanism in its most extreme form – by looking at the arguments of the French revolutionary Anarchis Cloots. Cloots argues for a central, global government under which individuals are directly subjected – no borders, no local governments, and no states. As I hope to show, this kind of system is neither desirable nor practical. It is impractical, because such a state would be unresponsive to local needs, while also facing difficulties in managing all the different groups (cultural, religious, etcetera) that exist. It is undesirable, because such an extreme centralisation of power would ultimately result in a kind of despotism which forces its values upon all individuals (since this would make practical matters easier). No check on the state's power will exist, leaving its citizens vulnerable to possible unjust action from the state. It seems that a world-state is just as undesirable as a world consisting of completely separate, sovereign states. This radical position needs to be tempered. In the final section, I consider various principles of cosmopolitanism which are reconcilable with the existence of states. David Held (2007) proposes a layered cosmopolitanism, where states adhere to eight fundamental principles. Thomas Pogge (2005) argues that the global economic order should be restructured in such a way that states and institutions can work together to bring about global justice. In both these approaches, there is room for the existence of states, on the condition that they take the international community into account as well. If neither absolute sovereignty nor a world-state is desirable, a middle-way between the two poles seems the only possible way forward.

In the second chapter, I discuss Immanuel Kant's cosmopolitanism as set out in his 1795 essay *Perpetual Peace* (1939), which influenced later cosmopolitan thinkers, but which also provides a kind of 'middle way' between sovereignty and cosmopolitanism. Kant also specifically addresses the question of hospitality toward foreigners, which is of direct import for the refugee crisis. The chapter will follow the structure of Kant's essay, in which he articulates three definitive articles for perpetual peace, which correspond to the three spheres of right. The first article for perpetual peace holds that states ought to be republican, and corresponds to domestic or civil right (Kant 1939: 12). I discuss the characteristics of a republican state, and the opportunities it affords for its members to participate in political processes. I also address the problematic notion of patriotism, which Kant sees as desirable but which today has a negative connotation. I show how republican patriotism is directed at the state's constitution, which embodies republican ideals such as freedom and equality. Because the members of a republican state are loyal toward their constitution, and not toward an ethnic or cultural notion of the state, membership can in principle be open to foreigners.

The second article corresponds to international right, and prescribes that states should form a federated world republic (ibid. 18). This world republic differs from the kind of world-state that Cloots proposes in that states retain a measure of autonomy. Where Cloots draws a direct relation between the individual and the world-state, Kant proposes that individuals are represented by their elected leaders on the federal level. The different states can then exert influence over other members of the federation when necessary. Unlike Cloots' system, this system provides a check on the power of the state. In spite of the 'influence' states have upon one another, Kant's proposed league of republican states is also a voluntary league: states cannot and should not be coerced into joining the league. Kant's main reason for this is that coercing a state into joining the league will deny the autonomy of the state and that of its citizens.

In the final section of Chapter 2, I turn to Kant's third category of right: cosmopolitan right. Cosmopolitan right is related to his third article for perpetual peace, which states that cosmopolitan right is only realized when conditions of universal hospitality are met (ibid. 23). Cosmopolitan right is therefore concerned with the right to hospitality. I consider the differences between Kant's second and third categories of right, to establish why he thinks it necessary to form a third category of right. Whereas international right deals with relations between states, it leaves the question of relations between individuals and foreign states hanging. For this reason, we need the category of cosmopolitan right (ibid. 11). Next, I turn

to the content of cosmopolitan right, as well as the limitations Kant sets. Cosmopolitan right gives every individual seeking entry into a foreign country (for whatever reason) the right to request interaction with the state. However, the right to enter the foreign territory is not included. It remains the prerogative of the sovereign state to decide who is granted entry, but that decision should be based on good reasons (ibid. 73). I then turn to possible justifications of cosmopolitan right. Why should we see hospitality as a right? Kant justifies this with reference to the fact that we inhabit the same earth (1939: 24). I consider the limitations of this justification, as well as Pauline Kleingeld's reading of Kant, which could offer more convincing justifications. Kleingeld (2012: 83) believes that cosmopolitan right can be justified by two principles Kant formulated in *Metaphysics of Morals*: that our freedom only makes sense if we exist, and that we can only exist if we have a place in which we exist; we also have a right to communicate with others, to inform them of the choices we freely make. Finally, I investigate how cosmopolitan right can be institutionalised. This is also the project of the last two chapters.

In Chapter 3, I discuss three prominent approaches to the question of welcoming foreigners or, then, extending hospitality to foreigners. The first approach is multiculturalism, which was developed as a model for accommodating cultural, religious, and ethnic diversity in democratic states through policies protecting group rights, specifically the rights of minority groups. I explain the basic characteristics and aims of multiculturalism, before turning to three justifications of multiculturalism: the communitarian, the liberal, and the postcolonial. I claim that multiculturalism is an inadequate response to the refugee crisis, and a problematic approach, for three reasons: (i) its view that culture should be protected is problematic and potentially dangerous. Multicultural theories can miss the ways in which different cultures interacted over time to form the cultures we have today, which makes it harder to distinguish between 'our' culture and 'their' culture. It could also entrench existing divides between groups resulting from their differences, which could lead to violence. (ii) Multiculturalism faces the problem of internal minorities. Practices which discriminate against minorities within minority groups (women, for example) are allowed to continue. Because multiculturalist policies protect the cultural practices of specific groups, these discriminatory practices cannot be stopped by the state. Furthermore, any dissent from within the group (for example, women claiming their human rights) can be seen as a betrayal of the group, with serious social implications for the person who dissents. (iii) When it comes to the problem of refugees, it is not clear that a multicultural approach will necessarily be better. Even within a

state which adopts multicultural policies, group rights are only extended to members of minorities who are also members of the state. Multiculturalism on its own cannot guarantee hospitality to strangers, nor does it address the issue of membership of the state.

The second and third sections of this chapter deal with two responses that are influenced by Kant's cosmopolitanism. The first is John Rawls' 'law of peoples' which follows from Kant's second sphere of right: international right. Rawls wants to extend his theory of justice, which defines justice as fairness, to international law. I discuss the fundamental aspects of his theory of justice and how Rawls proposes to extend it: first in ideal or strict compliance theory, and then in nonideal theory (see Rawls 2002: 44 and following). As in the case of domestic justice, where individuals would decide on basic principles agreeable to all, different peoples will decide on seven fundamental principles which would govern their interaction (ibid. 46). However, Rawls' account for international justice is inadequate on several grounds: (i) the 'law of peoples' is supposed to provide standards along which interaction between different states can take place, but Rawls provides no institutions which can enforce these standards or pass judgement where states fail to meet them. (ii) Thomas Pogge (1994) and Martha Nussbaum (2006) argue that a theory of international justice has to take into account economic justice, which the 'law of peoples' does not do. (iii) Finally, Rawls' theory provides no answer for the refugee question. Rawls believes that, should a 'law of peoples' be formulated, immigration would not be an issue. Rawls therefore ignores Kant's third category of right, which is precisely the category which is of use to refugees. He limits a state's responsibility to foreigners to helping them in their own state, but remains silent on the state's responsibility to foreigners who enter its territory.

While also building on Kant's cosmopolitanism, Seyla Benhabib (2004, 2006) takes a different route from Rawls. What Rawls fails to recognise is the importance of *cosmopolitan* right. His theory of global justice is restricted because it remains within the framework of international right. Benhabib (2004: 6) argues that we need a new normative map to think about issues of global justice. She identifies three developments which changed the world in such a way that the old models (international law, Westphalian sovereignty) are now outdated: (i) a crisis in territoriality, (ii) an international human rights regime, and (iii) the disaggregation of citizenship. For Benhabib, cosmopolitanism (or moral universalism) offers a new normative framework for global justice. As foundation for her theory, Benhabib draws on Kant's cosmopolitanism and Arendt's notion of the right to have rights. I explain how she interprets these two notions and how she develops her own theory of a world-federation of

republican states structured along principles of moral universalism. Central to her theory is a political process Benhabib (2004: 19) calls ‘democratic iteration’. Democratic iteration entails deliberation over universalist rights claims, which allows these (general) claims to be contextualised in specific political communities. It therefore allows for mediation between the universal and particular. The process is also jurisgenerative, and can lead to more inclusive policies, which is beneficial to refugees and stateless people seeking entry into foreign states. Their rights claims, based on universalist human rights, can be answered through a deliberative process which also takes into account the particularity of the situation.

In Chapter 4, I investigate Benhabib’s proposed solution to the refugee question further. This chapter is divided into three sections. In the first, I explain how a deliberative politics, such as Benhabib’s democratic iteration, can give refugees a political voice, and why this is important. I focus on Arendt’s thought on speech and action in the political sphere. Arendt (1998: 4) holds that what we say and do only makes sense if it is seen and heard by others, and moreover made sense of by others. However, it often happens that people’s words fall on deaf ears: they are silenced, ignored, or not recognised as having a political voice. Where this happens – where individuals are deprived of a place in which their opinions and actions are significant – we can say that they are deprived of their human rights (Arendt 1973: 296). The question of whose speech is relevant is, therefore, a fundamental question in politics. Refugees are largely excluded from political processes, even when the outcomes affect their lives. They are in effect voiceless, and therefore deprived of their rights. The only way in which they can participate in political processes, and so effectively claim their rights, is if they somehow gain entry into the political sphere.

The second section of this chapter therefore deals with the different possible ways in which political membership can be extended to refugees. I consider three possibilities, present in Benhabib’s work, for extending membership to refugees: membership on different levels, political protest, and more inclusive political narratives. Benhabib (2004: 135) argues that membership cannot be denied in perpetuity – at some point, some form of political membership must be granted. Benhabib suggests membership on levels other than the national (i.e. citizenship): sub-national (city-citizenship) or supranational (citizenship to, for example, the European Union). Membership to supranational political bodies could help ensure that individuals are protected, even when their states no longer protect them, while membership to sub-national bodies ensures that refugees have a say in political matters that directly affect them, while also then being represented on the national level.

The second alternative I discuss is political protest, or informal action. While Benhabib's theory focuses on the institutionalising of membership norms and cosmopolitan values, it also allows for informal participation in politics. While this is something Benhabib recognises, I depart from her slightly and focus on an example of protest action by immigrants in the USA, which led to discussions on how to make public institutions more inclusive (see Beltrán 2009). I also refer to Jacques Rancière's view that politics is a moment of disagreement, when those who have been excluded and rendered voiceless make their voices heard. While protest action can raise awareness and even force those in power to take notice, it is only effective if it brings about institutional change. The same could be said of the third alternative: inclusive political narratives. In this sub-section, I discuss Benhabib's (1990) reading of Arendt and her claim that the stories we tell about ourselves and our identities shape our world. This has two consequences for the refugee question: (i) in retelling their (political) stories, host countries can become more inclusive and accepting of strangers, and (ii) if refugees are able to tell their stories they will retain their sense of identity, while their narratives can also lead to increased understanding between them and their hosts. However, storytelling is only possible if refugees have a place to tell their stories, which once again shows why institutional changes are necessary.

In the final section, I discuss two criticisms levelled against Benhabib's universalism by Bonnie Honig (2006) and Jeremy Waldron (2006). Honig (2006: 102) criticises Benhabib's attempt to create a postmetaphysical politics, arguing that Benhabib's theory retains vestiges of earlier universalisms and that, like the earlier universalisms, it is incomplete because it is not as we would imagine universalism to be: unconditional, context-transcending, and unmarked by particularity (ibid. 116). This means that Benhabib's universalism remains tainted by the particularity of Western ideals, and all rights claims are measured against the existing (and dominant) Western standard. The upshot of this is that democratic iterations are not open to new ways of interpreting rights, or to new notions of right(s). Benhabib counters this criticism by pointing out that the notion of 'iteration' (which she borrows from Derrida) indicates that the universal *is* able to adapt to particular contexts, and that democratic iterations *can* therefore create new meanings.

Waldron (2006: 84) questions whether Benhabib, in her focus on institutional processes, does not undervalue the role mundane or everyday interaction plays in spreading cosmopolitan norms. I consider Waldron's argument, which focuses on commercial interaction, as well as other arguments that show how everyday interaction can help people 'get used to one

another' and so lead to increased tolerance, acceptance, and cosmopolitan ideals. In response to Waldron, Benhabib (2006: 149) points out that Kantian cosmopolitanism is not about interactions between individuals, but interactions between individuals and foreign states. It is, therefore, concerned with finding the correct institutions to bring about a global situation of right. Mundane interaction *helps* (in a way similar to the telling of political narratives, for example), but without the proper institutions in place, it will not get very far. The bonding that takes place between individuals in a political community can only be sustainable if it is institutionalised. Furthermore, only individuals who share a space can interact in this manner. The question Benhabib is grappling with is whether and how we should allow refugees to share 'our' spaces. Before we can interact with them, we have to let them in. Whether this will happen or not depends on decisions made by state institutions.

The key question I am asking in this thesis is what the responsibility of a democratic state is toward refugees seeking entry and protection. This question is important, given the number of refugees and stateless people on this planet. From a philosophical or theoretical perspective, it is important because it sheds light on a paradox found in democracies: the tension between the universalist or cosmopolitan norms upon which their constitutions are based, and notions of sovereignty and self-determination inherent in the idea of a democracy. In asking what a state's responsibility toward refugees is, I am asking how this tension can be resolved or, at least, managed.

1. Problematic Concepts: Refugeehood, Sovereignty, and Cosmopolitanism

In this chapter, I consider the three main elements at play in the problem of the refugee: the figure of the refugee, the sovereignty of states, and the cosmopolitan norms contained in the constitutions of democratic states. In each instance, I discuss how the concept has developed, how it is instituted in our current context, and how it can be adapted to meet the demands of the refugee crisis. This chapter will then form the theoretical basis of my thesis, in which I attempt to reconcile the sovereignty of individual states and the demands of cosmopolitanism in such a way that refugees are accommodated and protected.

In the first section of this chapter I discuss the situation of the refugee in international law. This is done in two stages. Firstly, I attempt to define refugeehood by looking at current definitions contained in international documents regarding the status of refugees. I show how this definition has expanded over time, since its first articulation after the First World War up until current definitions of refugeehood. In this discussion, I take my lead from Andrew Shacknove (1985), who argues that the defining characteristic of a refugee is the fact that the refugee is an individual who is left without the protection of his or her state. Secondly, I look at the rights accorded to refugees in documents of international law, including the principle of non-refoulement. I also draw on Hannah Arendt's (1973) discussion of the Rights of Man, her insistence that every individual has the right to have rights, and her belief that these rights cannot be guaranteed outside of the state. Refugees, as individuals who are not protected by their states, are therefore rightless beings. This is only partially remedied by the rights accorded to them and the protection offered to them by international bodies like the United Nations. Rights are still mostly guaranteed by states, and refugees are dependent on their host nations for access to their rights. This is problematic, given that states retain (to a certain extent) their sovereign right to determine who is allowed within their borders.

In the second section, I discuss the notion of the sovereign state. A possible response to the refugee crisis would be closing the state's borders to foreigners and limiting citizenship. This response rests on the assumption that the state has absolute jurisdiction over its territory, with no recourse to international law or universal moral standards. Human rights become citizenship rights, and the state is sovereign. First, I discuss the development of the concept of sovereignty or the sovereign state, from Hobbes' absolute sovereignty to notions of popular

sovereignty, and the Westphalian model of sovereignty. Secondly, I consider arguments for the closing of borders and the sovereign right of states to control their borders. I focus especially on arguments made in the national interest: that the influx of refugees poses a threat to communities and cultures (see Walzer 1983) and to national security. I show how these arguments fail to convince. The final argument for closed borders is that of a people's right to democratic self-determination. I argue that this right does mean that a group of individuals have the right to form a community and to erect borders, but that those borders - especially the borders of democratic states - need to be justified and cannot be set in stone. A democratic state's sovereignty is constrained in some ways by the cosmopolitan norms it upholds in its constitution.

This brings me to the final section of this chapter, in which I discuss the notion of cosmopolitanism. I return to the origin of the idea of world-citizenship in Greek times, with reference to the different interpretations thereof by the Stoics and the Cynics, and how the concept grew over time to include a range of meanings, specifically the idea of a collection of universal human rights (moral cosmopolitanism) which were codified into international law (legal cosmopolitanism). Secondly, as in the previous chapter, I discuss one extreme position as a response to the refugee crisis - in this instance, the possibility of a world-state in which the individual is directly subsumed and directly represented by a single government ruling over the entire globe. I refer to the eighteenth century French thinker Anarchis Cloots' arguments for a world-state (see Kleingeld 2006). This position is both impractical and undesirable, as it would lead to what Immanuel Kant (1939: 35) refers to as a "universal monarchy...and a despotism, which...sooner or later degenerates into anarchy". Finally, I consider principles of cosmopolitanism which would allow it to be applicable to particular situations and contexts. Throughout this thesis, this mediation between sovereignty and cosmopolitanism will be attempted, as refugees can only be protected if their rights as human beings (i.e. cosmopolitan rights) are recognised, but these rights can only be exercised within political communities (but not necessarily states).

1.1 The Refugee in International Law

1.1.1 Who is a refugee?

Before any attempt can be made to answer the question of the state's responsibility, before any talk of laws or policies, it is necessary to define the term 'refugee'. As Andrew Shacknove (1985: 276) points out, a too narrow conception of refugeehood will deny

international protection to a countless number of people, while a too inclusive conception is morally suspect and would exhaust the financial and other resources of relief programs. It is of great importance to have a working conception of refugeehood, as this will determine who is and who is not entitled to protection and assistance by the UNHCR and other protecting bodies (Goodwin-Gill 1983: 6). While refugees inhabit the “murky domain” between legality and illegality, if recognised they are also eligible for international assistance in the shape of material relief, asylum and permanent resettlement.

On a very basic level, we tend to think of refugees as people who flee their countries because of life-threatening conditions on that side, and who then enter other countries where they hope they will be able to live a better life. What is implied by the popular conception of ‘refugee’ is that a person who is a refugee is worthy of assistance, and that assistance (and possible protection) ought to be given (ibid. 2). After the First World War, it fell to the League of Nations to address the issue of the countless people left stateless due to the war. The League defined a refugee as a person who is a) outside his or her country of origin and, b) who is without the protection of the government of that state (ibid. 3). The failure of the League and the effects of the Second World War left those who were stateless even more vulnerable. Various bodies were formed to address the issue: first, the United Nations Relief and Rehabilitation Administration (UNRRA), which dealt with the repatriation of those who were displaced by the Nazi and fascist regimes, then the International Refugee Organisation (IRO) and, finally, the UNHCR in 1951. The 1951 Statute of the Office of the UNHCR (hereafter the Statute) was followed by the 1951 Convention relating to the Status of Refugees (hereafter the Convention), which are the international instruments that still protect the rights of refugees and other ‘persons of concern’ such as asylum-seekers, returnees, stateless persons and certain groups of internally displaced persons (ibid. 4).

The Convention, along with the 1967 Protocol Relating to the Status of Refugees (hereafter the Protocol), classifies persons as refugees if a) they are outside their country of origin, b) unable or unwilling to avail themselves of protection of that country, or to return to that country, c) and if their inability or unwillingness is attributable to a well-founded fear of being persecuted d) where this persecution is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion (ibid. 13). Refugees who meet these requirements are known as ‘convention’ refugees. Most countries have adopted a more or less similar formulation to the Convention’s in their constitutions.

The Statute later extended this definition to include persons who crossed an international frontier as the result of conflict, and radical political, social and economic changes in their countries of origin. Internally displaced persons, i.e. persons who did not cross an international frontier, were also eventually included (ibid. 8). Along with convention refugees, there are also ‘statutory’ refugees, a category which includes refugees whose individual cases have been heard, but also large groups of people who are fleeing war in their own country and can therefore be recognised as qualifying (as is the case with Syrian refugees today). A further distinction can be drawn between these *de iure* refugees – refugees whose status is recognised by law – and *de facto* refugees, who are convention refugees unwilling or unable to obtain recognition of their status or who do not qualify for refugee status, but yet are unable to return to their country of origin (ibid. 17).

Building on the notion of statutory refugees, the later definition of ‘refugee’ given by the Organization of African Unity (OAU) does not see persecution, or the fear thereof, as a necessary characteristic of refugeehood. A refugee can also be a person who leaves his or her home or country “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality” (in Shacknove 1985: 275-276). What *this* formulation recognises is that the bond between a specific state and a citizen in that state can be severed in several ways, and not only through persecution. There are multiple ways in which individuals can be alienated from their states.

Shacknove (1985: 275) contends that neither persecution nor alienage captures what is essential about refugeehood. This claim contradicts the implicit argument upon which previous definitions of refugeehood were based, which holds that a) there exists a bond of trust, loyalty, protection, and assistance between citizens and states, b) this bond is severed in the case of the refugee, c) the physical manifestation of this severed bond always takes the form of persecution and/or alienage, and d) these two manifestations are *necessary* and *sufficient* conditions for refugeehood. Shacknove agrees with the moral claim made by this argument (that there exists a minimal relation of rights and duties between citizens and states, and that the absence of this engenders refugees), but he disagrees with the empirical claim about the consequences of the severed bond. While persecution is a sufficient condition for severing the tie between an individual, as citizen of a state, and the state, it is not a necessary condition.

Shacknove (ibid. 277) sees persecution as a manifestation of a broader phenomenon: “the absence of state protection of the citizen’s basic needs”. It is not only brutal states that fail to protect their citizens – frail states also fail. Theories of state formation generally hold that states are formed when individuals decide to band together in order to protect themselves against one another, as well as against resource scarcity and natural disasters. Therefore, citizens should at least be guaranteed “physical security, vital subsistence, and liberty of political participation and physical movement” (ibid. 281). The primary purpose of any civil society, then, is to protect individuals from one another and to reduce every individual’s vulnerability to every other (ibid. 278). It is not only against state aggression (or persecution) that an individual should be protected by his or her state. Any aggression between individuals which is not met by state action is a negation of the minimum bonds tying the society together, and could engender refugees. What a state should offer its citizens is physical security, and persecution is just one way in which this security is absent. Shacknove (ibid. 279) argues that all threats to physical security establish valid claims to refugee status.

Alienage is also not a necessary condition for refugeehood, as people can be displaced within the borders of their own country, and as these people need not cross a border to gain access to protection from the international community. Alienage, then, is also a subset of a broader category: the ability of the international community to gain access to unprotected persons (ibid. 277). The international community has ‘access’ to the refugee within his or her country of origin when they can supply material or diplomatic assistance to the refugee. Where a state cannot meet its citizens’ basic needs (physical security, vital subsistence, political participation, and physical movement), those citizens have a valid claim to refugeehood even if they remain within the borders of the state. This does not mean that every individual deprived of a basic need is a potential refugee (this would be a too broad conception of refugeehood). While an unmet need is a necessary condition for refugeehood, it is not a sufficient condition – not all persons deprived of one or more of their basic needs are refugees (ibid. 282). What differentiates refugees from other destitute people, is their ability to seek international assistance – either because the state is willing to allow international assistance, or unable to prevent such assistance from being given. Shacknove (ibid. 277) therefore defines refugees as

[P]ersons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.

For Shacknove, then, the distinction between a refugee and an alien or a destitute person lies in the protection offered by the person's country of origin for that person, both within and outside of its borders. His conception rests on the *political* bond that exists between a citizen and a state:

Conceptually [...] refugeehood is unrelated to migration. It is exclusively a political relation between the citizen and the state, not a territorial relation between a countryman and his homeland. (ibid. 283)

The protection a state should offer its citizens is of two kinds. Firstly, there is internal protection, which is the effective guarantee in matters such as life, liberty and security of person. Then there is external protection, which includes diplomatic protection, and the documentation of nationals abroad, as well as the recognition of the right to return to your country of origin or country of which you are a citizen (Goodwin-Gill 1983: 10).

Arendt shares the idea that refugeehood or statelessness is a political concept. In her discussion of the concentration camps and internment camps of totalitarian regimes, Arendt (1973: 458-459) writes that “[s]uffering, of which there has always been too much on earth, is not the issue, nor is the number of victims. Human nature as such is at stake”. What concerns us is therefore the very political question of who counts as a human being worthy of protection and respect, and who does not. While I discuss the *plight* of the refugees, and while the global situation has economic implications (already scarce resources in countries such as South Africa now have to be shared with people who seemingly do not ‘belong’ there), I would argue that their plight, their suffering, is a product of a more underlying problem. This does not mean that no theorising should be done about how this can be alleviated or that questions should not be asked as to how food, healthcare, education and so forth can or should be distributed to them. Their situation – their lack of protection, of rights, of food and water and shelter – is a result of something else. They are situated where they are because their humanity was taken away from them, and because their nature and status as human beings were denied by their states. As Arendt (ibid. 294) points out, the problem facing us is not a problem of space, but a problem of political organisation. This challenge is, therefore, firstly a *political* challenge.

1.1.2 *The Rights of the Rightless*

One of the characteristics of the modern democratic state is that it subscribes to the idea of universal human rights which are accorded to all human beings on the basis of their humanity. While there are differences in interpretation of the idea of ‘human rights’, as well as differences in opinion as to how far they should extend, people generally believe that they, as humans, do have rights, not as citizens of a specific country, nor as members of a specific group, but as human beings *simpliciter*. These rights were first codified following the revolutions in America and in France in the late eighteenth century. The (French) Declaration of the Rights of Man saw each person as being entitled to certain rights, “not by virtue of the body politic to which he belonged but by virtue of being born” (Arendt 2006: 98). The Declaration distinguished a person’s nature, from which follows his or her right to have rights, from his or her political status. In accusing the *ancien régime* of depriving people of their rights, the revolutionaries were referring to the rights of life and nature. The American Bills of Rights, upon which the Declaration was modelled, did not see rights as ‘natural’, but as a way to restrain those who hold political power. Where the Declaration presupposed pre-political, natural rights, the Bills of Rights presupposed an existing body politic. It was therefore not concerned with the rights of nature, but with the rights of freedom and citizenship (ibid. 99). What the notion of the Rights of Man assumes is that every individual always has these rights, and that the protection and entitlements implied by these rights are always given to him or her; these rights are seen as inalienable. However, it is not clear that this is, in fact, the case. While there are various ways in which different individuals or groups of people can be denied their rights (women in extremely patriarchal societies or people living under totalitarian regimes, for example), the alienability of human rights is glaringly evident in the case of refugees and other displaced or stateless persons. The ideal of inalienable rights is, unfortunately, not realised.

In a chapter on the Rights of Man in *The Origins of Totalitarianism* (1973), Arendt provides an insightful discussion on the issue of statelessness. Arendt recognises that the events of the twentieth century, especially the two World Wars, were unprecedented. Wars had always been fought, people had always migrated or fled across borders, but not on the scale of the two World Wars. The First World War had damaged the European comity of nations so severely that the repercussions for the stability of Europe would be felt for decades after. The uneasy peace of the interwar period saw civil wars leading to

migrations of groups who, unlike their happier predecessors in the religious wars, were welcomed nowhere and could be assimilated nowhere. Once they had left their homeland they remained *homeless*, once they had left their state they became *stateless*; once they had been deprived of their human rights, they were *rightless*, the scum of the earth. (Arendt 1973: 267, my italics)

This situation was later echoed, in a more horrific way, by the rightlessness and statelessness of the Jews who were deported to concentration and extermination camps during the Second World War.

Arendt (ibid. 279) argues that these people had lost the rights that are held to be inalienable by “well-meaning idealists” and that these rights are therefore not inalienable. This creates one of the contrasts of contemporary politics between the situation of those who *have* rights (who belong to prosperous and civilised societies), and the situation of those who are rightless. The displaced groups, who were minority groups in nation-states that were ethnically homogenous, were often denationalised, which left them unprotected under conditions of absolute lawlessness. Some of these unprotected people saw no option but to beg, steal, and cross borders. This only served to entrench existing prejudices against these minority groups, for “if the world was not yet convinced that [they] were the scum of the earth, it soon would be when unidentifiable beggars, without nationality, without money, and without passports crossed their frontiers” (ibid. 269). Stateless persons had neither the right to work nor the right to residence, which rendered them outlaws by definition. They had no choice but to transgress the laws, as any action taken merely to ensure survival would be seen as a transgression. It is when individuals find themselves in this position that one can say they have been deprived of their ‘inalienable’ rights. It is when people would benefit by committing a crime, when their circumstances will improve if they are imprisoned, that we can be sure that they have been forced outside the pale of the law and that they have been deprived of their ‘inalienable’ human rights (ibid. 286). The fact is that stateless persons, who are without rights, will gain rights the moment they commit a criminal act – if they are then sent to prison, they will have food and shelter. If they are imprisoned, they are safe from the arbitrary police rule in the streets, and they will be treated like any other criminal:

Only as an offender against the law can he gain protection from it [...] The same man who was in jail yesterday because of his mere presence in this world, who had no rights whatever and who lived under threat of deportation,

or who was dispatched without sentence and without trial to some kind of internment because he had tried to work and make a living, may become almost a full-fledged citizen because of a little theft. (ibid.)

After the Second World War, the Universal Declaration of Human Rights (hereafter UN Declaration) set out a list of rights accorded to every person on earth, protected by an international body (the United Nations). The goal of the UN Declaration is to ensure that no one is deprived of their human rights, that no one is “forced outside the pale of the law”, or left “without the protecting mask of a legal personality” (Arendt 2006: 98). Of the thirty articles contained in the UN Declaration, Article 14 gives specific rights relating to refugeehood (United Nations 1948):

- 1) Every person has the right to seek and to enjoy in other countries asylum from persecution.
- 2) This right may not be invoked in the case of persecutions genuinely arising from non-political crimes or from acts contrary to the principles and purposes of the United Nations.

Article 6 acknowledges the right for every person to be recognised before the law. Article 13 grants every person the right to freedom of movement and residence within the borders of a state, as well as the right to leave any country, and the right of return to his or her own country. Article 15 states that everyone has a right to a nationality, and that no one may be arbitrarily deprived of their nationality or denied to change their nationality. While the UN Declaration and the actions of the UNHCR and other protecting bodies have done much to protect the stateless, they only apply to signatory states and act as standards, not as formal law. The upshot of this is that sovereign states have leeway to interpret the articles as to how these standards should be formulated and applied in their own legal systems.

An important principle in refugee law is the principle of non-refoulement. In the previous section, a refugee was defined as a person who fled his or her country of origin because of the fear of persecution. In such a case, the country to which the refugee flees has a responsibility to grant asylum. This includes not only entry into the host country, but also a duty on the part of the host country. This duty entails giving refuge to the refugees at least until such a time that it is safe for them to return to their own countries:

The principle of *non-refoulement* states, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or danger to life or freedom. (Goodwin-Gill 1983: 70)

This holds even for refugees who have not been granted refugee status, or who entered the country illegally. Refugee law recognises that people who flee from dangerous circumstances often do not have the means to follow immigration formalities (hence the protection of people who are not protected by their own states). If this is the case, states may not deport the ‘illegal’ persons upon entry:

Instead, it is provided that penalties on account of illegal entry or presence shall not be imposed on refugees ‘coming directly from a territory where their life or freedom was threatened [...] provided they present themselves without delay [...] and show good cause for their illegal entry or presence’. (ibid. 83)

The principle of non-refoulement does not mean that no refugee will ever be deported. If they present a genuine threat to the state, for example, the state has the right to deport them (it is beyond the scope of this study to discuss all the exceptions – see Goodwin-Gill 1983). What is important to note is that (i) a person fleeing from danger should be recognised as a refugee (ii) states (or at least signatories to the UN Convention, etcetera) have certain duty to accept refugees into their territories, and (iii) once the refugees have been accepted into their territories, they cannot be deported or resettled in their countries of origin if the danger from which they fled still exists.

Unfortunately, these laws are often disregarded or circumvented by preventing the refugees from entering a territory. In July 2014, there was outcry in Australia and the international community against the actions of the Australian government, and specifically the commands of Immigration Minister Scott Morrison, when around 200 Tamil asylum seekers fleeing from refugee camps in India and arriving by boat were intercepted by Australian custom vessels and then handed over to the Sri Lankan navy (where they originally came from). According to the Tamil community in Australia, these asylum seekers will likely be tortured upon their return to a country being investigated for war crimes (Whyte 2014). Following the outcry, the asylum seekers were moved to a customs boat. After spending weeks on the boat (the location of which remained unknown, making it difficult for the UN to assess the situation), they were admitted to the Australian mainland, but the government of Australia is trying to convince the government of India to take the refugees back, which the Indian

government is unwilling to do (Hunter 2014). What this instance shows is that democratic states – as both India and Australia are democracies – are not only willing to refuse refuge, but also willing to hand over refugees to the governments of the countries they fled from. While the people on this boat did not have official refugee status, their lives were still in danger should they ever return to their country of origin.

Many states, including Australia, ‘solve’ this problem by resettling refugees in third states (Goodwin-Gill 1983: 223). In doing this, they avoid sending refugees back to danger, but they also avoid allowing refugees to enter their own territories. While this distributes the costs of caring for refugees, it also faces a problem. The ‘third countries’ chosen for resettlement are often countries that are economically less well off than the countries doing the resettling. Australia, for example, signed an agreement with Papua New Guinea early in 2013 to resettle refugees there. Upon the signing of this agreement, the UNHCR questioned whether Papua New Guinea could offer adequate protection for refugees and asylum seekers (UNHCR 2013b). According to UNHCR (2013a: 14) statistics, Pakistan is the country that hosts the most refugees, with only one European country in the top ten, and other developed countries such as the United States and Australia completely absent. The ‘distribution’ seems skewed, with countries such as Lebanon and Pakistan bearing the brunt of the ‘burden’ (due to their proximity), while countries such as Australia ‘disburden’ themselves by resettling refugees in developing countries.

While international law and international bodies offer some sort of protection for refugees, this protection is limited. The responsibility of protecting refugees often falls on states. The problem is that states, even if they are signatories to the documents of international law, still retain the sovereign right to decide to what extent they implement those laws. They can avoid their responsibilities by not granting refugee status, by settling refugees in camps or third countries, or by claiming that refugees are a threat to their security and the well-being of their citizens. In the next section, I consider the development of the notion of sovereignty, as well as the limitations but also possible value of it.

1.2 Sovereignty and Closed Borders

1.2.1 The Sovereign State

A possible response to the refugee crisis is to argue that democratic states have the right to control their borders. They have a sovereign right to decide who is included in and who is excluded from their territory. Modern democratic states hold two ideals: a) self-governance, and b) a territorially circumscribed nation-state (Benhabib 2005: 673). The ideal is that within this circumscribed territory the state is sovereign, the “final and absolute authority in the political community” (Hinsley 1989: 1). In what follows, I examine the ideal of the sovereign state by, firstly, looking at how the concept of sovereignty developed over time, giving rise to differing conceptions; secondly, I focus on the idea of absolute sovereignty or sovereigntist territorialism (the argument for closed borders) to show how, both on a moral and on a practical level, it is unable to deal with the refugee crisis.

Before discussing the sovereign right of a state, we need to clarify what is meant by a state (specifically a liberal, democratic state). Dryzek and Dunleavy (2009: 2-3) identify seven defining characteristics of a state:

- i) A state is a set of organised governing institutions.
- ii) A state must operate in a particular *territory* in which a population lives as a *distinct society*.
- iii) The state’s institutions should aim at reaching collectively binding decisions, and ensure that these decisions are obeyed.
- iv) The state has the *monopoly of the legitimate use of power* (as defined by Weber).
- v) The state must claim *sovereignty* (which Dryzek and Dunleavy define as having unconstrained power over all other institutions).
- vi) The state institutions define the public realm, as distinct from the private.
- vii) The state should define who its ‘citizens’ are, and also be *able to control entry and exit*.

In addition to these seven defining characteristics, they also identify five associated characteristics (Dryzek & Dunleavy 2009: 4-5):

- i) The state must claim to be advancing the common interest of its society.
- ii) *Significant groups within a society should accept the state as legitimate.*

- iii) The state is run by bureaucracies.
- iv) Social activities are regulated by the state using a system of laws and a constitution. The latter also regulates the institutions of state.
- v) Other states should recognise a given regime as a state.

A state, then, is a bounded political community situated in a particular territory, over which it has absolute authority, controlling who belongs and who does not, and able to (legitimately) use its power to control what goes on inside. A democratic state's legitimacy is derived from the people who belong to the state: its members or citizens. The idea of sovereignty is inextricably linked with the existence (and legitimacy) of the state: "the origin and history of the concept of sovereignty are closely related to the nature and evolution of the state, and in particular to the development of centralised authority in early-modern Europe" (Camilleri & Falk 1993: 15). I now consider the development of the concept.

The idea of sovereignty was first formulated in ancient Rome to consolidate the Emperor's rule, and it later resurfaced in the sixteenth and seventeenth centuries, coming to enjoy popularity with the publication of Thomas Hobbes' *Leviathan* in 1651 (Hinsley 1989: 126). Jean Bodin (in Camilleri & Falk 1993:16) draws on the principle on which Roman law was based: a political community has the inherent power (*imperium*) to exact unlimited obedience from its members or citizens. Like the Romans, and later Hobbes, Bodin sees a central authority (a Ruler) wielding absolute power as the only way to end the chaos in the state of nature. Bodin seeks to formulate a theory of sovereignty which integrated the ruler and the ruled, the two parts comprising the body politic. He also holds that the ruler, or the governing power, has to respect legal and moral rules (Hinsley 1989: 121). The moral rules binding a sovereign refer to divine and natural law, while the legal rules refer to the customary laws of the political community and the property rights of the citizens. Other than these two constraints, Bodin holds that the sovereign has absolute authority:

Not only was the idea of a mixed state, in the sense of shared or limited sovereignty, absurd. Even if the result was tyranny, there could be no limitations upon the sovereign power except those which existed by the sovereign's will. (ibid. 122)

The early seventeenth century German thinker, Althusius, develops a theory of sovereignty in which the sovereign power belongs exclusively to the people, on the basis of the social contract which had brought them into being. The Ruler derives his power from a different

contract: the contract of rulership between the People and him. As a self-determined people, the People retain their sovereign rights in their contract with the Ruler, and they can therefore resist the Ruler and deprive him of his power if necessary (ibid. 132). This theory is one of the earliest formulations of the idea of popular sovereignty. Grotius agrees with Althusius that a community has certain rights and that it obtains these rights from the social contract, but he disagrees with Althusius' conclusion that the People are sovereign: "the sovereignty of the People was visible and active in the sovereignty of the Ruler alone" (ibid. 139).

It was Thomas Hobbes who radicalised Grotius' ideas and who popularised the idea of sovereignty. Hobbes sees the dualistic nature of the body politic – the distinction between People and Ruler (or Prince) as the weak point in the theories of sovereignty preceding him. His theory therefore aims to strip the People of their rights and their sovereignty. For Hobbes, there is no distinction between the social contract and the contract of rulership – there is only one contract in which individuals submit to the sovereign in return for his protection (ibid. 142). In the act of state formation, individuals give their right to rule, their power and authority, as well as their right to participation, to the sovereign. They surrender their will to the will of the sovereign state. Hobbes sees the sovereignty of the state as "unlimited, illimitable, irresponsible and omnipotent [...] necessarily concentrated in a single centre and [...] armed with power" (ibid. 142-144).

Hobbes' absolutist conception of sovereignty did not resonate with later developments in political theory. The idea of a People without rights or authority clashed with the democratisation of politics and the belief that every individual is a bearer of certain rights and privileges, among them the right to political participation. Later theorists, such as John Locke, see the power of the People as inalienable. However, the People as a whole cannot rule – their power needs to be delegated to an authority, which then becomes the bearer of executive authority:

[For Locke, the] People was the latent and, on the dissolution of government, the active sovereign; the legislature was the supreme organ of government so long as government endured, but could be dissolved by the People at any time; the executive power, held on trust, was supreme only so long as it operated within the legislature's law. (ibid. 146)

Stephen Krasner (1999: 3-4) distinguishes four distinct kinds of sovereignty: international legal sovereignty and Westphalian sovereignty (dealing with issues of authority) and

domestic sovereignty and interdependence sovereignty (relating to issues of control). International legal sovereignty has to do with the practices associated with mutual recognition between states or other territorial entities with formal juridical independence. Westphalian sovereignty is based on the exclusion of external actors from a given territory's authority structures. Domestic sovereignty has to do with the formal organisation of political authority within a territory or state, as well as the state's ability to exercise control. Interdependence sovereignty deals with the state's ability to control the movement of ideas, information, goods, people, pollutants and capital across its borders (Goodhart 2001: 243). Whatever the kind of sovereignty, it can be violated in two ways: by invitation (when a state signs international treaties, contracts, or conventions) and by intervention (coercion, imposition) (ibid. 244). However, where refugees are concerned, this 'violation' is still limited, as the documents (the Convention, the Protocol) which states signed are not enforceable to the same extent as positive law, and the international bodies that should enforce them (such as the UNHCR) have limited power. There remains enough room for states to decide how to enforce these laws in their own territories. In what follows, I consider the kinds of arguments made against any such 'violation'.

1.2.2 Arguments for Closed Borders

The most extreme arguments made in the name of sovereignty are made by those thinkers Benhabib (2009) refers to as the sovereigntist territorialists. This form of sovereigntism is characterised by "commitments to territoriality, national politics, deference to executive power, and resistance to comity or international law as meaningful constraints on national prerogative" (Koh in Benhabib 2009: 692). This brand of sovereigntism Benhabib further divides into two strands: nationalist sovereigntism and democratic sovereigntism. Nationalist sovereigntists argue from the standpoint of a people's right to self-determination, where 'the People' are a homogenous entity (an *ethnos*). The law, as an expression of collective will, is legitimised by the state being a self-determining entity.

Democratic sovereigntists do not see 'the People' as being constituted by an *ethnos* (necessarily), but rather by a *demos*. For them, laws are legitimate if a) the people are both the authors and the subjects of those laws, and b) there are "clear and recognised public procedures for how laws are formulated, in whose name they are enacted, and how far their authority extends" (Benhabib 2009: 693). The distinction Benhabib draws between nationalist and democratic sovereigntism is the distinction she sees Arendt drawing between

nationalist claims and the sovereignty of the people (or popular sovereignty). Nationalism has the potential of becoming repressive of differences and otherness, as it introduces categories of unity and homogeneity into the political sphere. According to Benhabib (1996: 43), Arendt sees (popular) sovereignty as the democratic self-organisation and political will of a group of people who are not necessarily of the same nationality. This group, the *demos*, then constitutes itself as a self-governing and self-legislating body politic.

Democratic sovereigntists claim that the movement toward a global legal system is normatively dangerous and undesirable (Benhabib 2009: 693). While they provide various arguments in support of this claim, three main themes are salient: (i) the preservation of culture, (ii) national interest (which includes issues such as economic stability and security), and (iii) the right to political self-determination. I will show that, ultimately, none of the reasons given by sovereigntist territorialists provide convincing arguments against providing refuge for displaced persons, but that some form of sovereignty is reconcilable with the developments in the global legal system.

Michael Walzer (1983: 39) is of the view that opening borders will threaten cultural heritage. The distinctiveness of a specific culture from other cultures relies on closure. Where there is no closure – no borders – and where people can move about freely, no distinct, stable culture can be formed or, if already existing, be preserved. For Walzer, the political community is therefore a bounded community in which the right to distribute membership lies solely in the hands of those who are already members. The members, a sovereign People, distribute power amongst each other and avoid sharing it with non-members (*ibid.* 31). The distribution of membership and of power is done according to every distinct community's understanding of the two concepts.

While the fact that a culture will be influenced and can undergo changes when confronted with a different culture cannot be disputed, it does not necessarily follow that borders should therefore be closed, or as closely controlled as Walzer suggests. Walzer seems to be working with the assumption that culture is something that is set in stone (and that change is therefore negative) and that there exists something like a 'pure', 'essential' or 'original' culture (a specific culture that developed on its own, without any external influences). This is, to say the very least, historically inaccurate. Writing on Indian culture and identity, Amartya Sen (2005) describes the futility (and danger) of attempting to define what it means to be 'Indian'. Recent years saw the emergence of the Hindutva movement which equates being Indian with

being Hindu. Hindutva challenges the inclusive ideal of Indian identity that emerged after the country's independence. It supports its claim that being Hindu equals being Indian (or vice versa) by the statistical fact that the majority of the Indian population are Hindus, and the historical and cultural fact that Hinduism has been present in India for more than three millennia (Sen 2005: 52-53). What this movement ignores, however, is the immense impact other religions and cultures had on the story of India. India is the birthplace of Buddhism, which was the dominant religion at one stage. Later, it became a Mughal empire, bringing a strong Muslim influence, and following that a British colony. Given its rich, dramatic history, it is impossible to equate Indian culture with (a narrow conception of) Hindu culture, or to argue that there is something like 'pure' Hinduism, free from the influences of Buddhism, Islam and Christianity. While closing borders could help preserve a culture, we would be mistaken if we thought that the culture we are trying to preserve is anything other than a heterogeneous product of intermingling cultures, religions and peoples.

There is also the practical question of whether it is at all possible to close a state's borders. Certainly, a state can write laws that decree that it is illegal for refugees or immigrants to enter, it can deny the right to asylum, and it can deport unwanted individuals in society. This will not, however, prevent people from entering the state. If conditions on their side of the border are bad enough, they will not hesitate to cross, even if it means living an outlaw life. States cannot but try and find some kind of solution. If it is a democratic state which respects human rights norms, this solution has to be humane. The dangers of being a stateless, rightless person have already been discussed above. If states refuse refuge, if they close their borders, they are deliberately endangering those who will enter their country anyway.

Walzer's stress on the primacy of the bounded community has an impact on how other resources should be distributed and on our responsibility toward others. Whereas John Rawls argues that we should aid others who are not of our community, Walzer (1983: 33) questions whether this is necessary. He argues that it is unclear that we do in fact have an obligation toward strangers. Not only should we, in thinking of our responsibility toward strangers, first determine whether our assistance is *urgently* needed, and what the cost would be, but he goes further and claims that we only have a responsibility toward refugees if a) we helped to turn them into refugees, or b) if there is some affinity (cultural, religious, historic) between us and them. A democratic state, therefore, has no obligation toward refugees who come from non-democratic states with a culture vastly different from its own, if it did not have a hand in making them refugees (ibid. 50).

Thomas Nagel (in Benhabib 2009: 693) shares Walzer's view that we do not have a responsibility toward those who are not members of our state. For Nagel, the state is indispensable, as it provides a framework for questions of justice. International law is merely quasi-contractual commitments between sovereign states. While he admits that we owe certain 'moral duties' to each other on the basis of our shared humanity, these duties do not go beyond our borders to non-nationals. Justice only has a value within the framework of a sovereign state, as it is only within this framework that it can be applied. The state puts citizens in a specific relation to each other, and it is from this institutional relation that their moral duties toward each other, and the content of justice, flow. This relation does not exist between citizens and non-citizens (ibid.).

A second argument for closed borders or strict border control is that it is in the national interest to do so. The influx of people who do not share a community's culture, its values, and its political beliefs can pose a security threat to that community. This argument has gained support in recent years, with democratic countries like the USA being victim to terrorist attacks, creating a fear of the other.

Allen Buchanan (2005) argues against things being done 'in the national interest'. He identifies two theses that defend the view that foreign policy should depend on the nation's best interest. The first he calls the Obligatory Exclusivity Thesis (henceforth OET): "A state's foreign policy always ought to be determined exclusively by the national interest" (Buchanan 2005: 110). The second thesis is the Permissible Exclusivity Thesis (PET), which is a slightly weaker thesis than the OET: "It is always permissible for a state's foreign policy to be determined exclusively by the national interest. If a state chooses, it may subordinate all other values to the pursuit of the national interest in any case" (ibid. 111). OET aside, he argues that the weaker PET cannot be justified, as holding this position while claiming to believe in human rights is untenable. The reason for that is that the whole idea of human rights is that we have them regardless of our nationality or our being citizens of a specific nation. As all democracies subscribe to the ideal of human rights, they cannot also subscribe to the PET, much less the OET. Putting national interest first at all times can lead to human rights being denied, not only of non-citizens, but even of a country's own citizens. Buchanan (ibid. 113) uses the example of a group of citizens unjustly imprisoned by a foreign power, but whose salvation may not be in the national interest. Their right not to be unjustly imprisoned, their right to freedom and life, would be sacrificed.

The PET is generally justified by what Buchanan (ibid. 114) calls conditions of Hobbesian Realism, which sees the world of international relations as a large-scale assurance problem³. Under such conditions, it would not make sense for a state to not subordinate other values (such as individual human rights) to the national interest, as this self-assurance on the part of the state can be taken advantage of by other states. Sovereign states are like individuals in Hobbes' state of nature, with no supreme arbiter of conflicts that can enforce rules of peaceful cooperation. However, this is not entirely true – leaving aside the question of its effectiveness, this is the task of the United Nations (and also regional bodies such as the African Union and the European Union). If such regional and international bodies were to become more effective, the other two conditions of Hobbesian Realism (the inequality in power between states, and the fundamental preference of states to survive) can be addressed in such a way that less powerful states are not constantly at the mercy of more powerful states, and the individual states do not all seek to dominate in order to survive. Universal moral principles can then be made applicable.

The final argument made by democratic sovereigntists is that people have a right to form communities – the right to democratic self-determination. When a community establishes itself on the basis of this right, it immediately erects boundaries by determining who is, and who is not, part of the community. However, even here it is not clear that the self-determined community (or the state) does not have some kind of responsibility toward the people who are excluded from it. Abizadeh (2008: 45) uses the fact that democracies require borders to argue that these borders, and the control of borders, need to be justified, not only to those who are included (as is commonly held), but also those who are excluded:

First, a democratic theory of popular sovereignty requires that the coercive exercise of political power be democratically justified to all those over whom it is exercised, that is, justification is owed to all those subject to state coercion. Second, the regime of border control of a bounded political community subjects both members *and nonmembers* to the state's coercive exercise of power. Therefore, the justification for a particular regime of border control is owed not just to those whom the boundary marks as members, but to nonmembers as well.

³ A state cannot be sure which course of action its neighbouring state will follow – will it cooperate to bring about peace, or will it further its own ends by invading? All states therefore assure themselves against invasion by strengthening their militaries and taking other measures to ensure its own safety. Instead of cooperation, each state fends for itself.

According to the democratic theory of popular sovereignty, the exercise of political power is legitimate only if it is justified *to* and *by* the people over whom it is exercised, in a way that views them as autonomous, equal beings (ibid. 41). Liberalism requires, at least in principle, that the exercise be justifiable to everyone, not only those over whom it is exercised. The real difference between the two approaches lies in the way this justification takes place. Liberalism is satisfied by a hypothetical justification and the establishment of just institutions and laws which exercise the political power. Democratic theory requires actual participation in practices of discursive justification which establishes the legitimacy of the institutions and laws. Liberalism does not deal with the *process* of justification, but with the content. Democratic theory deals with the process, in which those over whom power is exercised participate in the political processes that determine how power is exercised, in a way that is consistent with their freedom and equality (ibid. 41). Liberalism in its fully realised form, then, as Frederick Whelan (1988: 17) points out, “would require the reduction if not the abolition of the sovereign powers of states”, while democracy requires “the division of humanity into distinct, civically bounded groups...democracy requires that *people* be divided into *peoples*” (ibid. 28). However, the fact that democracy requires the division of people, and that it requires borders, does not mean that a democracy has a right to control those borders:

[D]emocratic theory either rejects the unilateral right to close borders, or would permit such a right only derivatively and only if it has already been successfully and democratically justified to foreigners. This is because the demos of democratic theory are in principle unbounded, and the regime of boundary control must consequently be democratically justified to foreigners as well as to citizens. (Abizadeh 2008: 38)

If absolute sovereignty is undesirable or even unjustifiable, the question is whether there is space for any form of sovereignty in the global system at all.

1.2.3 An Alternative to Absolute Sovereignty

Hoffman (in Goodhart 2001: 256) argues that sovereignty matters, because it is deeply tied to matters of autonomy, self-determination, democracy, and liberty, which we value. It is sovereignty that defines the political space and the political community, because it holds that there is only one legitimate source of political authority. However, as I hope to show, matters

of autonomy and self-determination need not be incommensurable with the notion of universal human rights, and bounded communities need not imply closed borders.

Joseph Carens (1987) argues for open borders and the right for individuals to leave their country and settle in another, on an equal footing with the citizens of that country, as far as the constraints put upon us by our laws go. He holds that three of the main approaches in contemporary political theory (the Rawlsian, the Nozickean, and the utilitarian) are commensurable with the idea of open borders and that all three come to the conclusion that the restriction of immigration cannot really be justified. While all three theories come to the same conclusion, and start from the same kind of assumption (that individuals have equal moral worth), the way they move from that assumption to their shared conclusion differs. Nozick's libertarian theory rests on the idea of absolute, *individual* property rights and a minimal state, which only has the authority to enforce and protect the rights of individuals. An argument against closed borders that rests on the right to private property, however, rests on the idea of *collective* or *national* property rights. These 'forms' of property rights would undermine the individual rights libertarians advocate. According to the libertarian theory, individuals not only have the right to own private property, but they also have the right to exchange that property in the free market, unhampered by government restrictions. The individual has this right to enter into voluntary exchanges with others as an individual, not as a citizen of a specific state (Carens 1987: 253). If this is the case, and if the state is merely there to protect rights individuals already have in the state of nature, there is nothing special about citizenship. The state, therefore, has no reason to exclude aliens.

While Rawls (1993a: 41) assumes a closed system in which immigration is not an issue, Carens suggests that his liberalist approach can be applied to a broader context. Rawls holds that people behind the 'veil of ignorance' (i.e. people who do not know anything about their personal situations) would choose two principles to govern society: a) a principle guaranteeing equal liberty to all, and b) a principle that would only permit inequalities if they were to the advantage of the least well off in the society – Rawls refers to this as the difference principle (Carens 1987: 255). The point of the original position (or veil of ignorance) from which these principles are chosen is to nullify the effects of natural and social contingencies (such as one's race or gender). Carens (ibid. 256) argues that being a citizen or an alien is also, like the other contingencies, arbitrary from a moral point of view: "whether one is already a citizen of a particular state or an alien who wishes to become a citizen – this is the sort of specific contingency that could set people at odds". Justice can

only be fair if knowledge of one's membership to a specific polity (or lack thereof) is also excluded – if one takes a global view of the original position. Furthermore, states cannot restrict immigration on the grounds of birthplace and parentage (which determine one's citizenship).

A reinterpretation of the concept of sovereignty may allow us to reconcile it with (or come closer to reconciliation with) global developments which call for a diminishing of sovereign power, such as the refugee crisis and the refusal of some states to grant refugees their human rights. Osiander (2001: 251) disputes the idea of 'Westphalian sovereignty', dismissing it as a myth and a creation of nineteenth and twentieth century international relations' fixation on the idea of sovereignty. Instead, he argues, the system put in place by the Treaty of Westphalia was a strengthening of a system already in place before: "a system of mutual relations among autonomous political units that was precisely not based on the concept of sovereignty" (ibid. 270). The Treaty, in fact, made no mention of sovereignty and non-intervention. What it did endorse was this system of mutual relations, known as *landeshoheit*. The empire consisted of various autonomous political entities, estates governing in their own territories. Their right to do so is *landeshoheit*, which is sometimes translated as 'territorial jurisdiction'. This right gave the rulers of territories the power in their territories to command, forbid, decree, undertake, or omit everything that pertains to a ruler, "inasmuch as their hands are not tied by the laws and traditions of the empire" (Moser in Osiander: 272). The autonomy of the state was therefore limited in two ways: internally, by the constitutional arrangements within the territories, and externally, through the laws of the empire. This system resembles the current global order. Such a conception of sovereignty would give each state jurisdiction over its territory, within the broader framework of international human rights norms and laws, thus allowing the celebration of difference and autonomy, while preventing unjust discrimination and human rights violations.

We therefore have two options: (i) reconcile the notion of sovereignty with that of cosmopolitanism, as suggested above, or (ii) reject sovereignty altogether and opt for a cosmopolitan order in which there exist no bounded or self-determined communities. In the next section, I consider the possibility of (ii), showing it to be just as undesirable as a system comprised of states with absolute sovereignty, and therefore investigate the possibility of (i): a world order in which individual communities ascribe to cosmopolitan norms, while still retaining their particularity. This is the project of this entire study.

1.3 Cosmopolitanism and the World-State

1.3.1 *The Origins of World-Citizenship*

The roots of cosmopolitanism can be found in the philosophy of the Cynics and Stoics of Ancient Greece. Diogenes of Sinope, the famous Cynic philosopher, is said to have coined the term ‘cosmopolitan’, when, replying to the question of where he comes from, he claimed that he is a ‘citizen of the world’ (Kleingeld 2012: 2). Cosmopolitanism, then, is world citizenship. For Diogenes, as for the other Cynics that followed in his footsteps, his philosophy was a way of life – it was “the life of a wandering beggar” (Armstrong 1983: 117), a life lived detached from all worldly ties, an “uprooted variety of world citizenship” (Kleingeld 2012: 2). These cosmopolitans “[regarded] the universe as their city, a commonwealth of gods and wise men” (Armstrong 1983: 118). Yet this conception of cosmopolitanism was not all-inclusive: excluded from this cosmopolis, and thus from entitlement to citizenship rights, were the foolish masses of mankind.

The Stoics shared the Cynics’ idea that there is, in fact, only one society. However, Diogenes and his followers held a position that disregards social conventions and is extremely individualistic. The Stoics world citizenship involved a moral obligation toward other humans anywhere on the face of the earth (Kleingeld 2012: 2). For the Stoics, the whole cosmos is one society ruled over by Zeus, the Divine Reason. Citizenship was restricted, as with the Cynics, to the gods and wise men, but all men were inhabitants of this society as partakers in the Divine Reason (Armstrong 1983: 128). The important difference between Cynic and Stoic conceptions of world citizenship is that the Cynics interpreted it literally: the cosmopolitan is without a city, a home, or a country (Kleingeld 2012: 2). The Stoics saw it metaphorically, indicating common membership in a world-wide *moral* community. They held world citizenship to be compatible with political membership to a specific political community (be it a city-state or a nation). Stoic cosmopolitanism is, therefore, a rooted variety of world citizenship. As cosmopolitans, the Stoics also had certain duties: the duty to be benevolent toward others and to partake in public activity. Due to this, they made a considerable impact on the politics of the Hellenistic and Roman worlds (Armstrong 1983: 128).

The Stoic cosmopolitans’ influence on the Hellenistic and especially Roman worlds can be attributed to another factor as well: their doctrine of natural law. They believed that Zeus, or the Divine Reason, made *universal* decrees that counted for all men. All positive law the

world over should, therefore, correspond to these divine decrees. Theirs was not the first doctrine of a divine, universal law – Socrates and Plato, for example, also believed that we can discover an absolute moral law through the use of reason – but they, along with the Cynics, were the first to claim that this moral law is a universal law, “the law of the City of the Cosmos, the same everywhere and superior to merely local custom and tradition” (Armstrong 1983: 129). It is here, therefore, that the root of contemporary cosmopolitan laws and universal human rights lies.⁴

As the concept of cosmopolitanism developed, its meanings diverged: “[the] range of meanings now includes [...] a position on global justice, a particular view of modern identity, a political theory about the proper relations among the states of the world, [and] the view that states should dissolve into a unified world state” (Kleingeld 2012: 4). Defining cosmopolitanism is already a very daunting task. Two broad conceptions of cosmopolitanism can be identified, namely *moral* cosmopolitanism and *political* cosmopolitanism. Briefly, moral cosmopolitanism is what was found with the Stoics: the idea that every *individual* belongs to a single, world-wide moral community. Political cosmopolitanism, on the other hand, deals with the relation between *states* and the attempt to establish some kind of global political and legal order. While these two forms of cosmopolitanism are distinct, they also inform one another – the belief that I form part of a moral community, in which I hold certain responsibilities toward others, will necessarily impact how I interact with others in the political sphere.

At the base of moral cosmopolitanism is the idea that, while we are divided into different nations, speak different languages, and practice different religions and customs, “all human beings share certain essential features that unite or should unite them in a global order that transcends national borders and warrants their designation as “citizens of the world”” (Kleingeld 1999: 505). The fact that we share these essential features which unites us means that, at least at a very basic level, we have equal status. The upshot of this is that *every* person, as an individual, has equal moral status with every other person. Every person “has global stature as the unit of *ultimate* moral concern and is therefore entitled to equal respect and consideration no matter what her citizenship status” (Brock 2011: 455).

What this ‘essential’ characteristic could be is a controversial topic which deserves more room for discussion than this study allows. The Stoics identified this essence in a common

⁴ Although today this rights and laws are, of course, no longer restricted only to men, but to all humans.

rationality and moral capacity. It is because we are all rational (whatever that may mean) and capable of acting according to certain moral standards (though these may vary – it is the capability to do so, and not the content of our morality, that is important) that we deserve equal respect and equal moral treatment. As mentioned, moral cosmopolitanism is not distinct from political cosmopolitanism: it is neither apolitical, nor is it anti-political. As Kleingeld (1999: 508) writes, “it does entail political duties, insofar as morality provides guidelines for one’s actions in one’s capacity as a citizen or a politician”. Moral cosmopolitanism, then, is very often the starting point from which a theory of political cosmopolitanism can be developed.

Julia Driver (2007: 596) also distinguishes between moral cosmopolitanism (where biases and prejudices are *not* morally appropriate) and political cosmopolitanism (where biases and prejudices are ruled out on the political, or institutional, level). She writes that critics of moral cosmopolitanism argue that moral cosmopolitanism is not as plausible as is often supposed. Such critics argue that it is morally permissible to care more for one’s own child than for strangers, to be patriotic toward one’s own country rather than neutral toward all. For them, being a cosmopolitan means failing one’s community. Contra these critics, there are those (like Peter Singer) who argue that to be loyal to one’s community, or to be patriotic, is arbitrary and unfair.

David Held (2007: 10) sees cosmopolitanism as the ethical, legal and cultural basis for the political order. This ties in with what is stated above – that political cosmopolitanism is founded on moral cosmopolitanism. Importantly, he points out that communities and states do matter in a cosmopolitan world, but not exclusively – they are not “ontologically privileged”. They do not have, to use Brock and Brighouse’s (2007: 4) formulation, “ultimate value”. As mentioned above, it is the individual as a human being who has ultimate (moral) value. Cosmopolitanism should still, however, take states into account, “and build an ethically sound and politically robust conception of the proper basis of political community, and of the relations among communities” (Held 2007: 10). While Held (and many others) holds that states still have some value, this view is not shared by all cosmopolitan theorists. There are a great variety of theories as to what a world-wide legal and political order should look like. Some, like Immanuel Kant, advocate a federation of states (this is discussed in chapter two). Others see such federations of states as too restrictive, too closed. They advocate a single world state – a world entirely without borders, ruled by a single

government. An investigation into this radical form of cosmopolitanism will, I believe, show why cosmopolitanism alone, like absolute sovereignty, is insufficient.

1.3.2 Arguments for a World-State

Kleingeld (2006) discusses the cosmopolitan theory of the eighteenth century Jacobin revolutionary, Anarchis Cloots, as an example of a radical cosmopolitan stance. In the texts Cloots published during the French Revolution, he argues that the logical consequence of the social contract is the establishment of a republic of the united individuals of the world (Kleingeld 2006: 561). Cloots supports his argument by referring to the 1789 Declaration of the Rights of Man, which stated that (i) all human beings are, or should be, free and equal, and (ii) that a republic based on human rights is the only legitimate political system. As a starting point for his argument, Cloots subscribes to the following ideas found in the Declaration (ibid. 563-564):

- 1) All human beings are free and equal
- 2) This fundamental equality of all requires the introduction of democracy through universal suffrage
- 3) Preserving the human rights of its members should be the aim of any political association
- 4) In order to preserve its members' rights, any political association retains the authority to coerce for the advantage of all.

These principles are in agreement with those invoked by social contract theorists to justify the authority of states, but Cloots argues that the plurality of states assumed by other contract theorists is inconsistent with the logic of the argument of the social contract theory (ibid. 564). Individuals leave the state of nature by forming states, with laws and rights and regulations, to protect themselves against each other. A state that does what it should, therefore, is a state that keeps its citizens safe – a state that ends wars between individuals within its territory. However, argues Cloots, as long as there are a plurality of states, the threat of war cannot be eradicated. Only when there is one single state, encompassing all humans, can this be avoided. Cloots argues that “[the] organization of humans into a plurality of states does not end the state of nature, but merely shifts it to the international realm” (ibid. 565). Instead of having individuals warring, we now have states warring – the problem is in no way resolved. If the point of the social contract is to protect individual people or states, it follows that a single, all-encompassing world state should be formed, in which each

individual has an equal standing. Any form of political organisation between the level of the individual and the world state would once again bring the problem of war to the fore. For this reason, even a loose federation of states all adhering to the same universal laws would not work. What Cloots wants is a single government with world-wide jurisdiction, under which individuals are directly subsumed and into whose legislature all individuals elect representatives from all over the world (ibid.).

As is the case with absolute sovereignty, cosmopolitan stances like Cloots' can be criticised for being both impractical and undesirable. Kwame Anthony Appiah (2006: 163) points out that there are three fundamental problems with the idea of a world-state: a) such a state can easily accumulate uncontrollable power, b) such a state would be unresponsive to local needs and, finally, c) such a state would reduce the variety of institutional experimentation. This echoes Immanuel Kant's statement that a world state is likely to result in a dangerous and soulless despotism (Kleingeld 2012: 48). Kant speaks of this state as a universal monarchy, which implies that such a state would have too much power, and that it will not be representative. In a multi-state world, if a nation acts in an unjust manner (either toward its own citizens or toward other nations), other nations exist that can curb its power. Where there is only a world state, no corresponding recourse exists (Nussbaum 2006: 313).

Kant (1939: 36) argues that states are in fact prevented from combining into a single state by nature, due to existing diversity of language and religion. It is this diversity which would require a state to be responsive to local needs, and which, therefore, makes a world state impractical. As Martha Nussbaum (2006: 313) points out, existing differences in language and culture would make the requisite communication between citizen and state too difficult, and the world state is therefore unlikely to have a decent level of accountability to citizens. Any governmental structure ruling over a large group of people should be decentralised and federalised (as is the case in the United States and in India) if it is to be responsive to its subjects' voices and needs, and if it is to protect their rights, entitlements and capabilities. Such a state, argues Nussbaum (ibid. 314), would be *ipso facto* tyrannical, as it would be uniform in its institutions and requirements, thus preventing people from asserting their moral autonomy, which she sees as the right to do things differently from one's neighbours.

A possible response to this problem would be to suggest that a single language be adopted as the *lingua franca* of the world state. However, as Nussbaum also points out, it is unclear that

linguistic (or cultural) homogeneity is desirable. For her, diversity is valuable. Arendt (1998: 175-176) discusses why it is necessary for human beings to be both *equal* and *distinct*:

If men were not equal, they could neither understand each other and those who came before them nor plan for the future and foresee the needs of those who will come after them. If men were not distinct, each human being distinguished from any other who is, was, or will ever be, they would need neither speech nor action to make them understood.

Where there is no diversity – in language, in culture, or in action – there is no need for communication, nor a need for social interaction, no need to express ourselves or our cultures. The world state would then indeed be soulless; as it is our differences and our interactions as beings that are different that gives rise to politics and culture.

1.3.3 Principles of Cosmopolitanism

If ‘world-citizenship’ does not mean citizenship of a single, global state, the question is what cosmopolitanism means. It remains to be told what form cosmopolitanism can or should take, in order for it to provide a universal standard to which states adhere, without threatening the diversity of particular states. Brock and Brighouse (2007: ix) point out that, while many thinkers who identify as ‘cosmopolitans’ do counter the claims of nationalism and particularity, there does not exist an elaborate and distinctively political cosmopolitan theory. In this section, I briefly discuss two cosmopolitan theories: David Held’s and Thomas Pogge’s. Both these theories are, to a certain extent, reconcilable with the continued existence of particular political communities, while both also offer justifications for trumping the sovereign rights of communities in order to help refugees.

David Held (2007: 18) proposes a liberalist and layered cosmopolitanism built on eight fundamental principles: i) equal worth and dignity; ii) active agency; iii) personal responsibility and accountability; iv) consent; v) collective decision-making about public matters through voting procedures; vi) inclusiveness and subsidiarity; vii) avoidance of serious harm and, finally, viii) sustainability. These principles protect and nurture each individual’s equal moral significance. The first principle, concerning the equal worth and dignity of every individual, rests on the idea that individuals, and not the state, are the ultimate units of moral concern. Held refers to this principle as individualist moral egalitarianism or egalitarian individualism. While not denying the reality of cultural and other

differences between individuals and communities, it limits the moral validity of the communities in which individuals live. While limiting these communities, this principle also recognises and demands “that we must treat with equal respect the dignity of reason and moral choice in every human being” (ibid. 12). This includes moral choices informed by cultural practices or religious beliefs, as long as they do not betray cosmopolitan values or rights (such as the idea that every individual should be treated with dignity). In her capabilities approach, Nussbaum (2006: 314) insists that the constitutions of all states should include and respect certain core entitlements, but that these core entitlements can still be interpreted and institutionalised in diverse ways by the different states.

Building on the first principle, the second recognises that human agency is *active* – it is not teleological, or determined by fate or tradition. Only when we think of human agency as “the ability to act otherwise” (Held 2007: 12) can the dignity of moral choice be recognised and respected in every individual and universally accepted. For Arendt (1998: 177), action is the ability to begin anew, to bring something new in the world. Action implies a new beginning – the Greek word *archein* means ‘to begin.’ Arendt (1973: 479) saw this ability to begin anew as the supreme capacity of the human being. This supreme capacity is, for Held (2007: 12), the ability to shape the human community, instead of just accepting the way it was shaped by the choices of others. It is the capacity to reason self-consciously and to be self-reflective and self-determining.

Principle three, dealing with personal responsibility and accountability, supplements the first two principles. These three principles constitute the fundamental organizational features of a cosmopolitan order (ibid. 15). Because people are active agents who shape their own lives, they inevitably end up shaping different kinds of lives: they choose different cultural, social, economic and other projects. As mentioned above, Arendt believes that it only makes sense to act and to speak where there is difference. For active agency to have any meaning, difference is necessary, but also because of active agency, difference is inevitable. The eighteenth century German cosmopolitan, Georg Forster, holds that, while we have a shared humanity based on our predisposition to reason, imagine and feel, these predispositions develop differently due to external circumstances (Kleingeld 2006: 516). These differences should be welcomed and respected as “*prima facie* legitimate differences of choice and outcome”, and they are distinct from “unacceptable structures of difference which reflect conditions which prevent, or partially prevent, the pursuit of some of [our] vital needs” (Held 2007: 13). To prevent our legitimate differences, which are the results of our choices and

actions, from becoming unacceptable structures of differences, we have to be aware of the consequences of our actions and we have to be held accountable for them, as they may limit others' choices and ability to act.

The first three principles, as fundamental organizational features, form the basis of the next three, which translate individual activity into collectively agreed frameworks of action or regulatory regimes – they cross over from moral cosmopolitanism to political cosmopolitanism (ibid. 15). The first principle in this group is that of consent. The principle of consent recognises that, where there is a commitment to the equal worth of individuals along with active agency and personal responsibility, a non-coercive political process is needed through which people can negotiate their interdependencies and life chances (ibid. 12). This principle is therefore the basis of governance and non-coercive collective agreement. Where such agreement or consent is sought, it is to be done through voting. This constitutes principle five. Principle five assumes the mechanism and procedures of majority rule, yet it also emphasises the importance of inclusiveness. The idea of inclusiveness forms part of the sixth principle, along with subsidiarity. This principle is concerned with “drawing boundaries around units of collective decision-making” (ibid. 14) and determines what the grounds are for drawing such boundaries. Who should be included within such boundaries are those who are seen as the subsidiaries of any decision implemented within the boundaries – those who are “significantly affected by public decisions, issues, or processes, should [...] have an equal opportunity, directly or indirectly through elected representatives, to influence and shape them” (ibid.).

Principles seven and eight prioritise urgent need and resource conservation. Principle seven is the avoidance of harm and the addressing of urgent need. According to this principle, urgent cases of need should be prioritised until such a time that every individual is covered, *de facto* and *de iure*, by the first six principles. Held (ibid.) argues that, if this principle is to be upheld, public policy ought to focus on the prevention of harmful conditions and the eradication of severe harm inflicted against the will and without the consent of the people. The final principle, the principle of sustainability, is an environmental principle: “all economic and social development must be consistent with the stewardship of the world's core resources [...] which are irreplaceable and non-substitutable” (ibid. 15).

While Held focuses on the individual and the individual's place in the cosmopolitan order, others such as Thomas Pogge (2005) focus on reforming the economic policies of institutions

and states to bring about global justice. Like Held's seventh principle, Pogge (2005: 93) concerns himself with the issues of harm and need. He states it slightly stronger than Held: the poverty which exists in the world "manifests a violation of our *negative* duties, our duties not to harm" (ibid.). He claims that the advantaged citizens of affluent countries are actively responsible for the life-threatening poverty in the world (ibid. 92); that alleviation (a positive duty – something you *do*, as opposed to something you refrain from doing) does not solve the problem, as the advantaged citizens are implicated "in shaping and enforcing the social institutions that produce these deprivations, and are moreover benefiting from the enormous inequalities these unjust institutions reproduce" (ibid. 95); and that the "worse-off" are excluded from a proportional share of global resources by the well-off (ibid. 99). The global economic order is therefore one of radical inequality which actively harms the less fortunate (ibid. 96). To counter this, Pogge suggests global institutional reform through a minor change in international property rights:

[T]his change would set aside a small part of the value of any natural resources used for those who would otherwise be excluded from a proportional share [...] this *global resources dividend* (GRD) could comfortably raise one percent of the global social product specifically for poverty eradication. (ibid. 105)

Countries would agree to this, Pogge (ibid. 106) holds, as their own industries would benefit from the distribution of resources. A country like India, for example, would receive a part of the GRD to invest in health care for the poor. This would benefit India's pharmaceutical industry and, by making workers healthier, also the agricultural, construction, and other minimum wage sectors and businesses.

While Pogge's approach to justice and global economics takes into account the positive impact it would have on states, its cosmopolitan aspect lies in the fact that it recognises that "every human being has right to have her or his vital interest met, regardless of nationality or citizenship" (Jones 1999: 15). Held also recognises this. His eight principles can be implemented in state institutions, giving them a cosmopolitan character while not transforming them to such an extent that the particularity of different states falls away completely. I have shown why this is undesirable and why a variety of states is desirable. However, such cosmopolitan institutions in the state would recognise that the state has a responsibility toward its citizens not because they are citizens, but because they are human

beings worthy of respect, and individuals in possession of certain rights. These institutions should therefore also recognise the worth of non-citizens, and seek to ensure that their worth and dignity is protected, that they have active agency, and that they come to no harm. Pogge's argument that the well-off in society have a negative duty not to harm the worst-off (by failing to end poverty) can also be made applicable to the refugee crisis. Many refugees, for example Syrians situated in refugee camps in Lebanon, lack access to health care, education, and the things needed to take care of their basic needs. In fleeing their countries and finding shelter where they can, refugees often join the ranks of the global poor. As mentioned above, Arendt sees the problem of statelessness as a problem of organisation – we do not lack space, but the space that we have is organised in such a way that there is no space on earth for these people. Similarly, we do not lack the resources to help the poor, or to adequately take care of the basic needs of refugees. What is needed is for us to realise that we are actively harming refugees if we do ensure that they live a basically decent human life, and that they deserve this protection and recognition not as our co-citizens, but as our fellow human beings.

1.4 Conclusion

In this chapter, I outlined the main aspects concerned in the refugee crisis: the figure of the refugee, the sovereign right of the states into which refugees flee, and the cosmopolitan norms that give refugees rights.

In the first section, I outlined the different documents and bodies of international law which aim to protect refugees and displaced persons left without the protection of their states. I then defined refugeehood. Following Shacknove, I claimed that the defining characteristic of refugeehood is that the refugee is left without the protection of his or her state, which makes the refugee crisis primarily a political issue, and not merely an issue about the distribution of resources. I also discussed the rights refugees possess, not as citizens of a country, but as human beings. In this I referred to Hannah Arendt's assertion that every individual has the right to have rights, as well as her scepticism regarding the possibility of these rights being implemented outside of the state. I considered the rights accorded to refugees in the UN Declaration, which offers limited protection to refugees. This negates Arendt's scepticism slightly, but the main brunt still falls on states.

In the second section I discussed the sovereignty of states, how the notion developed, and to what extent it is still relevant today. I considered the main arguments for closing borders against the influx of refugees and immigrants: (i) open borders threaten our cultural heritage; (ii) arguments made in the interest of national security; and (iii) the democratic right to self-determination. I showed why these arguments fail to convince, because (i) they deny the historical development of cultures; (ii) they give states too much power, as many human rights violations can be defended by saying that it is in the national interest; and (iii) the political community, if it is to have democratic legitimacy, should be able to justify its formation to those excluded from the community, as the *demos* is in principle unbounded. Finally, I considered alternatives to such absolute forms of sovereignty. In this, I followed Joseph Carens' arguments to show that the main theories in political theory cannot argue for closed borders. I concluded this section by claiming that, while political communities may be valuable, they should not hold absolute sovereignty.

In the final section, I discussed cosmopolitanism by looking at the development of the concept, from the Greek notion of world-citizenship to its diverse meanings today. I then considered the possibility of absolute cosmopolitanism – a world-state in which individuals would be subsumed under one centralised government, with no distinct political communities. I showed this to be undesirable as well as impractical. A world-state would fail to meet the particular needs of different groups of people. Such a state would have to be tyrannical, denying the individual needs of its citizens and forcing them to conform to a single culture and adopting a single language. I also provided arguments for why diversity is desirable, as it creates the need for communication or interaction between people. Finally, I consider two theories of cosmopolitanism which can be reconcilable with the existence of distinct political communities: David Held's theory of layered cosmopolitanism and Thomas Pogge's arguments for the restructuring of the global economic order. The value of these two theories lies in the fact that they recognise that protection should be offered to non-citizens and that states and the individuals belonging to those states are interdependent.

What I attempted to show in this chapter was the need to find a way to reconcile the particularity of states or political communities with the universal, cosmopolitan norms which offer protection to refugees. In my next chapter, I consider Immanuel Kant's cosmopolitanism as a possible middle way.

2. Kantian Cosmopolitanism

In an essay first published in 1795, *Zum Ewigen Frieden (Perpetual Peace)*, Immanuel Kant develops a cosmopolitan theory which would form the basis upon which a peaceful world order could be founded. In the essay, Kant puts forth three definitive articles for perpetual peace, along with six preliminary articles. Perpetual peace is attainable, Kant (1939) argues, in a world where (i) states have a republican constitution, (ii) the public right is founded on a federation of free states, and (iii) the cosmopolitan right is limited to conditions of universal hospitality. The three definitive articles for a perpetual peace correspond to the three categories of right Kant (1939: 11, 1996: 89) distinguishes: (i) domestic, or civil, right (*ius civitatis*), (ii) the rights of nations, or international right (*ius gentium*), and (iii) cosmopolitan or cosmopolitical right (*ius cosmopoliticum*). In the previous chapter, I argued that neither absolute sovereignty nor absolute cosmopolitanism is practical or desirable, especially not when dealing with the refugee crisis. Kant's cosmopolitanism offers a model for an international system consisting of a plurality of states joined together in a federation, while also directly addressing the question of hospitality.

In this chapter, I discuss the three definitive articles for perpetual peace and their corresponding categories of right. The first definitive article claims that states ought to be republican, which corresponds to the sphere of civic right. In this section, I discuss Kant's conception of a republican state, looking at what the characteristics of such a state could be. Secondly, I look at the rights extended to members of such a state, and specifically the right to participate in the political processes of the republic. I argue that the right to political participation should be seen as a fundamental right. Lastly, the issue of patriotism is discussed. Kant believed that it is possible and even desirable to be patriotic toward the constitution of one's state. Patriotism is not, therefore, linked to cultural, ethnic, or other kinds of identity, but to the values upon which the constitution of the state rests.

In the second section, I consider the sphere of international right and Kant's proposed international world order: a federated world republic. Firstly, I show how a world republic would differ from the kind of world-state proposed by Cloots (which I discussed in Chapter 1), and why Kant believes a world republic would be better than a world-state. Secondly, Kant argues that such a system cannot be brought about coercively. The world federation is a

voluntary federation. I consider the arguments he gives to support this claim, and the possible ways in which the federation can form without recourse to coercive measures.

In the final section, I discuss the right to hospitality, which is central to Kant's third category of right: cosmopolitan right. I consider (i) Kant's justification for creating a third category of right, (ii) what this right entails, (iii) how the right to hospitality is justified, and (iii) how it can be institutionalised. This category of right bears directly on the situation of refugees, as they have to ask for hospitality and are often at the mercy of their hosts. However, this category of right cannot exist without the first two already in place. Host nations cannot recognise their duty to be hospitable if they do not recognise the importance of the right to political participation, or if they define themselves in terms of some cultural or ethnic identity. A world federation of states would necessarily have softer borders than a collection of sovereign states would, and such a system would also offer checks and balances on the power of individual states, thus potentially preventing objectionable practices within those states.

2.1 The First Article: Civic Right and Republican States

2.1.1 The Republican State

Kant's cosmopolitanism is grounded on the idea that all human beings, as rational beings, are citizens of a shared moral world. This idea of a 'moral world' one already finds in *The Critique of Pure Reason*, as the world where rational beings are unified under common laws (Kleingeld 2012: 17). In the realm of ends, different rational beings are unified through common moral laws, thus constituting a moral community. In *Perpetual Peace*, Kant transforms his moral cosmopolitanism into a form of political cosmopolitanism – in light of the moral fact that all human beings are equal, Kant wishes to bring about a peaceful global order in which this equality would be protected. Perpetual peace would safeguard the freedom of individuals as human beings by making them subjects to a common source of law, it would guarantee their equality as citizens (of specific states, and of the world), and it would safeguard their independence as civil subjects (Benhabib 2006: 149). To achieve this, Kant provides three necessary conditions of right that need to be met. The first category of right is civic or domestic right, and the first definitive article for a perpetual peace explains how a condition of civic right can be brought about: "The civil constitution of every state ought to be republican" (Kant 1939: 12).

Kant provides two categories with which we can identify the form of a state: the form of sovereignty, and the form of government. While what we today refer to as a representative democracy resembles Kant's idea of a republic, Kant held that republics and democracies are not necessarily the same. Democracy is a form of sovereignty, while a republic is a form of government. The form of sovereignty can be autocratic, where supreme power (sovereignty) is situated in a specific individual, aristocratic, where power is divided between a few, or democratic, where power is exercised by all members of a specific society. The form of government refers to the constitutional mode according to which power is exercised. This is determined by the general will of the people. A state can be either despotic or a republic. In a despotic system the ruler executes his own laws – there is no separation of powers. In a republic, the executive power (the government) is separate from the legislature:

Every state contains three *authorities* within it, that is, the general united will consists of three persons (*trias politica*): the *sovereign authority* (sovereignty) in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge [...]. (Kant 1996: 90-91)

The first characteristic of a republic is therefore a mixed government, where there is a separation of powers between the legislature and the executive branch of government. This form of government checks the power of both the executive branch and the legislature, ensuring that the power is not abused and the citizens are protected (Dryzek & Dunleavy 2009: 214).

Because the separation of powers in a republic protects its citizens, Kant sees the republican state as a normative requirement. Only within such a state can the external freedom of individuals be protected (i.e. can the individual's freedom be protected when interacting with others who might take it away from them). A republic is therefore the only form of government in which the right to equality is realised, as every individual's freedom is protected and all are subject to common legislation (Kant 1939: 13). For Kant (1996: 30), the right to freedom is the only innate right individuals hold by virtue of their humanity. This innate freedom involves the following:

[I]nnate *equality*, that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master (sui iuris)*, as well as being a human being *beyond reproach (iusti)*

[...] and finally, his being authorized to do to others anything that does not in itself diminish what is theirs [...] such things as merely communicating his thoughts to them, telling or promising them something [...]. (ibid.)

As is shown in the next section, all other rights individuals hold seek to protect and further this innate right to freedom.

2.1.2 *The Right to Political Participation*

In *Metaphysics of Morals*, Kant (ibid. 25) distinguishes between two kinds of rights: “strict rights” and “rights in the wider sense”. The latter category expresses our moral obligations, which are internally binding and therefore generate reasons for action. Strict rights, on the other hand, are relational – they are mutually binding external constraints on our actions. Unlike moral rights, which are justified on the basis of our humanity, strict rights gain their legitimacy from the minimal constraints for legitimate political authority that can be justified to those with whom we share a political community (Peter 2013: 10). The rights accorded to us therefore do not allow us to fulfil our individual interests – we are not “[authorised] to enforce [our] rights with all possible rigour; morality opposes this” (Kant 1939: 55). Our rights simply prevent us from being used as means to someone else’s end as this would violate our innate right to freedom, which implies the right not to be constrained in our choices by other’s choices (Peter 2013: 7).

Strict rights are therefore concerned with the protection of, and legitimate constriction of, our freedom and the free choices we make. These rights are codified in the law, which springs from the legislative authority belonging to the people: “The legislative authority can only belong to the united will of the people” (Kant 1996: 91). The citizens of a country write the laws which protect their freedom, but this also gives them a lawful freedom, “the attribute of obeying no other law than that to which he has given his consent” (ibid.). This implies a conception of citizenship as *active* citizenship. To protect our innate right to freedom, we need to agree on strict rights. This process of agreeing on strict rights, formulating laws, and consenting to them constitutes the right to self-legislation. The right to self-legislation implies a right to political participation. A second characteristic of a republic is therefore a politically active citizenry (Dryzek & Dunleavy 2009: 214). This right is recognised in Article 21 of the UN Declaration (United Nations 1948, my emphasis):

(1) Everyone has *the right to take part* in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; *this will shall be expressed in periodic and genuine elections* which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Fabienne Peter (2013: 13) argues that the right to political participation is justified by Kant's treatment of political legitimacy. When individuals decide to form a state and to formulate laws and rights which protect their freedom, this general will is expressed in the original contract. This 'contract,' for Kant (1996: 93) is merely a hypothetical thought experiment: "the original contract is only the idea of this act [forming a state], in terms of which alone we can think of the legitimacy of a state". The judiciary also only has authority if it expresses the will of the people: "only the concurring and united will of all [...] and so only the general united will of the people, can be legislative" (ibid. 91). No law that is not in accordance with the will of the people can be deemed legitimate. If everyone does not have the right to participate in the deliberative processes of a political community, the community holds no political legitimacy.

Because the state's legitimacy depends on the ability of its members to participate in political processes, the *raison d'être* of the state is to protect the political rights of its citizens by guaranteeing an inclusive opinion. In a republican state, political rights are seen as positive liberties that guarantee the possibility of participation in a common praxis. Opinions are formed and expressed within a structure of public communication that is oriented toward mutual understanding, and not by the structure provided by a market. The paradigm for politics is, therefore, not the market, but dialogue (Habermas 1996: 23). The aim of the Kantian republican state is also to provide a domestic situation and right, and not merely to facilitate free trade (Kleingeld 2012: 139). This does not mean that Kant undervalues the ability of the market to contribute to a situation of right. Kant (1939: 37) argues that the "spirit of commerce" is incompatible with war, and that trade could therefore put pressure on states not to pursue a war (a point which I return to later). What is important here is the fact that republicanism entails civic participation in political processes through dialogue and interaction in the public sphere.

2.1.3 Patriotism toward the Republic

If republicanism entails civic participation, the question is whether individuals within the state have a duty to participate in politics and specifically in the politics of their own state – do they have a patriotic duty to their state? Kleingeld (2012: 26) believes it is possible to construe and argument in favour of patriotism from passages in Kant’s various works. The model Kant proposes for states – the republican model – is ideally “a community of citizens who collectively, through their representatives, give themselves laws, and who establish executive and judicial powers that are separate from the legislative power” (ibid. 27). As already mentioned, the laws of the state come from the will of the people (see Kant 1996: 91).

The people who unite to formulate laws are the citizens of the state. Kant (ibid.) identifies three defining characteristics of citizenship: (i) lawful freedom (the citizen only obeys the laws to which he has consented), (ii) civil equality (no citizen has the superior moral capacity to bind other citizens in ways they cannot bind him in turn), and (iii) civil independence, (“owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people.”) Patriotism, for Kant, is sharing in the self-legislating of the republic, in consenting to and obeying laws, and identifying yourself as a member of the commonwealth and, therefore, identifying yourself with the civic activity of the commonwealth. Civic patriotism is, importantly, *not* the same as nationalist forms of patriotism, or even patriotism felt toward one’s country as a specific territory. In Kant’s day, ‘patriotism’ did not hold the same connotations it holds today. Today, our conception of patriotism is coloured by ethnic nationalism. For Kant, patriotism is the commitment of citizens (as *demos*) to their political system – not to their ethnic or cultural group (i.e. not as an *ethnos*). It is love of a shared political freedom and the institutions which protect and sustain this freedom.

This view of patriotism is shared by a contemporary of Kant and a moral cosmopolitan, Christoph Martin Wieland. Wieland defends feeling (and acting) benevolently toward those you share a community with, but the extent of this benevolence is limited by cosmopolitan principles such as the moral equality of all human beings. One can be benevolent toward one’s neighbours, but not at the cost of everyone else. This means that there are limits to favouring one’s country or the interests of one’s country: “[states or citizens] are not allowed to promote the well-being, the reputation, and the expansion of their own country by undue preferential treatment of their own state or by oppressing others” (Kleingeld 2012: 22).

Wieland rejects nationalist patriotism (the grounds of which are, for him, fictitious and dogmatic) and he rejects militant republican patriotism (killing the king in the name of the people). What he defends is a love of the constitution of the political entity to which you belong. Love of one's country is, therefore, tied to the qualities and characteristics of its political system. Jürgen Habermas refers to this as "constitutional patriotism" (ibid. 24).

This view of Kant's has two potential consequences. Firstly, if patriotic feelings are directed toward a political system and not toward a community to which one belongs on the basis of some facet of your identity (such as nationality or religion), the danger of violence between different groups could be lessened. Nationalist patriotism rests on entrenched us/them (or even friend/foe) distinctions, and is therefore by definition exclusionary. However, civic patriotism, if felt for a political system which emphasises freedom and equality of all human beings *as humans*, allows for the possibility that the *demos* can be redefined or extended. It is a less exclusionary form of patriotism. Where a state's political identity lies not in the culture or ethnicity of its people, but on virtues shared with other states, cooperation between states is also promoted. This is the subject of the next section.

2.2 The Second Article: International Right and a Federation of States

2.2.1 A World Federation of States

Kant's second definitive principle for a perpetual peace states that "[t]he public right ought to be founded upon a federation of free states" (Kant 1939: 18). It is only within a federation of plural states that a situation of international right can come about. In his account of international right, Kant therefore (i) proposes that sovereign states form a world federation of states, and not a single world-state; and (ii) argues that this federation should be a *voluntary* league, and not a league into which states were coerced.

That right should be realised between nations is the second precondition for perpetual peace identified by Kant. However, if states remain completely autonomous entities, peace cannot be attained. As in the state of nature, where individuals would necessarily fight for survival, where there are no laws governing international relations, states would constantly make war, as "the field of battle is the only tribunal before which states plead their cause" (ibid. 20). Kant uses the individual in the state of nature as an analogy for the state in a world-system in which there are no laws governing the interactions of states. Just as it is necessary for

individuals to band together and form a self-legislated state which would protect them, states will ultimately be forced to exit the state of nature by the hardships of war. It is, therefore, necessary to implement some system of international law if international (and perpetual) peace is to be achieved:

One may, in order to secure its own safety, require of another to establish within it a constitution which should guarantee to all their rights. This would be a federation of nations, without the people however forming one and the same state. (ibid. 18)

Kant argues that it is reason that demands peace – reason makes “a state of peace an absolute duty” (ibid. 21) – as war is not (in terms of morality) a mean of right. Kant’s (1996: 24) universal principle of right states that

[any] action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.

Any action which hinders our actions from coexisting with the freedom of others is therefore a *wrong* committed against us. War is such a wrong. The concept of right has to do with the external relations between people “insofar as their actions, as deeds, can have (direct or indirect) influence on each other”; it also relates to the choices we make or are able to make and whether these choices are free (ibid.). In a situation of war, this freedom of choice is limited. The only way to ensure the freedom of individuals and states would be to prevent war and promote peace.

The only way to effect a state of peace is with some kind of compact between nations. This cannot be done by people forming a single state (see discussion in Chapter 1). What Cloots suggests is a world republic where there is no level of authority or representation between the individual and the world-state. While Kant grants that a ‘state of peoples’ is a reasonable idea, this state is different from the world republic that Cloots had in mind. Cloots argues that all states should be completely dissolved. Kant argues that states should join, and so form a world republic:

At the tribunal of reason, there is but one mean of extricating states from this turbulent situation, in which they are constantly menaced with war; namely, to renounce, like individuals, the anarchic liberty of savages, in order to submit

themselves to coercive laws, and thus form a society of nations (*civitas gentium*) which would insensibly embrace all the nations of the earth. But as the ideas which they have of public right, absolutely prevent the realization of this plan, and make them reject it in practice what is true in theory, there can only be substituted, to the positive idea of an universal republic (if all is not to be lost) the negative supplement of a permanent alliance. (Kant 1939: 23)

Cloots' 'peoples' refers to individuals, where Kant's refers to 'peoples' as a group of individuals who have already formed a sovereign state. When leaving the state of nature, these states do not dissolve but they give up their external sovereignty – they let their interaction (as states) be governed by the public laws of the international institution (Kleingeld 2012: 50). They form a “federative state of states” (ibid. 51).

In *Perpetual Peace*, Kant also calls this federation a pacific alliance (*foedus pacificum*), which is not the same as a peace treaty (*pactum pacis*). A peace treaty only ends one war – it does not abolish the state of war itself. Treaties do not preclude the possibility that new pretences for waging war can be found by states, and they are therefore insufficient and invalid (Kant 1939: 20). Kant's first preliminary article for perpetual peace expresses this sentiment: “No treaty of peace shall be esteemed valid, on which is tacitly reserved matter for future war” (ibid. 2). A federation would be more permanent, more binding and able to exert more power. A federation would also maintain the liberty of the different member-states. Kant's second preliminary article for perpetual peace stresses the importance of maintaining the autonomy of states: “Any state, of whatever extent, shall never pass under the dominion of another state, whether by inheritance, exchange, purchase, or donation” (ibid. 3). If one state is ‘grafted’ onto, or incorporated into, another state, the state is reduced from a moral ‘person’ to a mere thing. As shown above, the state is necessary to protect the autonomy of the individual, and any global order should therefore protect the autonomy of the state.

2.2.2 Coercion within the World Federation

Kant believes that states ought to form such a league or enter into a pacific alliance, but that this should be done voluntary. This raises the question of whether states would in fact join an alliance without being coerced. Kant's analogy between the individual and the state seems to imply some form of coercion. Kant (ibid. 11) believes that individuals have the right to compel others, or then coerce others, into forming a state:

But the man, or the nation, that live in a state of nature, deprives me of that security, and attacks me without being an aggressor, by the mere circumstance of living contiguous to me, in a state of anarchy and without laws; menaced perpetually by him with hostilities, against which I have no protection, I have a right to compel him, either, to associate with me under the dominion of common laws, or to quit my neighbourhood.

He also writes that individuals and states “by their vicinity alone commit an act of lesion” (ibid. 18), which leads him to conclude that states and individuals may “require” that other states or individuals establish a constitution guaranteeing their safety. Kleingeld (2012: 46) points out that the way in which this requirement is met changes for Kant. It seems as if the requirement would be met in the same way the requirement for individuals to join a state would be met – through force or coercion.

Yet in *Perpetual Peace* Kant does not take this route. States must not be coerced into joining the federation:

This alliance does not tend to any dominion over a state, but solely to the certain maintenance of the liberty of each particular state, partaking of this association, *without being therefore obliged to submit, like men in a state of nature, to the legal constraint of public force.* (Kant 1939: 21, my emphasis)

Kant advocates a loose federation of states. While the laws of the federation are still coercive, in the sense that they restrict the power of member-states and they require member-states to be republican, a state’s decision to join the league is free of coercion. States cannot coerce other states into joining.

Kant could be criticised for not following his analogy through and advocating a coercive league (and therefore being inconsistent). However, Kleingeld (2012: 53) argues that Kant’s line of argument *is* consistent. While Kant uses the analogy of the individual leaving the state of nature to argue that states should form a federation, there is an important disanalogy between individuals and states:

The law of nations cannot even force them [to join the federation in order to bring about peace], as the law of nature obliges individuals to get free from this state of war, *since having already a legal constitution*, as states, they are

secure against every foreign compulsion, which might tend to establish among them a more extended constitutional order. (Kant 1939: 21, my emphasis)

The starting assumptions differ: where individuals are concerned, the state of nature is universal and in leaving it they *establish* a civil condition. Where states are concerned, the state of nature exists in the relations between states (i.e. it is external), but not within the state, where there is already a civil condition.

The state's (internal) constitution is an expression of its (or its members') political autonomy. It is the duty of the republican state to protect the autonomy or freedom of its citizens. Therefore, if a people is coerced into joining the federation, this act is not an expression of their will: "[coercing] them into a state of states would run counter to the basic idea of the people as a self-determining and self-legislating political union" (Kleingeld 2012: 54). If states were able to coerce each other into leaving their state of nature, the result would probably be that the strongest state exerts its power to set the terms in its favour and to subject the weaker states to its laws. Thomas Carson (1988: 211) points out that it is unlikely that all states would have to become republican states and join a federal world republic, if left the choice, as joining such a federation would impinge on their sovereignty and their economic freedom. Carson (ibid.173) believes that Kant's conception of a world federation would not be successful, because it would not possess any military forces (at federative level), which is needed to prevent individual nations from forming their own armies and making war. He (ibid. 211) does not think it is necessary for states to adopt democratic or republican forms of government to form a world government; all that is needed is for "all great powers (or all nuclear powers) [to agree] to the idea of a world state". It is not clear that this process would be any less despotic than the kind of world-state Cloots advocated, as the individual's political autonomy (at least in the coerced states) would be dissolved. The most we can say, therefore, is that states ought to join a federation, but not that they must. Only when states voluntarily join the federation, can it be said that the laws of the federation express the united will of the states (and therefore that these laws are legitimate), instead of expressing the will of one or a few strong states.

States would retain their autonomy and the autonomy of their people, while enjoying the benefits of cooperation (in trade, in sharing knowledge and technology) and peace. Kant believes that it is conceivable that, if there should come a strong republican state which could

act as a centre for the federation, other states may adhere to the republican and federative principles to guarantee their liberty:

That a people should say, “There shall not be war among us: we will form ourselves into a state; that is to say, we will ourselves establish a legislative, executive, and judiciary power, to decide our differences,” – can be conceived.
(Kant 1939: 22)

The question still remains what difference a voluntary league would make – how it would secure peace on a global scale, if it does not have the power to coerce. It will not be in the interest of all states to join the league. War can be profitable. Even if states decide to join the league, their autonomy allows them to leave when it no longer serves their purposes. Therefore, Kant’s league does not really add anything substantive other than the intention of member states not to wage war. It does not actively promote peace. However, what this line of critique assumes is that the federation will be formed by states signing a treaty. As mentioned above, Kant envisions a contract more binding than a treaty. In allying themselves into a federation, the states not only sign a peace treaty, but they (somehow – Kant does not give detailed guidelines) bring into being an institutionalised framework within which conflict can be resolved. It is within this institutional context (or on the federal level) that Kant allows a kind of coercion. For each state to secure its own safety, as well as to secure the public right (on a domestic and international level), it is necessary that the member-states be republican. Member-states can therefore require of their counterparts to “establish within it a constitution which should guarantee to all their rights” (ibid. 18). The laws of the federation would require states to act in a certain way. The fact that the federation cannot use force to ensure that states fulfil the requirements does not mean that it serves no purpose. Its institutional framework serves as a court of arbitration between hostile states, but it can also regulate trade and labour laws, provide support for economic development, and be a channel for cultural and scientific exchanges, all of which are beneficial for the securing of peace and public right (Kleingeld 2012: 68).

Kant’s third principle of right relates to international right, or the relations between states. This sphere of right, however, cannot ensure the protection of refugees. While it may promote peace between the states belonging to the league (which could lead to less people being uprooted), it does not guarantee the protection of those *individuals* who are without a

state. Kant therefore proposes a third category of right which concerns the relations between (foreign) individuals and states.

2.3 The Third Article: Cosmopolitan Right and Hospitality

2.3.1 A Third Category of Right

Kant's third definitive article for a perpetual peace corresponds to the third category of right he distinguished in *Metaphysics of Morals*: cosmopolitan (or cosmopolitical) right. In the third article, Kant limits this right to conditions of *universal hospitality* (Kant 1939: 23). In what follows, I consider (i) Kant's reasons for creating a third category of right, as opposed to merely subsuming cosmopolitan right under international right, (ii) the content of cosmopolitan right, or the right to hospitality, (iii) the justification of cosmopolitan right and, finally, (iv) how this right can, or has been, institutionalised. In this investigation, I take my lead from Pauline Kleingeld's (2012) discussion of this third category of right.

Before Kant, the laws and rights governing all matters that were cross-border in scope were subsumed under international right and international law (as it still is, to a large extent, today). The interaction between individuals or groups, distinct from their own states, and foreign states was therefore also a matter of international right. Kant argues that a distinct category of right should be created for such situations. He limits international right to relations between states or representatives of those states, such as diplomats and ambassadors. Citizens travelling as tourists or traders, or fleeing their countries, could therefore not be included in this category. Just as domestic and international right seeks to protect citizens from the state and states from one another, a category of right is needed to protect individuals who find themselves outside their own states, but left unprotected by those states. Kant argues that there is a difference in scope between cosmopolitan and international right, with the former dealing specifically with individuals and states who stand in an external relation of mutual influence to each other (Kant 1939: 11). Every individual should be regarded as a citizen of a universal state of humans (which, of course, is to be read as a metaphor, or a form of moral cosmopolitanism – as has already been shown, Kant opposes a world-state). The bearers of cosmopolitan right are what he refers to as 'earth citizens' (*Erdbürger*) or 'peoples'. Cosmopolitan right pertains to the individual, *not* as a citizen belonging to a specific state, but as a person to a universal humanity, whereas international right only addresses individuals insofar as they are citizens of specific states. This third

category is necessary because when individuals, groups and states interact, they necessarily influence each other's sphere of external freedom. A principle of right, independent from existing treaties and covenants between states, should be found which would provide a guideline for interaction between states and foreigners (Kleingeld 2012: 73).

2.3.2 *The Right to Hospitality*

Cosmopolitan right (*Weltbürgerrecht*) seeks to answer questions about the responsibility of states toward foreign individuals, and the rights individuals have in relation to foreign states. It relates to questions of the right to entry and settling (on the part of individuals), the right of refusal (on the part of states), and the rights of states regarding foreign territories that do not form part of a state. Cosmopolitan right is concerned with interaction (*Verkehr*) across borders, whatever form it may take (travel, migration, intellectual exchange, commercial endeavours). It lays down normative principles for interaction between *all* individuals, as having equal moral status, and states (ibid. 75). It is a moral principle with possible legal consequences.

Kant limits this right to conditions of universal hospitality, thus placing the right to hospitality in the centre of cosmopolitan right. The right to hospitality gives individuals and states

the right to request interaction with other states and their inhabitants, but not a right to enter foreign territory. The addressees have the right to refuse such requests, but not with hostility, and not if it leads to the “demise” (*Untergang*) of the applicant. (ibid. 73)

Essentially, this right signifies that every stranger has the right of not being treated as an enemy, if they arrive in a foreign country. Every person has the right to be treated civilly (as long as they do not offend the potential host nation) and the right to be admitted into the society of others.

The right to hospitality, while not being the right to enter a foreign territory nor the right to be treated as a guest, does entail the right to interact, to communicate, and to *attempt* to establish a community (ibid. 75). Hospitality is, therefore, a minimal and negative concept: it is the right to present oneself to, or attempt contact with, people and states in other parts of the world. The right to hospitality, other than being the right not to be treated with hostility, is

therefore also the right to be recognised as a potential subject of contracts and bearer of basic rights. Even non-state nomadic peoples have this right (ibid. 77).

While the political autonomy of the state, or its sovereignty, gives it the right to refuse entry to foreign individuals, this right is also limited. Entry cannot be refused if the refusal could result in the demise of the applicant. States may also not expel individuals from their territories, if that could result in the demise of the individual (ibid.). Furthermore, entry may not be refused on *a priori* arbitrary grounds such as race, religion, or culture. If states had the right to refuse on such grounds the individual's right to establish contact would be an empty right. Where entry is refused for security reasons it must be on the basis of a *known* threat: "The state as such [...] has the right to refuse access to foreigners whose intended activities can rightfully be expected to produce a genuine litany of evils" (ibid. 81). A state's right to refuse entry does not, therefore, extend to refusing entry of people belonging to certain cultural or religious groups of which certain members have, in the past, posed a threat to the state. It can only refuse entry if that individual intends to do harm to the state. An individual belonging to a radical religious group, known for terrorist acts, may therefore be denied entry. An individual merely belonging to a specific religion may not, simply on that basis, be denied entry.

As an example of legitimate rejection of entry, Kant defends Japan's laws restricting foreign access to their territories. In the late eighteenth century, access to Japan was denied to all Europeans, save the Dutch. Traders of the Dutch East India Company were allowed to dock at and stay on an artificial island near Nagasaki, connected to the main island with a bridge. Barring an annual visit to the shogun, no foreigners were allowed to cross this bridge. While the Japanese's refusal to allow contact could be seen as a breach of cosmopolitan right, Kant argues that they were protecting themselves from a known threat. Previous contact between Europeans and nations in the Far East showed that the European powers were violent and imperialistic: "The Chinese and Japanese, whom experience has taught to know the Europeans, wisely refuse their entry into the country" (Kant 1939: 26). Other countries were not as 'wise':

Under pretext of establishing factories in Hindostan, they [the European powers] carried thither foreign troops, and by their means oppressed the natives, excited wars among the different states of that vast country; spread

famine, rebellion, perfidy, and the whole deluge of evils that afflict mankind, among them. (ibid.)

Cosmopolitan right is therefore restricted insofar as entry would pose a genuine threat to the country, but entry cannot be denied to those who pose no threat, and who moreover are fleeing from threatening conditions in their own countries.

It could be argued that Kant's restriction on the right of refusal (that entry can only be refused if the refusal would not result in the demise of the individual) is possibly *too* restrictive, in the sense that 'demise' is too strong a condition. However, argues Kleingeld (2012: 78), 'demise' need not mean 'death.' It could be interpreted more broadly to include incapacitating physical or psychological harm. In this condition, Kant anticipates the principle of non-refoulement that is currently found in refugee law. This principle states that "no refugee should be returned to any country where he or she is likely to face persecution or danger to life or freedom" (Goodwin-Gill 1983: 69). This principle thus extends Kant's concept 'demise' to include not only death, but a loss of freedom.

A state's right to refusal has one further condition. In refusing entry, the state is in no way released of all responsibility toward the one(s) refused. Like international right, the purpose of cosmopolitan right is to realise right *globally*. Right can only be realised where our actions do not infringe on the freedom of others (as discussed above) and vice versa. Kant (1939: 26) writes that the world is now structured in such a way "that a violation of rights, committed in one place, is felt throughout the whole". Even if refugees are not within our territories, the fact that they are deprived of their rights and therefore in a situation of wrong (or being wronged against) impacts our ability to realise right domestically. States should therefore apply the cosmopolitan principle to their domestic policies. Citizens of the state, as civic patriots, should also support this. Patriotism, it has been shown, is felt toward a political system, and specifically that system as an institution of right (Kleingeld 2012: 79). The state is still obligated to attempt to realise right on a global scale. States would be wise to fulfil their duty in this respect, as the world is now structured in such a way that "every man feels the shock of events which take place on the other side of the globe" (Arendt 1995: 83).

2.3.3 *The Justification of Cosmopolitan Right*

Kant (1939: 24) justifies cosmopolitan right, firstly, with the fact that we share possession of the surface of the earth. Before the division of the earth into different territories, and before

the imposition of private property, all were equal members of the original community of the land (Kleingeld 2012: 81), and no one had a greater right to a country, or residence in a specific territory, than another (Kant 1939: 24). Secondly, he bases cosmopolitan right on the fact that we cannot but come into contact with others due to the spherical shape of the earth (ibid.). The ‘community of the land’ is a community of (possible) physical interaction. To maintain peace and right, this interaction should be regulated according to certain principles – Kant proposes his three categories of right to serve this purpose.

It is not clear that the mere fact of a shared earth is an adequate justification for cosmopolitan right. Kant does not provide further justification. However, Kleingeld (2012: 83) argues that it is possible to construct a justification of cosmopolitan right from certain preliminary principles formulated by Kant in *Metaphysics of Morals*. Kant (1996: 50) claims that any piece of land can be acquired originally, based on the original community of land:

All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them.

Human beings can only exist if they have a place in which they can exist. From this, one could argue that we at least have a right to inhabit the space in which we were placed, as not having *some* space in which to exist would lead to not being able to exist at all. This is the danger refugees are constantly facing – deprived of their homes and prevented from entering foreign territories, they are left without a space within which they can (inter)act and fulfil the basic functions of life.

Furthermore, the concept of freedom, the only innate right individuals possess, makes no sense without this existence: “humans have a right to freedom, freedom requires existence, and human existence requires a place on the globe” (Kleingeld 2012: 84). Our innate right to freedom implies being independent from being constrained by the choices of others. This in turn implies an innate equality. In the limited space available on earth, it is impossible not to come into contact with others and constrain their choices in some way. However, this constraint does not limit their freedom if they can in turn bind you. The equality implied by freedom is the “independence from being bound by others to more than one can in turn bind them” (Kant 1996: 30). If you do not at least have the right to be where you were placed, or where you are against your will, you are not on an equal footing with others. In the case of

refugees, “nature or chance” ‘placed’ them in the host countries – even if they did choose to flee their own countries, they did so because of life-threatening circumstances they did not choose. If they are not granted access to foreign countries, they are ‘bound’ in a way by the citizens of those countries which limits their freedom. From this, Kleingeld concludes that cosmopolitan right is necessary, as the shared surface of the earth compels us to interact, and as this interaction can only be free if the actors each have a space from which they can act and where they can exist.

The second preliminary principle which could justify cosmopolitan right is closely related to the first. It is the right to attempt community and communication (Kant 1996: 31, Kleingeld 2012: 84). This right follows from our innate right to be free, as our freedom implies independence from others, and in turn our not doing something that would diminish what is theirs, so long as they do not want to accept it. Their acceptance (or not) needs to be communicated to us, just as we need to communicate our intentions or thoughts to them. We therefore have a right to communicate with others, and they in turn have the right to refuse to listen. Kleingeld argues that this principle can be transposed to cosmopolitan right: we have a right to seek entry or interaction, and they have a right to refuse or accept. From these two principles, Kleingeld believes we can derive the three central aspects of the principle of hospitality:

[S]tates and individuals have a right to attempt to visit elsewhere, that prospective visitors have no right to intrude into the sphere of freedom of others against their will, and that neither states nor individuals have the right to refuse prospective visitors when this would lead to the annihilation of their freedom (their demise). (Kleingeld 2012: 85)

Kleingeld (ibid. 82) provides a supporting argument for the justification of cosmopolitan right. Johann Gottlieb Fichte attempts to justify cosmopolitan right by arguing that every individual possesses a fundamental right: the possibility to acquire rights. This resonates with Arendt’s right to have rights. The individual has this right, regardless of his or her relation to a state. It is the original human right: “the right to the presupposition, on the part of all human beings, that they can enter into a legal relationship with him through contracts” (Fichte in Kleingeld 2012: 83). Foreigners who enter a state do not immediately possess positive rights (as citizens would), but they do have the right to the possibility of entering into legal relationships with states. For Fichte, this implies the right to set foot on foreign territories,

and cosmopolitan right is therefore “the right to travel freely over the surface of the earth and to solicit a legal association” (in Kleingeld 2012: 83). Kleingeld points out the obvious flaw in Fichte’s justification: legal association can be solicited from a distance (especially with today’s technology). However, his insight that we all have the right to be recognised as a legal entity is important with reference to refugees, who are often not recognised as such. Furthermore, for refugees fleeing circumstances of war or extreme violence, it is not always possible to first establish contact or solicit legal association from a distance – sometimes circumstances force them into foreign territories unexpectedly.

Fichte’s argument rests on the fact that every individual has the right to have legal status or the right to a recognised legal personhood in a *positive* sense – he or she can request entry, demand rights, and sign contracts (whether real or hypothetical, as Kant saw the original contract) to safeguard these rights. This form of legal personhood gives agency to the individual. This is the opposite of what happens when the stateless person commits and is punished for a crime. When it comes to penal law, the citizenship of both the perpetrator and the victim does not matter (Dubber 2010: 196). If a foreigner commits a crime against another foreigner in South Africa, that foreigner is held accountable under our laws and can be imprisoned in South Africa. It is precisely the fact that citizenship plays no part in *this* kind of legal relation to the state which worries Arendt. She argues that the human rights of the stateless are violated because the only legal ‘protection’ they have is being imprisoned, the only way for them to gain equal status with citizens is for them to become criminals (Arendt 1973: 286). In this case, the individual is merely subject to laws, instead of having a say in the formulation of those laws or having legal agency.

The question of private property poses a problem for cosmopolitan right. If the right to private property is one of the fundamental human rights, allowing others to enter our territories could infringe upon this right. One counter to this objection could be to say that refugees, at least, do not acquire the property. However, they undeniably still impact the private property of others. Kleingeld (2012: 85) argues that we can use Kant’s analogy between the state and the universal state of human beings to answer this claim. In the same way that the state taxes its (more fortunate) citizens to support those who are disadvantaged, the universal state of human beings requires the use of a part of one’s private property by foreigners, if their survival is at stake. The right to private property is therefore limited by the requirement to ensure the sustenance of those whose survival is at stake.

2.3.4 Institutionalising Cosmopolitan Right

If cosmopolitan right is normative, we should, in some way, institutionalise the right to hospitality. The institutionalisation of cosmopolitan right is also necessary for perpetual peace and a global system of right – all three categories of right need to be present in order for the global system to be one of right. The question is how this institutionalisation is possible. Many of the rights which fall under Kant's conception of cosmopolitan right have, since his time, been codified. In the twentieth century, the rights of the stateless were codified by international bodies such as the United Nations. However, these rights still fall under international law (Kleingeld 2012: 75). The fact that these rights have been codified is already a step in the right direction, as it has "broken up the absolute subjection of people to the state" (Verdros & Simma in Kleingeld 2012: 88). The question of the institutionalisation of the right to hospitality still remains unanswered. It is also the question of the means of enforcement, and the question of what cosmopolitan citizenship consists of. It is to these two questions that I now briefly turn.

Cosmopolitan right is an empty right if it cannot somehow be enforced – it cannot simply be an ideal. The idea of right is to institute right on a domestic and global scale. Kleingeld turns to Kant's discussion of commerce for an answer. Kant (1939: 37) argues that the "spirit of commerce" is incompatible with war. Trade cannot prosper in a war. It is therefore in the interest of traders to stifle, through mediations, the outbreak of war (albeit not for moral reasons). The spirit of trade therefore guarantees perpetual peace (ibid.). Kant believes that commercial endeavours would lead to the functional equivalent of a league of states (Kleingeld 2012: 87). Because peace is in their interest, and because "the power of money [is] that which of all others gives the greatest spring to states" (Kant 1939: 37), commerce has great influence over states. States would therefore also seek to secure peace, as well as seek to ensure that their traders would be able to trade with and in foreign states and peoples. Treaties would be signed guaranteeing hospitality. The problem, as Kleingeld (2012: 87) points out, is that "there is nothing in the pursuit of commercial gain as such that implies hospitality rights for *all humans*" – the problem of enforcement of cosmopolitan right is not completely solved. The "spirit of commerce" would only secure the right of hospitality of traders and others in pursuit of commercial gain, but not of refugees and other stateless persons. It is also possible (probable, if one looks at the history of commerce) that the "spirit of trade" might go against the spirit of cosmopolitan right – that this right might be discarded by states, in the pursuit of commercial success and profit. Kleingeld points out that there is

nothing in the “spirit of trade” that would make states insist that their trading partners behave better, or respect the cosmopolitan (or other) rights of those who are not in trade. This is evidenced by the role trade often plays in warfare. While there is some truth in Kant’s claim that peace would profit trade, there is definitely also truth in the claim that war could be profitable – the Opium War, between Britain and China in 1840, is a case in point. The “spirit of trade” is, therefore, insufficient to guarantee the enforcement of cosmopolitan right.

Kleingeld sees the fact that some human rights have been codified into various statutes, protocols, and conventions in the past century as a sign that institutionalisation of cosmopolitan right is an attainable goal. The 1948 UN Declaration, which is the primary instrument governing international human rights, recognises (like Kant) the equal dignity of every human being, the right to seek and enjoy asylum, the right not to be arbitrarily exiled or denationalised, and (like Fichte) the right to be recognised as a legal person. Article 28 of the UN Declaration gives everyone “the right to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (United Nations 1948). These rights, or the realisation of these rights, are cross-border in scope – they apply to everyone, everywhere on the planet. The UN Charter also prohibits colonial conquest (as did Kant). Importantly, the status of individuals as persons and not as subjects has been strengthened, especially through developments in the sphere of human rights (Kleingeld 2012: 87). Kleingeld lists the 1951 UN Convention on the Status of Refugees, the 1967 UN Protocol, and the recently established International Criminal Court as examples. The tie binding the individual to his or her state, while not broken, has at least decreased in importance. As mentioned above, the individual is no longer absolutely subject to the state. Individuals are bearers of rights which can be asserted at the level of international law (Verdross & Simma in Kleingeld 2012: 88).

Kleingeld (2012: 89) also points out that the enforcement of cosmopolitan right can be hindered by the unequal distribution of money and power, as this will stand in the way of an equal cosmopolitan citizenship. As mentioned above, the pursuit of profit (which gives a state both money and power) could lead to states tolerating transgressions of cosmopolitan law. Whether cosmopolitan right is instituted depends on to what extent it corresponds to the interests of (powerful) states. Kant argues that the aim of the republican state is the permanence of its constitutive members (or the survival or continued existence of its citizenry) and therefore the state ought to relieve poverty and protect its members from the vicissitudes of the market (ibid. 140). If, as stated above, a violation of right (or a situation

where public right is not realised) in one place is felt in another, it is conceivable that this duty to relieve poverty could be extended to non-citizens – i.e., to the constitutive members of the world republic. Martha Nussbaum formulates ten principles for a just global structure, several of them addressing this issue:

1. “*Overdetermination of responsibility: the domestic never escapes it*” (Nussbaum 2006: 315). While it is unjust that poorer nations face greater obstacles than richer nations, this does not mean that rich nations carry sole responsibility for fulfilling the capabilities of those living in poorer nations. The governments of the poorer nations should do everything they can (domestically) to help their citizens.
2. “*National sovereignty should be respected, within the constraints of promoting human capabilities*” (ibid. 316). If sovereign states fail to promote the capabilities of their citizens, or if they violate the rights of their citizens, coercion is allowed, especially in the form of international treaties (see principle 6).
3. “*Prosperous nations have a responsibility to give a substantial portion of their GDP to poorer nations*” (ibid.). Nussbaum proposes that richer nations should give, for example, 2 percent of GDP to assist poor countries (an arbitrary number open for debate, but much higher than the current percentages given). How this is to be done (given to NGOs or given to governments) is also left for “contextual determination”. Nussbaum points out that while many people are deprived of what they need; many individuals (especially in richer countries) have access to luxuries that do not meet any central human needs, which violates ideals of human dignity and equality.
4. “*Multinational corporations have responsibilities for promoting human capabilities in the regions in which they operate*” (ibid. 317). MNCs should promote education and environmental issues in the regions in which they operate, devoting a substantial amount of their profit to such development. This responsibility should be recognised globally.
5. “*The main structures of the global economic order must be designed to be fair to poor and developing countries*” (ibid. 319). This relates to the first principle and the fact that poorer countries face additional obstacles, which the policies of international trade agreements and bodies such as the IMF and the World Bank do not adequately reflect upon.
6. “*We should cultivate a thin, decentralized, and yet forceful global public sphere*” (ibid.). This thin global government should respect the autonomy of states (as in

Kant's world federation). It should include a world criminal court, environmental regulations with the mechanisms needed to enforce them, global trade regulations, global labour standards, and limited global taxation.

7. "*All institutions and (most) individuals should focus on the problems of the disadvantaged in each nation and region*" (ibid. 320). This specifically concerns minorities or oppressed majorities (such as women) in states. Where the sovereign state fails to meet the capabilities of *all* its citizens (see principle 2), the international community has a responsibility to help.
8. "*Care for the ill, the elderly, children, and the disabled should be a prominent focus of the world community*" (ibid. 321). This relates to the previous principle. Health issues such as the spread of HIV/AIDS and infectious diseases are a global issue. The people who are affected by these conditions are in need of care. Richer countries especially have a responsibility to provide the resources needed to care for those in need of care.

The ninth and tenth principles state that (9) the family sphere is precious, but not "private," and (10) that all institutions and individuals have a responsibility to support education. Nussbaum's principles resonate with Thomas Pogge's suggestions for global justice (see discussion in Chapter 1). Pogge (2005) also suggests that economic policies of advantaged nations should be adjusted in such a way that a certain amount is set aside for development in the developing world, so avoiding the harm caused by global poverty.

With regards to what cosmopolitan citizenship could entail, Seyla Benhabib (2006) argues that Kant's insistence that cosmopolitan right be codified in treaties between states, while bearing upon individuals (as separate from their states) leads to asymmetries in his cosmopolitan theory. However, argues Kleingeld, Kant's analogy between the state and state citizenship could also be used here. Just like individuals co-legislate indirectly in Kantian republics, so Kantian cosmopolitanism is indirectly democratic. The representatives who legislate in a republic also legislate the cosmopolitan laws. They are, therefore, representatives of their constituents, and accountable to them: "Thus, individual citizens can at the same time be conceived as world citizens who co-legislate indirectly, through representatives who participate in forming and governing institutions at the global level" (Kleingeld 2012: 90).

Finally, cosmopolitan citizenship can be exercised in a global network of overlapping public spheres and international organizations. We see this happening with the formation of transnational bodies such as the EU and the AU, and international bodies such as the UN. How this is possible is discussed in the next two chapters.

2.4 Conclusion

This chapter was devoted to Immanuel Kant's theory of cosmopolitanism, as his thought influenced many contemporary philosophers working in the field (such as Rawls, Pogge, and Benhabib). Kant's theory also provides a possible solution to the problem posed at the end of the previous chapter: if neither absolute sovereignty nor a world-state is desirable, how are we to mediate between these two extremes? Kant's proposed solution rests on three different but interdependent spheres of right: civic right, international right, and cosmopolitan right.

In the first section of this chapter, I discussed civic (or domestic) right, and what a republic entails. The separation of powers in a republic prevents the abuse of power and ensures that the freedom of the state's citizens is protected. For this reason, Kant sees the republican state as a normative requirement. The individual's freedom should be protected because freedom is the only innate right individuals hold by virtue of their humanity. I argued that the forming of a state, the institution of strict rights, and the consent implied in the act of formation and codifying of laws implies a right to political participation. Since the state is, in a sense, the expression of the people's will, the people can also show loyalty toward the state (civic patriotism). I argued that this civic patriotism allows room for foreigners to become patriots, as it does not rest on a conception of an ethnically or culturally homogenous political community.

In the second section I discussed Kant's second sphere of right – international right – and his arguments for a world-republic or a federation of free states. It is only when states, having adopted republican constitutions, voluntarily join an international league that peace can be ensured. States will choose to join this federation to escape the hardships of war. Since a state already has a constitutional order which expresses the will of its people and a certain degree of autonomy, it cannot be coerced to join the federation. If a state is coerced into joining the federation, it will go against the will of its people and no longer be legitimate.

Kant identifies a third category of right: cosmopolitan right. Where the second category concerns relations between states, the third concerns the relations between states and foreign individuals. This sphere of right directly concerns refugees. Cosmopolitan right is limited to conditions of universal hospitality. The right to hospitality gives individuals the right to request interaction with other states. However, the foreign state still retains the right to refuse entry, but only if such a refusal would not lead to the demise of the individual making the request. As refugees are individuals fleeing from persecution, entry may not be refused to them according to this account. I considered the possible justifications for cosmopolitan right given by Kant and others: the fact that we share the limited space on earth; the right we have to inhabit a specific space; the right to community and (attempt at) communication; and the right to legal personhood. Finally, I turn to the question of institutionalising cosmopolitan rights. Cosmopolitan rights have already, to some extent, been institutionalised by international bodies such as the UNHCR, and in documents of international law. This development indicates that it is possible to institutionalise the right to hospitality.

The idea of a global network, and specifically one modelled along the lines of Kant's federation of free states, provides a possible framework for cosmopolitan citizenship, which in turn would ensure that the right to hospitality held by refugees is respected. In the next chapter, I turn to three prominent approaches to questions of cosmopolitan justice and showing hospitality toward strangers.

3. Different Approaches to Refugee Rights

In the previous chapter, I ended with Kant's view that cosmopolitan right entails the right to hospitality. As has been emphasised throughout this study, the world we live in is structured in such a way that we *have* to consider ways in which to accommodate difference in our political communities and ways in which we can try to live alongside one another. In this chapter I consider three influential responses to this situation: (i) multiculturalism, (ii) the 'law of peoples' as suggested by John Rawls, and (iii) a deliberative model of democracy, specifically the notion of democratic iteration proposed by Seyla Benhabib.

In the first section, I consider multiculturalism as a response to the diversity (in terms of language, culture, religion, and ethnicity) found in modern states, looking at the various kinds of (group-) rights contained in the multicultural approach and three main justifications for multiculturalism: the liberal egalitarian, the communitarian, and the postcolonial. Ultimately, I argue that multiculturalism fails as a response, specifically to the refugee question as it focuses on minority groups already accepted into the state, but also to the question of peaceful interaction and living together between different groups. Multiculturalism comes dangerously close to moral relativism, as practices within a culture are deemed untouchable. It also entrenches existing divisions between groups and fails to protect minorities within minority groups (internal minorities).

In the second and third sections, I discuss theories which depart from a Kantian perspective. The first is John Rawls' 'law of peoples'. I briefly discuss Rawls' conception of justice as fairness, and how he seeks to extend it into international law. The 'law of peoples' aims to bring about a global system of right, in which justice as fairness is realised. The first step is to ensure justice on a domestic level. Rawls distinguishes between five types of domestic societies, of which the reasonable liberal peoples and hierarchical societies are well-ordered peoples and therefore societies which can be just. The 'law of peoples' is the extension of domestic justice into global justice. This extension takes place in two stages: ideal theory and nonideal theory. I briefly explain how Rawls' 'law of peoples' is extended, before I turn to the criticisms levelled against Rawls' theory. Ultimately, I argue that the 'law of peoples' is limited by its focus on international law and not cosmopolitan law, which makes it unable to deal with the refugee question.

As an alternative to these two theories or approaches to the rights of others, I turn to Seyla Benhabib's arguments for a world federation and her notion of democratic iteration as a way to implement cosmopolitan norms. Like Rawls' 'law of peoples', her position takes its lead from Kant. However, Benhabib is more concerned with the third category of right – cosmopolitan right or the right to hospitality. I consider the reasons she gives for the creation of a federation of states united by cosmopolitan norms and laws, specifically recent developments such as the rise of an international human rights regime, a crisis in territoriality, and the disaggregation of citizenship. I then turn to the philosophical foundations she provides for her theory – Kant's republican federalism and Arendt's notion of the right to have rights – and show how she interprets and goes beyond Kant and Arendt's suggestions. Finally, I turn to the process she proposes to put cosmopolitan norms into practice in such a way that the rights of refugees and aliens are guaranteed or protected: the process of democratic iteration.

3.1 Multiculturalism

3.1.1 What is Multiculturalism?

Multiculturalism as a model for accommodating diversity developed in the 1960s and 1970s, as a rejection of the notion of a (ethnically) homogenous nation. Diversity – cultural, religious, and ethnic – is recognised and accommodated through a range of policies and rights aimed specifically at minority groups within the state (Kymlicka 2010: 97). These special rights are needed to counter the privileged position of the majority, to ensure representation of minorities in public institutions, and to preserve the cultural practices of minority cultures (specifically immigrant communities and indigenous cultures). They therefore combine economic, political, cultural, and social dimensions (ibid. 102). Liberal democracies seemingly fail to do so. Theorists of multiculturalism criticise liberalism for its focus on the individual and its devaluing of communities or group identities, specifically ethno-cultural and/or religious identities. Liberal democracies are criticised for being wedded to universalist principles, and therefore opposing alternative life forms. According to multiculturalists, democracies cannot accommodate radical cultural diversity (Dallmayr 1996: 280). While the constitution of a liberal democracy professes that all are equal (as individuals), the public institutions, processes of decision-making, legislature, etcetera, are biased in favour of the majority or the dominant culture. Constitutionally minorities may have the same rights as the

majority, but in reality they cannot exercise their rights to the same extent, nor can they participate in political processes in the same degree. For this reason multiculturalists argue that particular rights should be recognised for groups to promote their full participation (Young in Dallmayr 1996: 282).

Using Canada as an example, Will Kymlicka (1996) discusses how a multicultural state should be structured. Canada is an interesting example because it is a multination state – English, French, and aboriginal – and also polyethnic due to the large numbers of immigrants from different ethnic origins who now live there, but who still hold on to their ‘original’ cultures. For this reason, three forms of group-differentiated rights can be found in Canada: self-government rights, polyethnic rights, and special representation rights. The first form refers to Canada’s federalist structure, with the Aborigines and Quebecois considered as ‘nations’ separate from English-speaking Canadians (Kymlicka 1996: 155). Self-government rights generally include a combination of the following (Kymlicka 2010: 101):

- Federal or quasi-federal territorial autonomy
- Official language status (regional or national)
- Guaranteed representation in government or in the constitutional court
- Public funding of minority language institutions (schools, etcetera)
- Constitutional or parliamentary affirmation of multinationalism
- Separate international personality (for example, having their own Olympic team)

Polyethnic rights recognise the differences in cultural practices between the three ‘nations’ and also the immigrant minorities, and ensures that cultural particularity can be expressed without hampering the success of members of minority groups within political and economic institutions (Kymlicka 1996: 156). These rights include (Kymlicka 2010: 101):

- Constitutional, legislative, or parliamentary affirmation of multiculturalism (nationally, regionally, locally)
- Multiculturalism in the school curriculum
- Ethnic representation and sensitivity in the mandate of public media
- Exemptions from dress codes
- Dual citizenship
- Funding of ethnic group organizations for cultural activities
- Funding of bilingual education or instruction in first language
- Affirmative action

Special representation rights recognise that the democratic process does not reflect the diversity of the population, often resulting in minorities being underrepresented in the political sphere (Kymlicka 1996: 157). These rights often specifically apply to indigenous minorities. They are (Kymlicka 2010: 101):

- Recognition of land rights and title
- Self-government rights
- Upholding existing treaties and signing new treaties
- Cultural rights (language, hunting, sacred sites)
- Recognition of customary law
- Guaranteed representation in central government
- Constitutional or legislative recognition of the distinct status of indigenous peoples
- Support for international instruments on indigenous rights
- Affirmative action

I now briefly turn to three different justifications of multiculturalism: the communitarian (Walzer, Taylor), the liberal egalitarian (Kymlicka), and the postcolonial justification (Parekh).

3.1.2 Justifications of multiculturalism

3.1.2.1 Communitarian justification of multiculturalism

In my first chapter I briefly discussed the communitarian argument, levelled by Michael Walzer, that opening borders poses a threat to specific cultures. Communitarians see culture as inherently valuable, and therefore as something that should be protected (through group rights) and respected. They reject the liberal assumption that the individual is the ultimate unit of moral concern – this status is conferred on the (cultural, religious, ethnic) community. Communitarian multiculturalists argue for a “politics of recognition” in which “the importance of certain forms of uniform treatment [is weighed] against the importance of cultural survival” (Taylor 1994: 60) and in which the latter is most often favoured. Culture should be favoured because it is intrinsically valuable. Charles Taylor (ibid. 58) comes to this conclusion by arguing that there are certain goods (such as friendship) whose nature requires that they “be sought in common” and that are therefore “irreducibly social”. Culture is the locus of these goods and it cannot be separated from these goods. It is therefore intrinsically valuable (Taylor 1995: 137). If culture has intrinsic value, then it is deserving of our respect.

This means that difference should not only be tolerated (through non-discrimination rights) but actively affirmed (through special group rights).

3.1.2.2 Liberal egalitarian justification of multiculturalism

Liberal multiculturalists (like Will Kymlicka) hold that the liberal tradition does not guide us in evaluating the claims of minority groups, but that liberalism can nevertheless be reconciled with multiculturalism, or that liberalism can accommodate difference. Kymlicka (2001: 130) points out that the dispute between the majority and the minority in most (Western) states is not about liberalism, but rather about “how a (predominantly) liberal majority should accommodate the language, culture and identity of a (predominantly) liberal minority”. Most of the groups (in the west) that lay claim to minority rights share the liberal principles of the majority and the state in which they reside. While it is certainly true that some members of minority groups don't hold liberal principles, the same can be said for some members of the majority. Ignoring this fact could be potentially dangerous – if minority groups are continually seen as non-liberal, they could be seen as a threat to liberalism due to their radical ‘otherness’, which plays into the stereotypes of minorities held by members of the majority and cultural conservatives within the minority (Kymlicka 2001: 130).

Liberal egalitarian multiculturalists distinguish between three kinds of minority claims: (i) those consistent with and accepted by liberalism, (ii) those that are grossly inconsistent with human rights, which should be prohibited (with force if necessary), and (iii) those that are inconsistent with liberalism, even if they are not grossly abusive of human rights (Kymlicka 2001: 131). In this instance, force should not be used to impose liberal values. The state should rather enter into dialogue with the minority, giving greater exemption to groups who were involuntarily incorporated into the liberal state (indigenous groups) and groups that are not isolationist.

Kymlicka sees liberalism and multiculturalism as reconcilable, due to the perceived value culture holds for the individual. The autonomous individual should have the freedom to pursue his or her own goals, and he or she should have equal opportunity for doing so. Individuals are owed respect not only as citizens, but also as members of specific cultural communities (Kymlicka 1989: 150). Culture is seen as an instrumental good, and all cultures should therefore have equal standing in the state. Where the communitarian view of culture is that it is an intrinsic good, the liberal multiculturalist view is consequentialist: culture is valuable because it “contributes in an important way to the well-being of a relevant individual

or group” (Johnson 2000: 407). An individual’s culture provides a “context of choice” which determines the range of options the individual has; it is the structure within which “people can become aware, in a vivid way, of the options available to them, and intelligently examine their value” (Kymlicka 1989: 165). Liberal multiculturalists argue that every individual’s culture should be protected by rights, policies and laws (as shown above) – anti-discrimination rights do not do enough to protect minority cultures. For example, states may implement non-discrimination laws (which public and private institutions may follow) but still be biased in favour of the dominant culture through the use of that culture’s language as the official language. Language is an important marker of culture and the majority therefore automatically holds a privileged position.

3.1.2.3 Postcolonial justification of multiculturalism

Postcolonial arguments for multiculturalism focus mainly on giving rights to groups who were involuntarily incorporated into liberal societies (indigenous/colonised groups, descendants of slaves who were taken from their native countries). In this instance, group rights should (i) protect the particular (indigenous) culture and (ii) compensate for historical injustices – something liberalism cannot do. Bhikhu Parekh (1997: 54) points out that most political theories (including liberalism) assumes cultural homogeneity and (with liberalism) assumes that citizens primarily identify as individuals and not as members of cultural communities. Liberalism is inadequate because, like communitarianism and conservatism, it is one of the various cultural traditions present in Western states, and therefore it cannot provide the (sole) basis for political institutions in a multicultural society (Parekh 2000: 13-14). Liberalism as a basis would be rejected by non-liberals within the society, just like a communitarian basis would be rejected by liberals. Parekh (ibid.) therefore argues for a “higher level” multiculturalism – not rooted in a specific tradition or political doctrine – that can be accepted by people from different cultural traditions (liberal and nonliberal). He defines multiculturalism in terms of “the culture and morality of dialogue” (ibid. 340): a conversation between liberals and non-liberals. This higher level dialogue would also allow for multiculturalism in states or societies that are not liberal, which the liberal theory of multiculturalism (as expounded by Kymlicka) cannot do (see Parekh 1997: 58). What should be recognised and accommodated in the dialogue between the different cultural traditions and groups is the different ways people relate to their cultures. Not all people see culture as a “context of choice” – some see culture as an ancestral inheritance which should be honoured

(e.g. Jewish culture), some see it as a divine self-revelation (e.g. Catholicism) – and liberalism denies this “authentic otherness” (ibid. 59).

3.1.3 Problems with Multiculturalism

In what follows, I argue that multiculturalism (whether communitarian, liberal, or postcolonial) as a model for accommodating difference faces several problems, and that it is inadequate as an answer to the question accommodating minority groups like refugees. I (i) show how especially communitarian multiculturalism holds a sanitised idea of culture and identity, which is inaccurate and potentially dangerous, (ii) address the (to my mind) biggest problem facing multicultural theories: that of internal minorities, and (iii) discuss why multiculturalism does not seem to provide a solution for the refugee crisis.

3.1.3.1 A problematic view of culture

The view of culture found in some multiculturalist theories (especially the more communitarian arguments such as those made by Walzer) seem to view cultures as self-enclosed entities: a culture *X* is identified as having the characteristics *a*, *b*, *c*, and these characteristics are unique to that culture, and (in some cases) beyond judgement. This view is problematic on at least three counts: firstly, it denies the ways in which different cultures and identities within those cultures develop. Secondly, it is unclear how oppressive practices within cultures can be condemned (either from without or within) or how political judgement would be possible at all. Lastly, this view of culture could potentially entrench existing ‘us’/‘them’ distinctions, leading to alienation and possibly even violence between people from different cultures.

The first issue I briefly addressed in my first chapter. There has always been interaction between different cultures through trade, war, travel, and exchange of knowledge and information. While much of this interaction has been problematic (oppression, misappropriation, forced assimilation), it cannot be denied that the different cultures existing today are products of millennia of interaction between humans from different groups. Because of this, it does not make sense to speak of a ‘pure’ or ‘essential’ culture. An ‘essential’ characteristic or practice of a certain culture might be a characteristic or practice they gained (by whatever means) from a different culture during earlier interactions. It would be nearly impossible to separate the different cultures to such an extent that some kind of ‘essence’ is arrived at. Admittedly, this isn’t multiculturalism’s project. It seeks to protect the

cultures of different groups *as they are now*. However, this could foreclose the possibility of that culture changing. What the history of the development of cultures should show us is that culture is something that is ever-changing, open, and alive. A too strict definition of what a specific culture entails leads to stagnation and blind obedience to ‘tradition’, the dangers of which I discuss below.

If cultures are seen as self-enclosed, it leads to problems when the practices of those cultures are in some way oppressive (toward minority groups within the cultures – women or homosexuals, for example) or “reprehensible” (Taylor 1995: 137). Misogynistic practices can be explained away or justified with ‘but it’s our culture’ claims, and this ‘culture’ or ‘tradition’, because it is self-enclosed and not open to change, is seen as untouchable. Any attempt to change such practices, whether from without (pressure from the public, laws imposed by the state) or within (dissatisfied individuals within the group), would be seen as an attack on the culture and ignored, dismissed, or in the case of individuals within the culture, ostracised. Furthermore, it remains unclear how certain practices within a culture can be labelled “reprehensible”, while others are deemed acceptable, without recourse to some general (moral) standard. Johnson (2000: 408) suggests the well-being of the individual as a standard against which cultural practices are judged. If the well-being of individual members of the cultural group is diminished by a specific practice, it is reprehensible (and the opposite is also true). Communitarian multiculturalists at least would feel uncomfortable with this focus on individual well-being. However, the same standard does not work at group-level. A group may follow certain practices that are good for the group as a whole (or perceived to be), but that disadvantage certain members of the group. All universalist standards of judgement would face the same objections from a multicultural perspective. The alternative is to deny that specific cultural practices can be measured against an outside or objective standard, or against practices in other cultures, but this seems to leave us with nothing to say and no means with which to condemn reprehensible practices.

Lastly, this view of culture could exacerbate existing tensions between different groups, entrench extremist or conservative ‘interpretations’ of a culture’s defining characteristics (especially relevant where religious groups are concerned), and lead to intolerance and, potentially, ethnic or sectarian violence. Amartya Sen (2006: 23-24) identifies the assumption of singular affiliation (be it culture, nation, religion) as one of the reductionisms present in contemporary thought on identity:

We are all individually involved in identities of various kinds in disparate contexts, in our own respective lives, arising from our background, or associations, or social activities [...] We do belong to many different groups [...] and each of these collectivities can give a person a potentially important identity.

What we do, or may have to do, is decide which identities are of more or less value to us. A person may decide that their cultural or national identity is the most important aspect of their identity as a whole, or they may decide that their identity as a soccer player or violinist is more important, leading them to identify more with other soccer players or violinists in the world than with their fellow citizens. Whatever the case may be, the important point is that no individual can or should be reduced to a single, all-encompassing identity, especially not when this identity is ‘forced’ upon him or her by other members of the group. Unquestioned acceptance of a group identity as one’s *defining* identity leads to exclusionary practices and, argues Sen (ibid. 9), violence. Sen (ibid. 12) is critical of the state-financing of minority religion schools in Britain (Muslim, Hindu and Sikh schools, to supplement the already existing Christian schools), as this places children in a domain of singular affiliation before they have the ability to reason about different systems of identification or question the identity which they are given.

3.1.3.2 *The problem of internal minorities*

Because of its focus on the group or community and not the individual, multiculturalism faces a serious problem: what if the cultural practices (that are protected by group rights) discriminate against or oppress specific members of the group, or minority groups within the group? This problem of internal minorities is perhaps the biggest challenge facing multiculturalism. I alluded to it above when I discussed the problem of judging certain practices as reprehensible. Some feminist thinkers argue that multiculturalism is in tension with feminism, because “[multiculturalism] demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions” (Pollitt 1999: 27). Susan Okin (1999: 17) firmly holds that multiculturalism is bad for women, as many of the minority cultures that claim group rights are more patriarchal than the (also patriarchal) majority culture. She goes on to argue that:

In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture, no argument can be made on the basis of self-

respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed, they might be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women – at least to the degree to which this value is upheld in the majority culture. (ibid. 22-23)

The problem is that if the group and its cultural/religious practices should be respected and protected – if it is the ultimate unit of moral concern – individuals within the group may suffer, their quality of life and their freedom may be restricted. This holds not only for women, but also other minorities within minorities: LGBT people (in religious communities, homosexuality is often seen as a sin and therefore a punishable offence), the poor (think of the implications of ‘protecting’ the caste system), those who do not ascribe to the values of their culture, the disabled, and also people who suffer from illnesses that can be cured with ‘Western’ medicine, but who refuse (or are refused) treatment and receive traditional healing.

The problem deepens when these internal minorities wish to speak out. Writing on rape narratives in post-Apartheid South Africa, Helen Moffett (2006: 134) points out that rape is intra-communal (as are many other crimes). However, discussions of rape are subsumed under narratives of class or race. The fact that the majority of rapists in South Africa are black (because the majority of men are) gives rise to the stereotype that black men are more likely to rape. Because of this damaging stereotype, black women are often kept from reporting (intra-communal) violence as it is seen as being disloyal to the group (ibid. 135). This fear of being ‘disloyal’ to the group is not limited to issues of sexual violence. Where a minority group (or, in the case of black South Africans fighting against apartheid, an oppressed majority) feels threatened, or where it wishes to assert itself within the political community, dissent from internal minorities is not tolerated. Complaints against discriminatory cultural practices from within the group ‘weaken’ the position of the group. Those who raise the complaints are often ostracised, disregarded, or silenced. The group should present a united front, and any internal questioning of its practices is seen as divisive. If the state, through group rights and special laws, protects the practices of a group, there is nowhere for dissatisfied and oppressed internal minorities to turn. They are deprived of their voice in the group, and ‘protected’ from state intervention by the state itself.

While group rights can protect minority groups from unfair bias and other forms of discrimination, it does so at the cost of the voices of the internal minorities and interaction and exchange between different groups.

3.1.3.3 Refugees and multiculturalism

While multiculturalism seeks to protect the rights and cultures of minorities within states, it is not clear that a policy of group rights will ensure the protection of refugee rights. As I have mentioned, multiculturalism accommodates diversity through implementing policies aimed at minority groups (see Kymlicka 2010). However, these minority groups (immigrants or indigenous groups) are recognised as belonging to the state: they are citizens of the state or permanent residents of the state. The laws of the state therefore accord them certain rights and protect those rights because they are members. The project of multiculturalism is to prevent unfair bias (in favour of the majority) in state institutions so that those who do not have equal access to those institutions can come to exercise their rights as citizens to the same degree. Refugees can be seen as a minority group, but they do not have equal standing with other minorities such as immigrant and indigenous groups, as they are not members of a state. Multicultural policies will not protect them or ensure their rights until they become members of recognised minority groups, unless multiculturalism itself is adapted in such a way that it seeks to protect the rights of non-members. This more cosmopolitan approach would not sit well with communitarian multiculturalists. While multiculturalism undermines the idea of a homogenous nation state and so could open certain doors for refugees, its focus on the rights of those who are already members limits its ability to provide answers for the specific problems regarding refugee rights and political membership for refugees. Multiculturalist projects are interested in the distribution of rights and privileges to members, and not the distribution of membership itself.

3.2 Rawls' 'law of peoples'

As an answer to the question of how different communities or societies can coexist or, to put it differently, how global justice can come about, John Rawls (2002) offers what he calls a 'law of peoples'. Rawls believes that global democratisation would bring the stability needed for a just global society. He draws on Kant's second sphere of right – international right – and the empirical findings of Michael Doyle (in Rawls 1993b: 49, n.20), which showed that

democracies do not wage wars against one another. The ‘law of peoples’ is therefore “a political conception of right and justice that applies to the principles and norms of international law and practice” (ibid. 36).

What Rawls seeks to do is to extend justice as fairness into international law. In his earlier work, *A Theory of Justice* (1971), Rawls provides guidelines for how a society’s institutions should be ordered in order for it to be just, where justice is equated with fairness, which rests on unbiased or impartial decisions: “Essentially justice is the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance between competing claims” (Rawls 1957: 653). These “arbitrary distinctions” are distinctions made on grounds of gender, race, class, etcetera. Importantly, justice is a feature of institutions and not a virtue individuals hold. In formulating his ‘law of peoples’, Rawls is asking what principles domestic and global institutions should hold in order to establish justice globally. With his ‘law of peoples’, he seeks to determine what the laws of all peoples have, or should have, in common if they are to be just, and if the institutions in which they are implemented are to be just (Rawls 1993b: 36, n.1).

Global justice can only be attained if justice is established on the domestic level. Rawls (2002: 4) identifies five types of domestic societies, the first two of which he regards as well-ordered peoples: (i) reasonable liberal peoples, (ii) decent peoples (hierarchical societies), (iii) outlaw states, (iv) societies burdened by unfavourable conditions, and (v) benevolent absolutisms. The well-ordered peoples are those that are organised by comprehensive legal, philosophical, religious, and moral doctrines. Liberal societies should be tolerant of non-liberal societies if, and only if, their social and political institutions meet certain conditions that would lead the society to adhere to a reasonable ‘law of peoples’.

It is important to note that, while being concerned with international justice, the ‘law of peoples’ is not the same as international law or the law of nations. The ‘law of peoples’ specifies the content of a liberal conception of justice, which could be extended to or applied to international law – it “provides the concepts and principles by reference to which that law is to be judged” (Rawls 1993b: 43). Rawls also makes it clear that a people are not the same as a nation. Ideally, a people would (a) have a reasonably just constitutional democratic government, (b) be citizens united by common sympathies, and (c) have a moral nature. Benhabib (2004: 78) points out that, while Rawls does not want to ascribe sovereignty to peoples (and therefore he insists that they are not nations or states), it is unclear how a people

can meet the three requirements, and not have some form of territorial sovereignty, especially as he views these societies as “complete and closed social systems” (Rawls 1993a: 41). The ‘law of peoples’ would govern relations between different societies – both liberal and non-liberal (or hierarchical), as all societies share the same world and should, therefore, formulate ideals and principles to guide their policies toward other societies (Rawls 1993b: 38).

The ‘law of peoples’ is ‘worked out’ in two stages: (i) ideal or strict compliance theory, and (ii) nonideal theory. Ideal theory is where

the relevant concepts and principles are strictly complied with by all parties to the agreements made and [...] the requisite favorable conditions for liberal or hierarchical institutions, as the case may be, are on hand. (ibid. 44)

The ‘law of peoples’ will be extended, in ideal theory, in two stages: first, to liberal societies, and then to hierarchical societies (what constitutes a hierarchical society and how the ‘law of peoples’ is to be extended to them will not be discussed). The second stage, non-ideal theory, also has two steps: (i) noncompliance theory (where just societies confront states that refuse to comply with a reasonable ‘law of peoples’) and (ii) unfavourable conditions (where states are too poor or less technologically advanced, which makes establishing just institutions difficult). The means of establishing the ‘law of peoples’ (or principles of global justice) is the same as that of establishing justice domestically: the different parties, subject to a veil of ignorance, work out which principles of justice would be most beneficial to them all (or would be most beneficial to the least well-off) and would secure a minimal list of human rights. Where individuals decide on the principles of domestic justice, the ‘law of peoples’ is decided on by representatives of the peoples. Rawls sees these representatives as being symmetrically situated (in ideal theory, which only applies to well-ordered societies), and therefore the individuals belonging to these societies would be reasonably represented on a global scale. The principles of justice that would be decided upon in this situation would be (ibid. 46):

1. Peoples (as organised by their governments) are free and independent, and their freedom and independence is to be respected by other peoples.
2. Peoples are equal and parties to their own agreements.
3. Peoples have the right of self-defence but not a right to war.
4. Peoples are to observe a duty of non-intervention.
5. Peoples are to observe treaties and undertakings.

6. Peoples are to observe certain specified restrictions on the conduct of war (assumed to be in self-defence).
7. Peoples are to honour human rights.

These principles are already familiar to people in well-ordered societies, as they govern the interaction between people in democratic states, but also the interactions between different democratic states (ibid. 46). Like Kant, Rawls holds that a world state would be despotic, therefore peoples should be independent and, if well-ordered, free from intervention. These seven principles also seek to maintain peace between different peoples. Rawls (ibid. 57) also provides a minimal list of human rights that should be upheld or honoured. These rights provide a standard for well-ordered political institutions. They are: the right to life and security, the right to private property and the elements of the rule of law, the right to a certain liberty of conscience and freedom of association, and the right to emigration. These basic rights impose moral duties and obligations on all members of institutions in order for them to cooperate.

Rawls' 'law of peoples' is inadequate on several grounds: firstly, his insistence, contra Kant, that no international federation with coercive powers is necessary (indeed, that it poses a potential danger) means that his account lacks a lawful and enforceable global arbitrator of conflicts, as Kleingeld (2012: 189) argues. Kant's league does not only guarantee peace, conceived of as the absence of war, but it provides an institutional framework within which disputes between nations can be resolved. Rawls' 'law of peoples' does not provide such an institution – it provides the standards against which international law can be judged, but it does not provide the judges. His account also implies that he sees international justice and transnational duty merely as a matter of war and peace, which Nussbaum (2006: 229) holds is inadequate and incoherent, as it leaves out questions of economic justice. Thomas Pogge (1994: 196) writes that “[a] plausible conception of global justice must be sensitive to international social and economic inequalities”. I have discussed Pogge's suggestions for an economic order which is sensitive to economic inequalities in the first chapter of this study.

Pogge (1994: 198) also criticises Rawls for not having an adequate response to the historical arbitrariness of national boundaries. Firstly, Rawls' idea of a 'people' (or 'peoples') does not take into account the fact that official borders often do not correlate with groups that would identify themselves as a 'people' on ethnic, religious, cultural, or similar grounds (ibid. 197). National boundaries were often imposed through violence or coercion. Rawls (2002: 223)

does not see the arbitrary nature of borders as a reason to deny the validity of boundaries in a 'law of peoples'. Pogge argues that for this position of Rawls to be valid, three things need to be justified: (i) that there should be boundaries; (ii) that the boundaries should be drawn where they are now; and (iii) that boundaries should have institutional significance. It is the justification of the significance of boundaries which Pogge questions. Where you are born significantly influences your quality of life and the opportunities you have. Like Carens (1987: 256, see discussion in Chapter 1), Pogge believes that one's citizenship is a contingency of birth, like gender or race, and should therefore also be morally arbitrary. In denying that the arbitrary nature of borders needs to be justified, Rawls fails to see the inequality which results from these borders. Rawls' assumption of rough equality (between representatives) is also counterfactual, with the implication that the resulting theory cannot address the problems facing the world (Nussbaum 2006: 235).

It is, however, in addressing the issue of statelessness and refugeehood that Rawls' 'law of peoples' fails on two grounds. Firstly, the list of minimum rights does not include a right to political participation. In the previous chapter, I discussed how this is implied by Kant's notion of a republican state. If people cannot participate in the political processes of a state, the state is not self-legislated. Rawls' 'law of peoples' only includes a 'certain' liberty of conscience and freedom of association, but not a (stronger) freedom of speech and assembly (ibid. 247). Rawls' basic right is too weak to support a right to political participation. If this right is not guaranteed, not only to members of a state or a people, but to all human beings, refugees and stateless people do not have a political voice and cannot, therefore, lay claim to their rights or demand protection.

Secondly, the 'law of peoples' sees questions of immigration as a non-problem, and does not discuss the situation of people who are not (or no longer) part of a people. Kant does address this in his discussion of perpetual peace by identifying the right to hospitality as a right belonging to all, but Rawls dissociates himself from this part of Kant's cosmopolitan theory. Rawls (2002: 8) argues that the issue of immigration would disappear in a society of liberal and decent peoples: it would be eliminated as a serious problem in a realistic utopia. Yet he also recognises that the 'law of peoples' cannot necessarily be extended to all societies, since some societies may refuse to comply with the principles of justice supplied by the 'law of peoples' (he refers to these as outlaw regimes). It is conceivable that, where such societies exist, the issue of refugeehood will remain pertinent (even if well ordered societies have adopted the principles of the 'law of peoples'). Rawls does grant that the law-abiding

societies have a duty to their own well-being, each others' well-being, and the well-being of innocent people who are members of the outlaw regimes:

These several duties are not all equally strong, but there is always a duty to consider the more extensive long-term aims and to affirm them as overall guides of foreign policy. Thus, the only legitimate grounds of the right to war against outlaw regimes is the defence of the society of well-ordered peoples and, in grave cases, of innocent persons subject to those regimes and the protection of their human rights. (Rawls 1993b: 61)

However, the duty still only amounts to protecting the rights of others in foreign countries in extreme circumstances – it does not say anything about having a duty toward people who may enter the well-ordered countries seeking protection. At the very least, Rawls' account needs to be radicalised or fleshed out. He does, however, in his discussion on immigration provide arguments for controlling immigration and against radically open borders. Firstly, he claims that a territory belonging to one people cannot be preserved in perpetuity for others (Rawls 1999: 39). Secondly, he argues that limiting the influx of foreigners would protect a people's political culture – an argument I have shown to be flawed (Chapter 1). Lastly, his 'duty to assist' exists specifically to curb migration (ibid. 105). If we help the poor and rightless in other countries, if we better their circumstances there, they would not come to our countries. These 'balancing acts', Benhabib (2004: 91) argues, applies only to potential immigrants and their moral claims. Toward the asylum seeker and the refugee, the state has both a moral and a legal obligation, neither of which is adequately addressed by Rawls.

3.3 Benhabib's Republican Federalism and Moral Universalism

Taking her lead from Kantian cosmopolitanism, Seyla Benhabib advocates a world-republic of states (republican federalism) based on cosmopolitan norms (moral universalism) and discourse ethics (democratic iteration). In this section, I (i) consider Benhabib's claim that we are in need of a new normative theory for global justice, (ii) discuss the philosophical foundations (Kant and Arendt) that she puts forth, and (iii) show how this gives rise to her idea of democratic iteration as a communicative process through which universal norms can be applied to specific situations.

3.3.1 *A new normative map*

If it was true at the time Kant wrote *Perpetual Peace* that there existed a need for a third category of right and that the absolute sovereignty of the nation-state or the Westphalian system was in decline, it is even more so now. While the earth is still divided into different states, the nature of these states has changed: they are no longer independent entities with absolute control over what happens in, or at, their borders. However, international law and theories of cross-border interaction are still by and large aimed at a Westphalian model (see Fraser 2007: 46). It is for this reason that Benhabib (2004: 6) writes:

[we] are like travellers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are travelling on, the world society of states, has changed, our normative map has not.

Benhabib provides three justificatory reasons for this claim: firstly, a crisis in territoriality; secondly, developments in certain areas of international law which led to the formation of an international human rights regime; and thirdly, the disaggregation of citizenship and new modalities of membership (ibid. 4). We are living in what Nancy Fraser (2008) and others have called a post-Westphalian world, yet we are still relying on the same normative tools and structures we relied on in the Westphalian world. Before I turn to Benhabib's attempt at formulating a new normative theory, I first consider her reasons for arguing that it is necessary.

3.3.1.1 *Crisis of territoriality*

In the Westphalian model, the identity of the nation-state is closely linked to its territory – the state is the dominant political authority that has supreme jurisdiction over a specific territory. Today, those arguing against opening or softening borders argue from what Benhabib calls a sovereigntiste territorial position. I have already discussed the problems with this position and the crisis facing states' sovereignty (see Chapter 1). Developments in global finance, the free market, the internationalisation of armament, communication, information technologies and other factors have led to the weakening of the link between political membership, individual identity, and political boundaries (Benhabib 2004: 4). On the one hand, the state is no longer large enough to accommodate these changes, but on the other hand it is too large to accommodate identity-driven social movements, for example demands for independence or

partition from the state made by minority groups.⁵ This leads Benhabib to conclude that (ibid. 5)

territoriality has become an anachronistic delimitation of material functions and cultural identities; yet, even in the face of the collapse of traditional concepts of sovereignty, monopoly over territory is exercised through immigration and citizenship policies.

As sovereign power is slipping from the state due to economic, technological, and informational advances and changes, the state tries to cling to its sovereignty by implementing more stringent immigration and citizenship laws.

3.3.1.2 *An international human rights regime*

Following the end of the Second World War and the UN Declaration, we have seen the emergence of a new international regime that is not founded on the idea of the nation-state and the interaction between sovereign states, but is rather characterised by “a set of interrelated and overlapping global and regional regimes that encompass human rights treaties as well as customary international law or international ‘soft law’” (ibid. 7). This regime is founded on *cosmopolitan* norms, applicable in all states and all communities at all times. The emergence of this regime can be seen in developments in three interrelated areas in international law:

- Crimes against humanity, genocide, and war crimes (see Benhabib 2004: 8).
- Humanitarian interventions (see Benhabib 2004: 9-10).
- Transnational migration.

What these developments have led to is the recognition that states have a generalised moral obligation toward humanity as a whole, that is, they should not only protect their own citizens, but citizens of other states against genocide and other forms of violence and oppression. The creation of ‘crimes against humanity’ as a category of wrong recognises that individuals are not merely worthy of equal moral respect, but that this equality can and should be formulated into positive law: “A crime, as distinct from a moral injury, cannot be defined independently of posited law and a positive legal order” (Benhabib 2006: 14).

⁵ The rise of the global economy, the internationalisation of various technologies (armament, communication), etcetera, requires administrative functions exceeding those a state can provide. On the other hand, states are too large to give equal treatment to the claims made by the various minority groups within their territories.

However, the third area – transnational migration – remains somewhat neglected in international law. The UN Declaration of Human Rights recognises the right of an individual or a group to leave their country, to emigrate, but it does not give them the right to enter a country, to immigrate, and it is silent on the *obligation* of the state who receives them (Benhabib 2004: 11). This means that the document that was drawn up to deal with the consequences of the failure of the Westphalian system (wars fought between nation-states, states committing atrocities against its own citizens because it has absolute power within its territory, people left stateless because other states refused to receive them) still upholds the sovereignty of states – it is still premised on the “Westphalian political imaginary”, to borrow Fraser’s (2008: 46) term. Here the tension between sovereignty and cosmopolitanism once again raises its head.

It is precisely here that Benhabib finds the central issue facing theories of global justice. The sheer number of people crossing borders (for whatever reason) has rendered the boundaries of Westphalian nation-states inadequate, especially when dealing with the question of membership. It is precisely because this area has been neglected in international law, because the documents containing the written laws pertaining to the movement of people across borders still cling to the idea of the sovereign nation-state, that this is the area in which and for which we should find a new normative map. While the categories of genocide and crimes against humanity deal with relations among enemies (within a nation-state and between nation-states), and humanitarian intervention is concerned with a state’s treatment of its citizens, transnational migrations “pertain to the rights of individuals, not insofar as they are considered members of concrete bounded communities but insofar as they are human beings *simpliciter*, when they come into contact with, seek entry into, or want to become members of territorially bounded communities” (Benhabib 2004: 10). This is where cosmopolitan right is situated. The fact that so many people cross borders daily – as migrant workers, as refugees – means that we can no longer rely on old modalities for regulating membership. The fact that so many of these people are left stateless, unprotected, or even seen as illegal, is proof that our current normative tools are inadequate. While the international human rights regime has done much to make us more aware of the plight of refugees and even help refugees, the implied support of sovereign states found in the UN Declaration shows that this regime is still limited, particularly by the fact that only signatory states respect the UN Declaration (if at all). Furthermore, the norms decided upon in the UN Declaration and other similar international documents are negotiated and adopted by the leaders and governments of states

(not all of them representative or democratically elected), not by the individuals who would be the bearers of these rights. For that reason, as Bauböck (2007: 88) points out, there remains an asymmetry between the position of the individual and that of the state in international law.

3.3.1.3 *Disaggregated Citizenship*

In a Westphalian world, political membership takes the form of citizenship of a nation-state. This citizenship is constituted by (i) a collective identity (mostly an ethno-national identity), (ii) the privilege of political membership, and (iii) entitlement to social rights and benefits (Benhabib 2006: 45). These three constitutive elements of citizenship are increasingly becoming unbundled. Porous borders, easier methods of international travel, the globalisation of trade and information-sharing, and immigration and emigration, have all contributed to changing the face of any community's collective identity. Even communities that do not allow outsiders in are influenced by those outsiders through television and the internet. National identity is no longer the sole or often even the primary defining factor of an individual's identity (see Sen 2006).

The question is whether citizenship in its disaggregated state can be recognised as democratic citizenship. The answer to this depends on how one conceptualises democratic citizenship. If the *demos* is equal to an *ethnos*, and especially an *ethnos* living in a circumscribed territory, then the answer is no. However, if one does not tie citizenship to territory or to a specific ethnic or national group, then disaggregated citizenship can also be democratic citizenship. Benhabib (2004: 174), like Sen, argues that we need not see our political identities exclusively in state-centric terms. Disaggregated citizenship allows multiple allegiances: citizens owe loyalty to the state, but they also have other interests and other loyalties. They can "sustain multiple allegiances and networks across nation-state boundaries, in inter- as well as transnational contexts" (ibid.). These multiple allegiances can (only) be conducive to democratic citizenship if they are actively involved with institutions that are representative, accountable, transparent, and responsible toward the constituency that authorised the institution in its own name.

Benhabib discusses the European Union as an example of how political membership is no longer merely the privilege of citizens of specific nation-states. Citizens of countries within the EU are also automatically citizens of the EU. Political membership can therefore also be supra-national. Some states within the EU also allow for sub-national citizenship. In the

Netherlands, for example, permanent residents without citizenship can vote in local elections (ibid. 157). Citizenship need not be defined on a national level. Developments in the sphere of international human rights have also ensured that individuals are now the holders of certain rights, entitled to certain privileges, wherever they may find themselves, regardless of citizenship. The nation-state now no longer only has a duty toward its citizens, protecting and ensuring their rights and entitlements, but also to any non-citizen within its territory, as well as those whose rights are being transgressed in the international community.

3.3.2 *Philosophical foundations*

If a normative theory of international justice cannot be based on the Westphalian system nor on the idea of individuals as citizens of states, but rather on individuals as citizens of the world, the question remains: On what should this citizenship be based, and what are the philosophical foundations for cosmopolitan norms? One danger of according rights on the basis of one's humanity is that the human will be too narrowly defined. As Bauböck (2007: 87) points out, the normative models for political structure should not rely on, or at least not be solely derived from, a general or 'essential' idea of human nature. Hannah Arendt (1998: 16) argues that when we see that which is common to all humans as some essential 'human nature', it hardly matters what we define as that essence – whether it is reason, or a feeling common to all such as compassion. The fact is that what is seen as the 'essence' depends on the interpreter. For this reason, it will vary from community to community, from culture to culture, with each group believing that *they* are truly human and others, consequently, are not. This promotes an exclusionary and potentially violent politics. However, cosmopolitan norms have to be founded on *some* idea of *something* we have in common, otherwise they cannot be made universal. Benhabib (2004: 13) identifies our (not unproblematic) ability to speak and to act, and therefore to be able to partake in the moral conversation, as what is common to all humans. I return to this in the next chapter. For her to reach that conclusion, she draws on Kant's cosmopolitan theory (discussed in Chapter 2) and Arendt's conception of the right to have rights (discussed in Chapter 1). I now turn to Benhabib's interpretation of these theories, showing how she goes further down the path initially trodden by Kant and Arendt, to reach a position of moral universalism within a political sphere structured as a world-wide republican federation.

3.3.2.1 Kant and Republican Federalism

Benhabib (ibid. 25) locates the issue of political membership within the sphere of Kant's third category of right: *ius cosmopolitanicum* or cosmopolitan right. She writes that this third category of right is situated on the borders between states, at the margins of bounded communities: "the right of hospitality occupies that space between human rights and civil rights, between the right of humanity in our person and the rights that accrue to us insofar as we are members of republics" (ibid. 26). The right to hospitality is therefore a right that constantly mediates between cosmopolitanism and sovereignty, between the universal and particular, between belonging and not belonging. Where the issue of membership is concerned, Benhabib goes further than Kant. Kant's hospitality only includes the right to *temporary* residency (which can be refused under certain circumstances), but it does not secure political membership. I have argued that Kant's philosophy implies that the right to political participation should be a fundamental human right, and in order for individuals to participate in politics, they must be members. However, while Kant's philosophy will probably concede this point where a citizen of a state is concerned, he does not extend it to non-citizens finding themselves in a host nation. His right to hospitality is a *moral* claim with *potential* legal consequences, and Kant provides no clear answer as to whether it *should* become an enforceable norm (ibid. 29). It is therefore an imperfect or "conditional" moral duty (Benhabib 2004: 36). Contra Kant, Benhabib argues that this moral claim should have legal consequences: that cosmopolitan right(s) should be codified in law and should be enforced. If one follows Kant's lead, the right to hospitality can be sacrificed on legitimate grounds of self-preservation – if, as discussed above, the person seeking entry poses a known threat. However, what these 'legitimate grounds' are or should be is a controversial point. As also argued above, the argument from 'national interest' gives too much leeway for sovereign states to close their borders when there is no real threat, and when the lives of those seeking entry are really in danger. Therefore, Benhabib (ibid. 37) argues that it is inadequate to construe obligations within the narrow dichotomy between legitimate self-preservation and duties to others.

For Kant, the right to hospitality is *temporary*. There exists for him an unbridgeable gap between temporary entry into a state and permanent residency in a state. Hospitality is the right of temporary sojourn, but anything more permanent is privileged, dependent on the decision of the state, and the outcome of a contract of beneficence between the host and the guest (ibid. 38). Benhabib (ibid. 42) diverges from Kant on this point, arguing that the

temporary resident has a right to membership of the state or political entity which should be viewed as a human right. This right is justified by universalistic principles.

Kant's essay on perpetual peace signalled a watershed between Westphalian sovereignty and liberal international sovereignty, in which the former was transformed or replaced by the latter. Liberal international sovereignty holds that "the formal equality of states [is increasingly] dependent on their subscribing to common values and principles" (Benhabib 2006: 23). However, this still remains binding only to states and state actors. Kant would say that it remains within the sphere of international law. Cosmopolitan norms go further. They create (or create the possibility for) a conceptual and juridical space in which rights-relations would be binding on non-state and state actors coming into contact with foreign individuals or non-members (ibid. 24). Individuals, and not states, are seen as primary political agents.

3.3.2.2 *Arendt and the right to have rights*

The second philosophical foundation for Benhabib's position is Arendt's 'right to have rights' (see Chapter 1). Kant still sees naturalisation as the sovereign right of the nation-state, but Benhabib wishes to show that the right to naturalisation and the prerogative of denaturalisation cannot be seen as sovereign privileges (Benhabib 2006: 50). Arendt (1973: 269) argues that denationalisation (or denaturalisation) is a weapon of totalitarian politics. A state does not have the right to denationalise its citizens, and doing so results in gross human rights violations. Arendt wrote this in the context of the post-WWII world, and was referring mainly to the denaturalisation and later extermination of German Jews by the Nazi state, but her claim remains valid for all persons. Arendt holds that every individual has the right to have rights, but that these rights can only be guaranteed by a state. If an individual is denationalised, he or she loses his or her rights (or his or her access to or ability to exercise these rights). For Arendt (ibid. 274) the significance of the League of Nations was that it offered legal protection to denationalised individuals and attempted to guarantee their rights. Ideally, one's right to have rights would be guaranteed by humanity (therefore we refer to our rights as *human* rights) or an international body such as the League or the UN. Arendt (ibid. 298) remains sceptical about the possibility of this being realised. However, today it seems that this *is* a possibility, as the developments in the sphere of human rights (discussed above) show.

Benhabib (2004: 56) argues that Arendt's use of the concept 'right' in 'the right to have right' changes. In the first instance, 'right' is addressed to humanity as a whole and it invokes a

moral imperative – all individuals should be treated as belonging to some group and entitled to protection of the same – which makes a moral claim to membership and treatment compatible with the claim to membership. The second instance builds upon the first:

To have a right, when one is already a member of an organized political community, means that “I have a claim to do or not to do A, and you have an obligation not to hinder me from doing or not doing A.” (ibid. 57)

This second ‘right’ entitles us to act, but these actions create reciprocal obligations. Individual rights can therefore not be separated from obligations between individuals, as consociates of a community. It is within this community – the state – that rights discourse takes place. This second use of ‘right’ is its *juridico-civil* usage. The rights-bearing individual stands in a triangular relationship with other individuals toward whom he or she has an obligation, and some organ (most often the state) which protects and enforces these rights.

The scope of rights extension therefore differs from the first use to the second. In the first, rights are extended to all human beings: “the identity of the other(s) to whom the claim to be recognised as a rights-bearing person is addressed remains open and indeterminate” (ibid. 57). In the second, the rights are only extended to those who already belong to a specific political community (i.e. to citizens). What holds for both cases is that the recognition of rights is the recognition of *membership*, whether membership of the human race and therefore some community, or of a specific, existing political community. The act of recognising therefore falls to humanity (or to one’s fellow citizens, in the second instance). It is humanity as a whole who has the *moral* duty to recognise other human beings as rights-bearing individuals, yet (as mentioned) Arendt is not sure whether humanity as such can do this. Therefore it falls to states to recognise the rights of its members.

Concerning the moral duty, Benhabib points out that Arendt diverges from Kant on this issue. Kant’s *Zweck an sich* (end-in-itself) principle – that one should act in such a way that humanity (and individual humans) is always treated as an end in itself and never as a means to an end – legitimises the right to be treated humanely, the right to human dignity and worthiness (ibid. 58). When we refuse someone entry into our society, when we refuse them hospitality, we are violating this right:

The right of humanity in our person imposes a reciprocal obligation on us to enter into civil society and to accept that our freedom will be limited by civil

legislation, such that the freedom of one can be made compatible with the freedom of each under a universal law [...] In Arendtian language, the right of humanity entitles us to become a member of civil society such that we can then be entitled to juridico-civil rights. (ibid. 59)

Because we are members of humanity as a whole, we have the right to be members of a political community. Arendt is critical of Kant's metaphysical defence of cosmopolitan norms, and therefore her argument against denationalisation or denaturalisation is a political, but not conceptual, solution. Contingencies of birth – gender, race, religion, etcetera – divide people. This situation is transcended by the idea that we have the right, as humans, to have rights, as members of a community. The realisation of this right can only come about where people are not judged through their contingent characteristics, but through what they do, say, and think (ibid. 60). The *demos* should not be an *ethnos*: Arendt is advocating a civic rather than an ethnic ideal of belonging (ibid.). Equality in such a system is not sameness: individuals and groups can be equal (or have civic equality) while having different identities and cultures which can be respected.

Arendt's thought on the nation-state is confusing. She has been criticised for being sceptical about the possibility of rights without a nation-state. Certainly, the global political sphere has changed since Arendt wrote *The Origins of Totalitarianism*, and the bodies in place to protect human rights – with limited success – are independent from nation-states and national citizenship. But Arendt was sceptical of a world-government because she believed that it would destroy politics “in that it would not allow individuals to defend shared public spaces in common” (ibid. 61). However, this does not mean that Arendt saw the nation-state system as the ultimate solution. This system is always exclusionary and potentially aggressive (aggression between states). Arendt is left with an impasse: on the one hand, rights cannot be guaranteed without the state, on the other hand, the state system contains the potential for denying and violating the rights it is supposed to protect. Arguing that Arendt and Kant rely too much on the nation-state and its sovereignty, Benhabib believes that this impasse can be overcome through reconceptualising the contradiction between human rights norms and sovereignty. These two conflicting aspects are inherent to processes of collective-identity formation in multicultural, multinational democracies (ibid. 65). Benhabib proposes mediation between cosmopolitan norms and sovereignty within the framework of a discourse or communicative ethics, through the process of what she calls democratic iteration.

3.3.3 Democratic iteration

3.3.3.1 Discourse Ethics

Benhabib identifies three main groups of cosmopolitan thinkers: i) those who see it as a kind of enlightened morality which places love of mankind before love of country (Nussbaum), ii) those who think that national fantasies and primordial communities are too narrow for the hybridity and fluidity of individual identity (Waldron), and (iii) those who see cosmopolitanism as “a normative philosophy for carrying the universalistic norms of discourse ethics beyond the confines of the nation state” (Benhabib 2006: 18) and who promote the notion of a more deliberative democracy (Habermas, Held, and Bohman). Benhabib identifies with this third group.

Within a republic, the deliberative process is used in opinion and will formation. As mentioned above (Chapter 1), Habermas states that the paradigm for politics in a constitutional democracy is dialogue. He holds that we should engage in a discourse-theoretic approach (as opposed to a communitarian approach), in which the legitimacy of a democratic state relies on a variety of forms of deliberation in which communicative presuppositions allow different arguments to come into play (Habermas 1996: 24). The communitarian approach fails because it sees a necessary link between the deliberative process and the concrete ethical community. Individual identity is only discovered within the community (in which all individuals share the same identity) through public exchange. The discourse theoretic approach does not assume any necessary link between the ethical community and deliberative democracy; hence it “breaks with a purely ethical conception of public autonomy” (ibid.). Rather, discourse theory looks at *moral* questions, questions of justice unrelated to a specific community or collective: “The politically enacted law of a concrete legal community must [...] at least be compatible with moral tenets that claim universal validity going beyond legal community” (ibid. 25).⁶ The reason why an ethical approach cannot be followed is that conflicting political interests can often not be solved. In such instances, Habermas argues that a compromise is needed. For Habermas (ibid.), a deliberative politics is constituted by a network of regulated bargaining processes and varying forms of argumentation (pragmatic, ethical, moral) relying on different communicative presuppositions and procedures.

⁶ For Habermas, ethics is related to questions about the good (or the good life) for (specific) individuals or groups, while morality relates to questions concerned with the right, questions about the norms and values along which we should conduct ourselves in our interactions with others in general (see Habermas 1993: 1-18).

The first issue facing a discourse theory or a notion of deliberative democracy is the question of discursive scope. Discourse theory starts from a universalist moral standpoint, and therefore its scope (potentially) includes all of humanity. Every person who has an interest in my actions or who can be impacted by my actions is potentially my partner in the conversation in which we partake as moral agents. For this reason, I am morally obligated to justify my actions to my conversation partners, whether individuals or representatives of individuals (Benhabib 2006: 18). Discourse ethics, being by definition universalist, should significantly limit what counts as morally permissible practices of inclusion and exclusion in sovereign polities (ibid. 19). I have already shown why it is desirable to have different communities, but also how the formation of these communities and the articulation of their identities and their norms automatically exclude some people from becoming members. Benhabib is not against the formation of such communities (nor are other discourse theorists), but she does hold that the norms regulating membership should be defensible.

However, with regards to membership, discourse theory faces another problem: in the articulation of norms of membership (including citizenship), those who are affected through being excluded from the group can *by definition* not partake in the articulation of these norms. By distinguishing between outsiders and insiders, citizens and noncitizens, membership norms automatically impact those who are excluded. In the act of self-determination, a group decides who they are as a people and in this way they decide on specific norms of inclusion which automatically exclude all others, without drawing them into the process of formulating these norms. The implication of this is that discourse theory is either irrelevant (at least where membership practices are concerned), being unable to articulate justifiable criteria of exclusion, or it has to accept existing practices of exclusion as morally neutral historical contingencies (ibid. 19). A different line to follow would be to see existing norms as the result of historical contingencies, but as morally problematic. Benhabib (2004: 175) argues that the constitution of a people should not be understood as a unilateral act of a homogeneous citizenry. This ignores how different peoples, communities, and states have come into being. The process has not been morally neutral. For this very reason, instead of accepting existing membership norms, these norms should be questioned and adapted through deliberative processes between those who are included and excluded, to ‘make up’ for the fact that those who were excluded did not originally partake in the articulation of membership norms. Membership norms should therefore not be seen as set in stone – the *demos* is in principle unbounded, and could therefore extend to those who were previously

excluded. Here lies the “normative potential of democratic constitutionalism” (ibid.): the modern democratic state is founded on the idea of human rights principles, which are context-transcending and cosmopolitan, extending to all of humanity. If the membership norms of a democratic polity are based on such context-transcending principles and norms, these norms have the potential to change and they are open to the claims of those who are excluded, and can be justified (or attempts can be made at justifying them) by those who are included. Benhabib proposes the process of democratic iteration as a way to regulate dialogue between members and non-members and to justify and, where necessary, alter existing norms of membership.

3.3.3.2 *Democratic Iteration*

A deliberative model of democracy would allow us to rearticulate the meaning of moral universalism, a challenge which faces democratic states and legislatures, given the presence of minority groups, refugees and asylees, and “others who do not share the dominant culture’s memories and morals” (ibid. 212). Benhabib (ibid. 19) suggests that a process of democratic iteration should be followed to meet this challenge. She uses the Derridean notion of ‘iterability’ to explain how a reinterpretation of cosmopolitan norms, democratic values, and cultural symbols is possible. This notion suggests that in the repeated use of a concept or a symbol, we do not simply reproduce the ‘original’ usage of that concept or symbol: “every repetition is a form of variation [and every] iteration transforms meaning, adds to it, enriches it” (ibid. 179). Democratic iteration is defined as

complex processes of public argument, deliberation, and learning through which universalist right claims are contested and contextualized, invoked and revoked, throughout legal and political institutions as well as in the public sphere of liberal democracies. (ibid. 19)

Such processes take place in public bodies such as legislatures, the judiciary and the executive, but also in ‘weak’ publics such as the media (especially social media in recent years) and civil society associations. The authoritative original – in this case, cosmopolitan human rights norms – is made sense of in a different context and resignified:

Democratic iterations are such linguistic, legal, cultural, and political repetitions-in-transformation, invocations which are also revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent. (ibid. 180)

Democratic iterations engage in what Robert Cover (in Benhabib 2006: 48) has called a *jurisgenerative politics*. Cover identified the radical dichotomy between the social organisation of law as power on the one hand, and law as meaning on the other. Meaning cannot be controlled as it is borrowed from or found in social activity, and therefore it has the potential to destabilise power. The dichotomy between law as power and law as meaning creates the potential for a jurisgenerative politics. Laws are written and passed by those in power, yet the “uncontrolled character of meaning” (Cover in Benhabib 2006: 48) gives those subject to the laws a measure of freedom in interpreting the laws. The *demos* can therefore be seen as the subject and author of the laws of the state.

A jurisgenerative process of law- and policy-making works against the asymmetry between states and individuals found in international law. Currently, individuals are bearers of rights but they do not write international law. States and governments negotiate and adopt human rights norms, and these states are not always democratic or representative of their citizenry (Bauböck 2008: 88). As already discussed, subsuming human rights under international law fails to address the issue of individuals travelling between states or fleeing their states and entering others. This is why Kant advocates a third category of right, and it is also why both he and Benhabib advocate a world-federation of republican states. While it would be impossible for every individual to partake in the process of generating laws and policies, ideally his or her voice would still be heard in a representative system of government.

Importantly, the validity of cosmopolitan norms does not result from the jurisgenerative process or from the *demos* (as with the validity of enacted legislation or the legitimacy of a democratic government). Cosmopolitan norms have value in themselves, and the jurisgenerative process can be positive or negative. When it is positive, productive, or creative, it augments the *meaning* of rights claims and nurtures the political authorship of individuals. This allows members of the *demos* to make these universal rights their own – to adapt it to their particular situation – by democratically deploying them (Benhabib 2006: 49). The *goal* of a jurisgenerative politics is not to generate laws – it is “not a politics of teleology or theodicy” (ibid. 50) – but a *process* which allows us to conceptualise moments when universal principles and norms become permeable to new semantic contexts and the meaning of human rights can be adapted to particular contexts (ibid.).

The question of membership of the *demos*, or the “politics of membership,” is the site of this jurisgenerative politics. How this question is approached and answered determines how the

demos looks – who is included and who is excluded. It therefore determines who partakes in the jurisgenerative processes. It is also in this space that the *demos* is confronted with the tension or disjunction between universalist norms and democratic ideals of self-determination. In ‘writing’ the laws to which they will be subject, the *demos* necessarily disenfranchises or alienates some people while including others. Distinctions are drawn between ‘us’ and ‘them’, ‘citizens’ and ‘non-citizens/aliens’. These distinctions, Benhabib (2004: 21) argues, are fluid and negotiable. Democratic iteration allows us to constantly redefine who ‘we’ are, to constantly extend (or, negatively, narrow) our borders, to constantly change the shape or face of the *demos*. Through the process of democratic iteration we can move toward a “postmetaphysical and postnational conception of cosmopolitan solidarity” (ibid.). This new “cosmopolitan solidarity” would ensure that all human beings share in the universal human rights and so undermine or weaken the “exclusionary privileges of membership” (ibid.).

Benhabib points out that up until the present, democratic rule has been supported by various illusions, notably the idea of a homogenous people (the *demos* as *ethnos*) that are territorially self-sufficient. Rawls and Walzer base their theories on these same constitutive illusions – both hold the view that culture and collective identity is static:

[T]here is a widespread trend in contemporary political thought to look upon the formation of collective identities and the evolution of cultural solidarities not as having been attained through long, drawn-out, and bitter social and political conflicts, but as if they were stable givens. (ibid. 173)

Walzer therefore argues that to allow aliens in would threaten the local culture. I have already discussed this argument and why it fails to convince. The challenge Benhabib identifies is to find some notion of democratic voice without resorting to either of these illusions. How do we identify the *demos* if not along ethnic-cultural or territorial lines? The disaggregation of citizenship in recent decades renders these models of identifying the *demos* ineffective and incorrect. There exists a need for new modalities for deterritorialised citizenship or multicultural enclaves (ibid. 174). The process of democratic iteration allows for the creation of and sustaining of such modalities and enclaves. It allows individuals to be members of communities on sub- and supranational levels.

The boundaries of a state and the boundaries of a political community therefore do not necessarily overlap. A *demos* should not characterise itself solely on the basis of its territory

and boundaries. Boundaries should not be set in stone – at least non-physical boundaries. Despite this, Benhabib is adamant that democracies do require boundaries (or borders), but these boundaries should be fluid, porous, and continually justified through the process of democratic iteration. Kant's notion of patriotism not toward a nation or a territory, but toward a republican constitution, can be helpful here. A *demos* founded on the ideals of human rights is a *demos* which can expand to include all those who fall within its territorial boundaries. The extent to which citizenship has already been transformed, with rights extended by virtue of residency rather than cultural identity, indicates that cosmopolitan norms or human rights ideals have already been incorporated into democratic polities to such an extent that democracy is popularly equated with human rights. Because the *demos* is not restricted by cultural or ethnic boundaries, defining its identity should be an ongoing process of constitutional self-creation (ibid. 177). The cosmopolitan norms on which democratic states base their constitution have only been realised as far as the state's citizens are concerned. Where membership status remains unresolved, these norms remain unrealised. It is precisely here where the identity of the *demos* should be defined, renegotiated, bounded, unravelled, circumscribed and rendered fluid (ibid. 178).

Benhabib discusses three examples of democratic iterations. The first two cases, *l'affaire du foulard* in France and a similar 'scarf affair' in Germany, shows us how the transformation of citizenship leads to the coexistence of individuals and groups from distinct cultures, with different and often contradictory values and norms; how these differences create tension; and how the process of democratic iterations allows us to mediate the tensions between groups and cultures. I will briefly discuss the first case.

In 1989, three Muslim girls, each wearing a headscarf (a *foulard*), were expelled from a school in France. This began the 'affair', which later saw twenty-three Muslim girls being excluded from school in November 1996 and ultimately led to the Conseil d'Etat ruling against the wearing of headscarves and other forms of veiling or religious symbols in schools, as this could be seen as propaganda, an act of pressure, or a threat to others' liberty or dignity. What Benhabib (ibid. 189) finds interesting about the Conseil's ruling is that it did not articulate clear guidelines (when is a religious symbol a threat to someone's dignity, etcetera), but left that open to interpretation by the school authorities. The authorities, and not the believers themselves, could therefore decide the 'meaning' of religious symbols. However, in continuing to wear the headscarves, the girls were claiming meaning and changing meaning: "the meaning of the scarf itself was changing from being a religious act to

one of cultural defiance and increasing politicization” (ibid. 191). In prohibiting them from wearing the scarf, the state (ironically) enabled them to resignify the scarf as a political symbol, and no longer a religious one. The upshot of this was that what was perceived to be a symbol of oppression (of women within Islam) became a means for these girls to raise their voices in protests against the state:

Although their struggle at first is to retain their *traditional identities*, whether they choose it or not, as women they also become empowered in ways they may not have anticipated. They learn to *talk back to the state*. (ibid. 209)

A more recent example of a democratic iteration, pertaining directly to refugees, is the unofficial renaming of Australia Day as Boat Day. Australia Day, celebrated on 26 January, commemorates the arrival of westerners on the shores of the Australian continent. Like Thanksgiving in America, the continued celebration of this day is severely criticised for perpetuating injustices. Celebrating this day ignores the violent history of the colonising of Australia, the oppression of the native population, and the racism and injustice still present in Australian society. Being a national celebration, many have also used it as an opportunity for criticising the current government’s stance on so-called ‘boat-people’ – refugees who arrive in Australia by boat. This led to a new initiative: instead of celebrating Australia Day, Australians are called upon to celebrate ‘Boat Day’ on 27 January in solidarity with those who are excluded from and unwelcome in their society, those who take dangerous journeys on the ocean only to arrive and be deported or be interned in detention centres. The idea is to celebrate Boat Day on a boat or any floating device, and so raise awareness of the plight of refugees. While this may not seem very dramatic, it shows how a national symbol could be resymbolised to be more inclusive. The aims of Boat Day, as stated on its website, are as follows:

It’s an opportunity to reflect upon what it means to be Australian, our attitudes toward those who have been mistreated and our attitudes toward those who now need us most – whether they be within, or outside of our national borders. Both in our boating history and our boating present, Australia has much to confront and overcome [...] National Boat Day is a response to the Australian Government’s inhumane treatment of asylum seeker boat arrivals and the rhetoric of ‘boat fear’ in Australian politics and the media. (*National Boat Day* n.d).

What the scarf affair shows us, Benhabib argues, is the ways in which identities, the ‘symbols’ of those identities and the meaning of human rights can be reappropriated and resignified. Benhabib (2004: 209) refers to this as the “dialectic of rights and identities”. In the scarf affair, the girls had a certain understanding of who and what they were (as Muslim women), but this understanding changed as the affair progressed. In Australia, citizens are challenging the way in which Australia’s history is celebrated and the way in which refugees and asylees are portrayed in the media and by the state. This will necessarily also impact their own identities:

Political agents, caught in such public battles [such as the scarf affair], very often enter the fray with a present understanding of who they are and what they stand for; but the process itself frequently alters these self-understandings. (Benhabib 2006: 67)

If our identities (as individuals and as groups) are more fluid than we think at first, and if the boundaries separating ‘us’ from ‘them’ are rendered more fluid, the potential is created to extend membership to refugees and other stateless persons.

3.4 Conclusion

In this chapter, I discussed three influential theories concerned with the question of how we should structure our society, given the increasing interdependence between states and the diversity which characterises modern states. In this discussion, I also considered whether these theories, as models for accommodating difference or bringing about global justice, can adequately address the issue of refugee rights and membership for refugees.

First, I discussed multiculturalism and what it entails, focusing on the idea of group rights which protect the cultural practices of minority groups, while also preventing institutional bias (in favour of the majority) from hampering the ability of minorities to exercise their rights as citizens. I discussed the three main justifications for multiculturalism (the communitarian, the liberal, and the postcolonial) before turning to the possible criticisms against multiculturalism. Firstly, I argued that some multiculturalist theories rest on problematic views of culture, which seek to protect cultural practices to the point where judgement of reprehensible practices is no longer possible, while also entrenching existing

divides between different cultures. This could lead to tension or even violence. My second criticism of multiculturalism relates to the first problem: certain practices within specific cultures which harm minorities within those cultures – the ‘internal minorities’ – cannot be condemned or stopped. Harmful practices against internal minorities are justified because it is part of that culture or tradition, and therefore protected by group rights. Lastly, multiculturalism is concerned with the rights of minority groups within states, which makes it an inadequate response to the question of refugee rights. Multiculturalism protects the rights of those who already have rights (as citizens or members), while the questions whether refugees have any rights at all, and whether they should have rights and be included in the state.

The second theory I discussed was John Rawls’ ‘law of peoples’. Rawls seeks to extend justice, or fairness, within domestic institutions to international law. He identifies the seven principles which are present (in the case of well-ordered societies) or should be present in the laws of different peoples. These principles then provide the framework against which international law can be judged. I criticised Rawls’ theory on several grounds: first, while providing standards against which international law can be judged, he does not provide any judges. Second, he leaves out the question of economic justice, merely framing the issue of international justice as a question of how to bring about peace. Third, Rawls assumes that there is a rough equality between states, while this is not the case. Finally, Rawls’ theory cannot address the issue of refugee rights, as his list of minimum rights is too limited and, importantly, he sees the migration of people across borders as a non-problem for well-ordered societies. Even if these societies could agree on matters of international law and could maintain peace between them, war and political turmoil in societies that are not well-ordered *could* result in refugees fleeing to well-ordered societies.

In the last section, I discussed Seyla Benhabib’s cosmopolitan, or universalist, theory. Benhabib argues that we need a new normative map when thinking about issues such as international law, citizenship, and the rights of others. A cosmopolitan or universalist theory would provide such a map, as it moves away from state-centred approaches. Benhabib proposes a world-federation of states. I discussed her justification for this position by firstly looking at developments in the world such as the rise of an international human rights regime and the disaggregation of citizenship. I then discussed the philosophical foundations upon which Benhabib builds her theory: Kantian cosmopolitanism and Arendt’s notion of the right to have rights. Arendt and Kant faced an impasse between the human rights that people hold

and the fact that rights can only be guaranteed by the state. Benhabib proposes the process of democratic iteration as a way in which this impasse can be reconceptualised, enabling us to mediate between cosmopolitanism and sovereignty. Democratic iteration is a jurisgenerative process (in state institutions and civil society) in which cosmopolitan or universal norms are made applicable to particular situations. Democratic iteration allows us deliberate about existing membership norms, changing our notions of who should and who should not be included in the demos.

The process of democratic iteration could give refugees a political voice with which they can lay claim to their rights, demand protection, and participate in the political processes of their host countries. In the next chapter, I consider why having a political voice and being able to partake in politics is important, and how we can extend political membership to refugees so that they can act and speak publicly.

4. Political Membership for Refugees

In my previous chapter, I outlined Benhabib's universalism. She argues for a deliberative model of democracy, in which members of political communities can interpret and apply cosmopolitan norms through the jurisgenerative process of democratic iteration. I showed why other theories such as Rawls' 'law of peoples' and multiculturalism are insufficient or problematic. In this chapter, I focus on Benhabib's theory. Firstly, it remains to be shown why deliberation – or dialogue – should form the basis of our jurisgenerative processes. I argue that having a (political) voice and being able to act in the public sphere is a fundamental aspect of being human, and that to deny refugees access to political processes by silencing or ignoring their voices and preventing political action is to rob them of their humanity. In this discussion, I rely on Hannah Arendt's interpretation of Aristotle's distinction between speech and noise, arguing that refugees are denied their humanity if they remain 'voiceless', or without speech and without a political space in which to speak and act. The deeds and words of refugees, as stateless persons, are in danger of being silenced or made obsolete if membership is not extended to them. From this, I conclude that democratic iteration as a deliberative model which allows the interpretation of universal norms in particular situations, which sees the *demos* as unbounded and potentially inclusive of refugees and aliens, and which would allow non-citizens or minority groups to take part in jurisgenerative processes, goes further in guaranteeing the inclusion of refugees in political communities than other approaches to the problem.

Secondly, I consider the ways in which Benhabib's theory can be implemented. Benhabib advocates political membership on sub- and supra-national levels, which would allow non-citizens to take part in formal (e.g. voting) and informal (e.g. protesting) political activities. I consider three ways of extending political membership to refugees. I (i) return to Benhabib's discussion of disaggregated citizenship, specifically focussing on the ways in which countries like the Netherlands allow non-citizens to vote in local elections, as well as Benhabib's suggestion that residents of the EU who are not citizens should be able to vote for the EU parliament. (ii) Taking my cue from the process of democratic iteration, I consider ways in which refugees can claim their rights, and specifically their right to political participation, in ways other than formal or institutionalised practices of political participation. Here I depart slightly from Benhabib's focus on institutions, and turn my focus more toward the idea of active participation also present in her work. The potential of political protest is central to this

discussion, and I draw on certain aspects of Jacques Rancière's conception of politics as disagreement. (iii) Finally, I briefly discuss the potential of another aspect of Benhabib's work: political narratives. Who we include and exclude, how we define our individual, communal, or national identities, even who we sympathise with, depend on our political narratives – the stories we tell about how our political community came into being, how a group of individuals came to be a 'we, the people.' My discussion of political narratives is threefold: I consider Benhabib's reading of Arendt to show how the stories we tell shape and order our world; I (briefly) consider how we can retell our own narratives to be potentially more inclusive; and finally I argue that allowing refugees and aliens to tell their stories, and creating spaces or enclaves within which they can do so, will allow them to retain their sense of identity in a foreign land, while also allowing that identity to adapt to their change in circumstances. Hearing their stories could also lead to increased understanding between them and their hosts, lessening the sense of alienation they feel and allowing them to voice their grievances, while also changing the host's perception of them as being wholly alien or other.

In the final section, I consider the possible limitations of Benhabib's approach by looking at two lines of criticism levelled against it. First, I look at Bonnie Honig's critique of Benhabib's universalism. Honig (2006) regards Benhabib's universalist approach and notion of democratic iteration as too conditioned by already existing (Western) standards and therefore not open to a new order of right. I consider her argument and Benhabib's response to it, in order to show how we cannot do without universalism if we seek to protect refugees. Secondly, I consider Jeremy Waldron's (2006) claim that Benhabib underestimates the role mundane interaction plays in the spread of cosmopolitan norms and Benhabib's response to that claim. I argue that Benhabib does indeed underestimate the potential of mundane interactions, but that it is not impossible to combine her approach with one more focused on the everyday interactions of individuals. I consider various ways in which such interactions could also further entrench cosmopolitan norms. I conclude, however, that such interactions are only valuable if (cosmopolitan) political institutions exist in which they can take place. Benhabib argues for such institutions.

4.1 Refugees and Political Voice

4.1.1 *Speech, Sound, and Action*

I have argued above that the right to political participation should be considered a basic right, and that every individual, regardless of nationality, also has the right to present him- or herself as a legal being. In this section, I link to those previous arguments and show how being deprived of one's political voice excludes you from the political community or state in which you find yourself and furthermore, from your own humanity. In what follows, I show how excluding refugees from our political processes by not extending political membership to them threatens their status as human beings.

Hannah Arendt (1998: 3) writes that “[wherever] the relevance of speech is at stake, matters become more political by definition, for speech is what makes a man a political being”. Politics, then, is concerned with questions about the *relevance* of speech, who is able to speak and who has the right to speak; who has a voice within the state. Arendt (ibid. 27) argues that those who are situated outside the *polis* or the state are deprived not of their speech, but of a place in which their speech makes sense – their words become mere noise. They do not become, as Aristotle would have it, beasts or barbarians, but their full humanity is still denied. Elsewhere, Arendt (1973: 296) expresses the same view when she writes that one is deprived of one's human rights when one is deprived of “a place in the world which makes opinions significant and actions effective”. Speech, or political voice, can only be distinguished from noise if it is heard by others and made sense of by others.

Importantly, Arendt mentions a second condition that has to be met if one's human rights are to be respected. Not only should our opinions (which we express through speech) be significant, but our *actions* should be effective. For Arendt, as indeed for Aristotle, political voice and political action go hand in hand. Arendt (1998: 25) points out that for Aristotle speech (*lexis*) and action (*praxis*) are the two constitutive activities of the *bios politikos*. The implication of this is that where speech is absent, our actions make no sense, and where action is absent, our speech (or opinions) has no value:

[W]hatever men do or know or experience can make sense only to the extent that it can be spoken about. There may be truths beyond speech, and they may be of great relevance to man in the singular, that is, to man in so far as he is not a political being, whatever else he may be. Men in the plural, that is, men in so far as they live and move and act in this world, can experience

meaningfulness only because they can talk with and make sense to each other and to themselves. (ibid. 4)

Arendt goes on to argue that not only does the meaningfulness of our lives depend on our ability to act and speak about our actions, but that the reality of our existence in the public realm depends upon this: our reality is constituted by our appearance in a shared space (ibid. 50). The term 'public' signifies for Arendt the world itself, the world common to us and distinguished from our privately owned places in the world. This world consists in "the fabrication of human hands, as well as [...] the affairs which go on among those who inhabit the man-made world together" (ibid. 52). It is a world of things we have in common, and these things relate and separate us at the same time. In this common world, every individual has his or her own location and perspective on what is common. Public life is therefore characterised by everyone hearing and seeing from different perspectives, and this gives significance to being seen and heard by others. We stand in an "objective" relationship with others because we are related to them by a common world of things, but also separated from them by that same world. We know that that world exists, because they see it also from their perspective. We know that we are real, because they hear us when we speak and see us when we act: "The presence of others who see what we see and hear what we hear assures us of the world and of ourselves" (ibid. 50).

Arendt (ibid. 176) gives a further reason why action and speech are so important: they reveal the unique distinctness of humans. She distinguishes between human distinctness and otherness (*alteritas*). Otherness is a characteristic humans share with everything else that exists (which enables us to differentiate between different categories of things), and distinctness we share with everything alive (which enables us to differentiate, say, between two different breeds of dogs). But in humans, distinctness and otherness combines to become uniqueness. This uniqueness is expressed and shown through speech and action. Speech and action allows individuals to *distinguish* themselves, instead of merely *being distinct*. Humans have the ability to take initiative, to make themselves be seen and heard and so create a unique space in the common world for themselves: "With word and deed we insert ourselves into the human world" (ibid.).

By inserting ourselves into the world we also reveal who we are. Arendt maintains that there is a closer relation between this revelation or disclosure of who somebody is and speech, than between revelation and action. Our speech and our actions show who we are, but we answer

the question “Who are you?” with speech and explain our actions with speech. Our actions have a revelatory character, but without speech accompanying them to make sense of them, they would merely be the actions of a (indistinct) robot: “Speechless action would no longer be action because there would no longer be an actor, and the actor, the doer of deeds, is possible only if he is at the same time the speaker of words” (ibid. 179).

For one’s actions and speech to be relevant, three things are necessary: a home (or a private sphere), a public sphere, and recognition by others within that sphere. If we do not have a space in which the world is properly our own – a space which we can claim as ours – we do not form part of the world and its affairs. However, just as we need a private place *from* which to act and speak, we need a public space *in* which we are able to act and speak: “Before men began to act, a definite space had to be secured and a structure built where all subsequent actions could take place, the space being the public realm of the *polis* and its structure the law” (ibid. 195). This space provides the framework within which citizens can appear to one another in speech and action. Their words and deeds are the contents of politics, as are their judgements about who is allowed to speak and act in the public domain. Just as the world is not the same as the earth or nature, so the space of appearance is not quite the same as the public buildings, institutions and bodies of the state. These spaces are necessary for people to come together, and it is in coming together in the manner of speech and action that the space of appearance comes into being. However, claims Arendt (ibid. 199), this space is always only potentially there, not necessarily and not forever. It is possible for an individual or a group, like refugees, to be in our public spaces without their actions making sense or without them being heard. It is only when their deeds and words make sense that those public spaces can truly be called spaces of appearance. Being seen and heard by others is therefore the final aspect of political life, which I discussed above. Arendt (ibid. 8) asserts that action, unlike work and labour, corresponds directly to human plurality. It is possible to labour on your own, outside of a community, but it is not possible to act. Action is the activity that goes on directly between people, and therefore it needs more than one person to take place. This plurality – the fact that there are many people living and acting in the world – is *the* condition of political life:

Thus the language of the Romans, perhaps the most political people we have known, used the words “to live” and “to be among men” (*inter hominess esse*) or “to die” and “to cease to be among men” (*inter hominess esse desinere*) as synonyms. (ibid. 30)

4.1.2 *Whoever is nameless cannot speak*

Arendt holds that politics is, or should be, concerned with the relevance of speech. When asking whose speech or political voice is relevant, we are asking who should be included and excluded from our political community. Politics is therefore also concerned with the distinction between ‘us’ and ‘them’. In the view of Jacques Rancière (1999: 22), the relevance of speech – whose speech is heard and whose is dismissed as mere noise – is not the foundation upon which politics is built, but the very subject matter of politics:

Politics exists because the *logos* is never simply speech, because it is always indissolubly the *account* that is made of speech: the account by which a sonorous emission is understood as speech, capable of enunciating what is just, whereas some other emission is merely perceived as a noise signalling pleasure or pain, consent or revolt. (ibid. 22-23).

Because inclusion into the political community, state, or polity (if seen as the recognition of one’s political voice) depends on what that state counts as speech, it is possible that some individuals and groups can be deliberately excluded from the polity, the humanity that they possess denied. This we see when Aristotle excludes women and slaves from the polity, or today where stateless individuals are excluded. Merely being human does not guarantee that you will have the ability to speak and act. The political community into which the refugee enters must recognise him or her as a speaking and acting being.

Rancière links this recognition to being given a name. He draws on Pierre-Simon Ballanche’s discussion of the tale of the secession of Roman plebeians, which Ballanche recognises as a dispute over the issue of speech, and not merely as a revolt against the ruling classes:

The position of the intransigent patricians is straightforward; there is no place for discussion with the plebs for the simple reason that plebs do not speak. *They do not speak because they are beings without a name, deprived of logos – meaning, of symbolic enrollment in the city.* Plebs live a purely individual life that passes on nothing to posterity except for life itself, reduced to its reproductive function. *Whoever is nameless cannot speak.* (ibid. 23, my emphasis)

Those whose speech and acts are recognised have a name. In answer to the question “Who are you?” they do not only speak and act, but they give their names. Membership in a

political community means being named as a citizen. This ‘being named’ is not being named as an individual or particular person, but being recognised as belonging to the polity – being ‘on record’ or counted as part of the people. A distinction can therefore be drawn between the named (in this example, the patricians) and the nameless (the plebeians). The named determine what counts as speech, and only there ‘language’ is recognised as such. Rancière holds that between the language of the named and the language of the nameless, which is not recognised as speech, no discussion or situation of linguistic exchange can take place, because the named do not and cannot recognise the sounds coming from the nameless as anything other than mere noise. The named therefore do not recognise the nameless as (potential) citizens. It is precisely this situation that the cosmopolitan perspective seeks to counter; *all* human beings are potential citizens, and should therefore be recognised, ‘named’, or counted.

4.1.3 Refugees, the Voiceless

In her 2004 Sydney Peace Prize lecture, Indian author Arundhati Roy said that we should remember that “there’s really no such thing as the ‘voiceless’. There are only the deliberately silenced, or the preferably unheard” (Roy 2004). This echoes Rancière’s point that the distinction between those who speak, or have a political voice, and those who merely make noises like animals, is not a natural distinction. I have shown how action and speech are fundamental characteristics of human beings, and that a person’s deeds and words only make sense if others see and hear them, and recognise them as being action and speech. I have also shown how this is the basis of politics. Politics is concerned with whose speech is relevant and whose is disregarded as mere noise, with who we name and include, or who remain nameless and excluded, and with where we draw the borders between ‘us’ and ‘them’.

The act of erecting a border is an act of deliberate exclusion and, as I have mentioned, needs justification. A border which excludes some from the category of human beings cannot be justified. This is especially the case where refugees are concerned. Refugees are, by definition, people without a home and without protection. In that sense, their situation already prevents them from living a fully human life. If they seek refuge in a specific political community or state, and that state chooses to ignore their plight or deliberately silences them, as is the case with African refugees in Tel Aviv who were imprisoned after protesting against indefinite detention laws (Al Jazeera 2014), the state not only violates their human rights, but places them in the category of being sub-human or not human at all.

As things are now, refugees, asylum seekers, and other stateless persons do not really have a political voice. They do not have a say in the laws that govern them, they do not always have access to their rights, nor access to the bodies that can guarantee those rights. Their ability to use their speech is impeded. They express their pain and frustration, but it falls on deaf ears. The only meaning their actions have is a negative meaning – their actions are criminalised (as I discussed in my first chapter) or ignored. What is needed, and what Benhabib tries to provide with democratic iterations, is a way in which political membership can be extended to refugees, and so allow their voices to be heard.

4.2 Possible Forms of Political Membership

4.2.1 Membership on Different Levels

As discussed in the previous chapter, Benhabib sees the disaggregation of citizenship to the nation-state as an indication that cosmopolitan norms are spreading, and also as an opportunity to allow political membership on levels other than the national. Questions of membership seek to determine who should be included (and on what grounds) and who excluded. The fact that people have transnational ties, for whatever reason, and complex identities, allows us to rethink how and to whom we extend membership. In a situation like this, discourse ethics gives those who were previously excluded but believe they have a claim to membership the opportunity to question and reverse their exclusion. Discourse ethics, and specifically democratic iteration, asks which norms and institutions are considered valid by all those affected (Benhabib 2004: 131). When dealing with membership norms, they should therefore be valid not only for those who are members, but also for non-members. The question of membership should always remain open, and membership norms should never be set in stone.

Benhabib (ibid. 135) argues that a sovereign state cannot deny membership in perpetuity to non-members within its territory. According to the UN Declaration (United Nations 1948), arbitrary denaturalisation of citizens is forbidden. Part of the definition of a refugee is that he or she has lost the protection of his or her states – he or she is in effect denaturalised. If a sovereign state is not allowed to *take away* an individual's membership of the state, it should also not be allowed to *deny* membership to individuals: "You may stipulate certain criteria of membership, but they can never be of such a kind that others would be permanently barred from becoming a member of your polity" (ibid.).

The route to naturalisation is normally as follows: (i) emigration; (ii) first entry into the foreign country; (iii) civil, economic, and cultural absorption for a duration of time; (iv) after residing in the country for a considerable duration, incorporation; (v) and finally naturalisation or the granting of political citizenship (ibid. 136). Where refugees are concerned, the duration of time they spend in the country seems less relevant. With tourists, students, people travelling for business, and even immigrants, incorporation is not immediately necessary, or necessary to the same extent, as they will probably return to their countries of origin. With the refugee, this is probably not the case. We do not only have a responsibility to let them in, but also to recognise their humanity. I have argued that this implies a right to participate in the political processes of their host country, especially where their own rights and lives are affected. Benhabib also holds that, upon first entry, refugees have the (human) right to membership: “once admission occurs, the path to membership ought not to be blocked” (ibid. 140). There may be no membership norms that absolutely prevent the possibility of granting a refugee membership, nor may the knowledge of how to become a member be denied to the refugee (through bureaucratic capriciousness, for example).

Importantly, Benhabib does not equate the right to membership with the right to citizenship. Benhabib suggests a broader or more general *human* right to membership which must be respected. She sees it as “an aspect of the *principle of right, i.e., of the recognition of the individual as a being who is entitled to moral respect, a being whose communicative freedom we must recognize*” (ibid. 142). Sovereign states retain the right to decide how membership is granted and how their citizenship legislation is formulated. However, there *must* be some procedure or possibility for refugees and other foreigners to become citizens eventually. This implies that the refugee must, from the start, have access to state institutions and be able to seek help in the process of applying for citizenship. They must therefore have communicative freedom, which implies the ability to speak and act publicly.

Due to the formation of international bodies to protect human rights, the disaggregation of citizenship, and other developments (notably, the forming of the European Union), national citizenship is no longer the sole basis for the ascription of rights (ibid. 143). In her discussion, Benhabib focuses specifically on the transformation of citizenship in Europe. This transformation has gone in contradictory directions – on the one hand, the significance of national citizenship is affirmed, while on the other the distinction between the legal status of the citizen and the alien is minimised. Previously, citizenship implied unity of residency,

administrative subjection, democratic participation, and cultural membership – what Weber (in Benhabib 2004: 144) called the “ideal typical” model of citizenship. Today, this model no longer holds. People can have the right to residence, while being denied the right to political participation; people who do not reside in the territory may retain their right to political participation, and so forth. The danger, for Benhabib (ibid. 146) is that of “permanent alienage,” where a group within the polity is part of civil society, but without ever having access to political rights. So while the distinction, in terms of civil rights, between aliens and citizens is shrinking, aliens are still to a large extent denied the crucial right to political participation or communicative freedom.

In the European Union, citizenship is found on two levels: the national and the supra-national. Every national citizen is automatically also a citizen of the union. This gives European citizens all kinds of benefits: they can travel across borders; they are represented in the federal government. EU citizens can vote as well as run for office in both local and union-wide elections. The EU, for Benhabib, is a possible model for instituting a Kantian world-federation. However, there is also one glaring problem she points out: while the borders *within* the EU are being lifted, the borders *of* the EU are being strengthened. It is becoming increasingly difficult for non-members to enter the EU, and once there it is difficult to become a member:

The obverse side of membership in the EU is a sharper delineation of the conditions of those who are non-members. The agreements of Schengen and Dublin intended to make practices of granting asylum and refugee status throughout member states uniform. Referred to as “legal harmonization,” in the early 1990s, these agreements made the acquisition of refugee and asylum status in the union increasingly difficult. (ibid. 149)

The danger the EU is facing is that its refugee and asylum policies will undermine the individual-rights-based system of the Geneva Convention, to which its member states are signatories, while also undermining the moral and constitutional responsibilities of member states toward refugees, especially those fleeing from former colonies or countries where these states have interfered.

Another difficulty is the disparity between the rights accorded to third-country national foreign residents, and foreign residents who are citizens of one of the EU member states. In the case of the former, many such residents were born in one of the member states. They can

speak the language and share, to some extent, in the culture, yet they enjoy fewer rights than EU citizens from other countries, who are sometimes strangers to the language and customs of their host country. So while those who fall under the latter category are privileged by their status as EU citizens, and enjoy democratic citizenship rights despite not being national citizens, the ties between national citizenship and democratic rights are strengthened in the former category, with those situated within that category denied both. Their only hope of participating in political processes is naturalisation, which is by no means guaranteed (as Benhabib argues it should be).

What the EU *does* provide us with is a model of a federation of states (albeit a very imperfect one at this stage). It shows that membership can be extended on levels other than that of national citizenship. Benhabib (ibid. 157) also discusses possibilities of extending political membership on a sub-national (local or provincial) level. The Netherlands grants city-citizenship to foreigners, under certain conditions (i.e. five years of residency). This sub-national form of citizenship allows foreigners to vote in local (city-wide) elections and to form political parties. This still does not grant them the privileges of someone with full membership to the EU, but it does ensure that they are represented at the municipal level, which also ensures that they are participants in the national dialogue surrounding their juridical status (ibid.). This option is, at least, a step forward in ensuring that the voices of non-members are heard.

Benhabib (2006: 173) proposes that national citizenship should not be a precondition for EU-citizenship, but rather that membership ought to be extended on one or a combination of three possible levels (local or sub-national, national, supranational):

Non-national modes of belonging, such as long-term residency or denizenship, binationality, and transnationality are among some of the alternatives [to national citizenship] currently evolving, not only in Europe, but throughout the world as well. Along with these changes, the site of political activity is decentered: proto-citizenship rights can be exercised at local and regional as well as supra- and transnational levels. The nation-state is not the sole site of our democratic attachments. (ibid. 172)

She proposes that third-country nationals specifically be granted EU citizenship, even if they do not have national citizenship. This would allow them to enjoy more rights within the EU, while also holding on to their citizenship of their countries of origin. Citizenship on the EU

level can be combined with city-citizenship, as in the Dutch model, which would allow them to actively participate in politics, even when they do not (yet) qualify for national citizenship.

Refugees pose a special problem even to this model: unlike the third-country national, they no longer belong to their countries of origin. There is no level of citizenship to which they belong, which places them in an especially vulnerable position: “The individual who is stateless [...] becomes a nonperson, a body that can be moved around by armies and police, customs officers and refugee agencies” (ibid. 175). For this reason, Benhabib proposes a fourth level of citizenship: the global. A truly cosmopolitan politics would require that every child receives a passport at birth, granting him or her global citizenship and hence universal legal personhood. These four levels of membership create the formal space within which refugees can lay claim to their rights as members. In the next section, I consider informal ways in which they can do so, given the difficulties they face with formal procedures.

4.2.2 Politics as Protest

Benhabib emphasises the importance of institutionalising universal human rights norms, in order for them to become more enforceable. The function of democratic iteration is to interpret these universal norms for particular circumstances, and so generate laws which can be enforced. However, this process is not solely focussed on judicial and governmental institutions. As Benhabib’s discussion of the scarf affair in France shows, it is the people – the *demos*, but also those currently excluded from the *demos* – that partake in democratic iterations. I believe that her emphasis on membership as a human right, which implies political rights such as participation in political processes, creates room within her theory for the kind of political participation the girls in the scarf affair enacted: protest. In spite of declarations of human rights and international bodies seeking to protect the rights of refugees, they are often still left without protection or the capability to live well. Clearly, the system fails many of them. While reform is needed in that respect – rethinking where we locate citizenship, for example – countless people are currently without homes, basic needs, and political voice. Remaining passive bodies, waiting for sovereign states to decide what to do with them, seems undesirable, given my preceding analysis of political voice as a necessary component of one’s humanity. In this section, I therefore turn to protest action as a way in which refugees can make their voices heard. Benhabib has been criticised for undervaluing the importance of informal political participation – a point to which I return later.

Earlier in this chapter, I referred to Jacques Rancière's discussion of the plebeian revolt, as told first by the Latin historian Livy, and later by Ballanche. Livy tells the story of the Roman plebeians' retreat over Aventine Hill, where they attempted to form their own society, and of the ambassador returning them to order. Where Livy sees this merely as a revolt caused by poverty and hunger, Ballanche reads it as a quarrel over the issue of speech itself (Rancière 1999: 23). The ambassador could not recognise the speech of the plebeians as similar to his own – he merely heard noise, the expression of biological desires, and not intelligence. What happened here was a disagreement about something both parties had in common – speech – but which the one party could not recognise as such. A disagreement arises (over who counts as speaking being and who not), and this disagreement institutes politics:

An extreme form of disagreement is where X cannot see the common object Y is presenting because X cannot comprehend that the sounds uttered by Y form words and chains of words similar to X's own. This extreme situation – first and foremost – concerns politics. (ibid. xii)

For Rancière, the political is a moment, and it is a moment of disagreement. The fleeting nature of the political echoes Arendt's claim that the space of appearance, where politics takes place, is always potentially there, but not necessarily and not forever. Politics is something which occurs, and if so, very rarely. The state institutions try to make an account of the different 'parts' that make up the political community. This account, or count of the constitutive parts, is always a false count, a double count, or a miscount (ibid. 6). Politics occurs when the parts that are miscounted lay claim to their equal rights as speaking beings:

Politics only occurs when these mechanisms are stopped in their tracks by the effect of a presupposition that is totally foreign to them yet without which none of them could ultimately function: the presupposition of the equality of anyone and everyone. (ibid. 17)

To apply this to refugees: refugees are, as Benhabib writes, situated in the murky domain between legality and illegality. As human beings, they share in the "equality of anyone and everyone," yet this is often not recognised. Not being members of a state (or at least a state which offers protection), they can be described as the uncounted, the miscounted or the "part of those who have no part" (ibid. 77). Upon entering a foreign country and claiming asylum, as well as other rights, refugees could potentially stop the state mechanisms in its tracks. By insisting that they are also speaking beings and not merely beings whose bare necessities

need to be cared for – in other words, beings that should have access to political processes and not merely food and shelter in refugee camps – refugees can create a political moment which would force others to take notice, to listen.

Discussing demonstrations for immigrant rights that took place in the USA in 2006, Cristina Beltrán (2009) indicates the significance of this kind of protest action by non-citizens. Beltrán (2009: 597) sees the demonstrations against new anti-immigrant legislation “as a moment of initiation and an inaugural performance of the political”. Before these protests, no “spaces of freedom and common appearance” existed for immigrants in the USA (ibid.). If, as Arendt suggests, the world is the space of appearances in which (political) actors distinguish themselves, these protests signified the (forceful, if non-violent) entry of immigrants into the space of appearances, demanding that they be distinguished from the undocumented, unnamed masses. These immigrants “challenged the dehumanising effects of anonymity and illegality” (ibid. 598) and demanded that which the American constitution praises, and that which they as human beings have: equality. These protests led to discussions of legalisation, naturalisation, and employment. Rancière would doubtless see this as a failed political moment, as the immigrants are simply incorporated into the existing order. Benhabib certainly seems to believe that such a politics, while potentially giving rise to democratic iterations, has a limited impact if not accompanied by more institutional measures. I return to this later, when considering Honig’s criticism of Benhabib’s account.

4.2.3 Naming and Narratives

In previous sections, I discussed the relation between being given a name and being recognised as a being capable of speech and action. As Arendt says, being given a name (once more, not in the sense of being named as a particular person, but in being given a recognised or documented legal status) increases one’s chance of survival, and for this reason Benhabib also proposes that each child be given a passport, naming them as a citizen of the world, at birth. But having a name is not only about being written up in public records – it is also about having an identity.

Arendt (1973: 287) points out that citizenship is generally linked with a clearly established officially recognised identity (this was truer in her time when especially European states were more homogenous than they are now). When refugees lose their citizenship, they also lose these identities. The undocumented refugee becomes one nameless individual, lost in the nameless crowd. The only way for individuals to distinguish themselves is by becoming

famous (or by committing a crime, as mentioned above): “it is true that the chances of the famous refugee are improved just as a dog with a name has a better chance to survive than a stray dog who is just a dog in general” (ibid.). Having an identity is not only having a name, but having a story behind that name. It is being able to say who you are and where you come from. The narratives we tell about ourselves, individually and communally, shape our identities. For this reason, Benhabib (1990), in her reading of Arendt, believes that narratives can serve a political function.

For Arendt, political theory is a form of storytelling; it is a human activity which requires freedom (Benhabib 1990: 170). Drawing on Aristotle, Arendt (in Beiner 1982: 143) describes the explicitly political role of the poet: he or she generates a catharsis, thus freeing people from their emotions and enabling them to act. The poet also acts as historian. He or she takes memories of past events and immortalises them to make “something lasting out of remembrance” (Arendt 1958: 574). This enables people to come to terms with traumatic events in the past and also to formulate their past actions in a way that says something about their identities. Without a sense of the past, individuals would not be able to have the sense of a self (Benhabib 1990: 187). Furthermore, it would also be impossible to have a vision for the future. Storytelling “[digs] under the rubble of history [to] recover those “pearls” of past experience...so as to cull from them a story that can orient the mind in the future” (ibid. 171). Our political narratives can therefore help us deal with traumatic pasts, shape our identities, and provide a vision for the future.

Part of defining who we are, as individuals or as communities, is distinguishing ourselves from others and so (on a group level) excluding others. The narratives we tell therefore shape the world we live in, if we see the world as the space of appearance as Arendt suggests. In formulating a narrative, the storyteller decides whose actions and words are worth immortalising, and whose can be forgotten. Earlier I discussed Arendt’s point that our actions only make sense if we can speak about them. Benhabib (ibid. 187) echoes this, by stating that actions “only live in the narratives of those who perform them and the narratives of those who understand, interpret and recall them”.

With regards to the refugee crisis, it is clear that many arguments against opening borders, or making it easier for strangers to enter into our midst, rest on narratives about who ‘we’ are – culturally, religiously, ethnically – which serves to estrange ‘us’ from ‘them’ (the construction of Afrikaner identity in twentieth century South Africa, with sanitised and

glorified tales told about the Great Trek and the Anglo-Boer War, is a case in point). When entering a foreign country, refugees are faced with being excluded from the dominant narrative of political identity within that country, coupled with their own inability to tell their stories. It is hard to tell your story if your voice is not recognised by others, especially if there are language and cultural differences.

However, it is absolutely necessary for refugees to be able to tell their stories and to form new narratives. In her discussion on totalitarianism, Arendt identifies three elements which enabled the extermination of the Jews in the concentration camps. The first was the death of the juridical subject or bearer of rights. I have already discussed Arendt's scepticism surrounding the Rights of Man and her belief that the state is necessary to ensure those rights. Where there is no protection from a state, the juridical subject becomes a superfluous human being (ibid. 175). This is accompanied by (ii) the murder of the moral person in humanity (which is not as relevant to the current discussion). The final element is the disappearance of individual identity, where the people (or mob) became the new historical actor. The loss of individuality leads to a situation of worldlessness: the individual has lost his or her space of reference, identity, and expectation of the future (ibid. 177). He or she is uprooted from the world:

To be uprooted means to have no place in the world, recognized and guaranteed by others; to be superfluous means not to belong to the world at all. (Arendt 1973: 475)

As long as refugees remain in the "murky domain between legality and illegality", as long as they are denied access to political processes and spaces where they are able to tell their stories and affirm their identities, they will be not only uprooted, but superfluous. And superfluous people can easily be disposed of, as Arendt has shown.

The question I want to ask is whether narrative can offer a way to give refugees a political voice. For them to be able to do this, political and legal institutions are needed which would guarantee that they are able to tell their stories. Within the kind of framework Benhabib proposes, refugees *should* be able to tell their stories. Firstly, with regards to democratic iterations: every iteration of the universal can be seen as a narrative. In the same way we use historical facts to construct narratives in new and illuminating ways, hoping thereby to create a more inclusive political community, so we interpret given norms in new ways to create new meanings. I have shown why this is necessary, but it is also desirable for another reason:

narratives can help us understand one another. I return to the importance of this later. Narratives can lead to understanding if one sees the link, as Arendt does, between historical understanding and Kant's *Einbildungskraft*: the power to create or to produce images (Benhabib 1990: 182). In writing history, the historian (as storyteller) also acts as a judge of history, as he has to represent a shared reality from the perspective of all concerned. What is therefore needed in telling a story is the ability to take the standpoint of the other, using one's imagination (ibid. 183). Telling narratives and listening to narratives therefore implies being able to see from the other's perspective and so come to understand them. If refugees are able to tell their stories, and they are listened to in this way, their plight may be better understood by those who can offer them refuge.

Importantly, narratives cannot guarantee political rights, nor should a particular identity be the basis of those rights. As Arendt shows, it is precisely where citizenship is so closely linked with identity that those who are not members of the main group in society are in danger of losing their identity and their legal status. Political narratives of the kind I am suggesting can only help to weaken the link between identity and citizenship by providing alternative identities and opening up exclusionary narratives. Refugees already possess certain rights, including political rights, on the basis of their humanity. Telling their stories may help others to recognise that they are bearers of rights and potential members of political communities.

4.3 Democratic Iteration: Criticisms and Limitations

Benhabib proposes the extension of political membership to refugees and aliens through the interpretation of cosmopolitan norms through a jurisgenerative process called democratic iteration. It is only through the iteration of cosmopolitan or universal norms in specific contexts, with the goal of making them relevant for those contexts, that the universal can be reconciled with the particular. It is also only through this iterative process, which adheres to cosmopolitan norms, that norms and practices particular to a culture, a political community, or a state can be rendered in such a way that they are not exclusionary, oppressive or discriminatory, especially toward those not part of the state but sharing in its territory. In the preceding sections, I argued that refugees and aliens deserve a political voice, as depriving them of speech would deprive them of their humanity and it would render their actions

meaningless. Without speech, aliens would not be able to participate in iterative processes, but it is also these processes that seek to ensure that they can. However, there are certain limitations to Benhabib's proposed strategy for extending membership to aliens. I look at two criticisms levelled against her approach, concerning (i) her appeal to universal standards and her attempt to reconcile moral universalism with political particularism; and (ii) the limits she imposes on her approach by denying the potential of mundane interactions to spread cosmopolitan norms. I attempt to show how Benhabib's approach can answer these challenges, but also how her approach can be adapted if necessary.

4.3.1 *The Problem with Universalism*

Bonnie Honig (2006: 102) questions Benhabib's success in reclaiming universalism for a postmetaphysical politics: "her reclamation is marked by traces of earlier universalisms that promise guidance from above to a wayward human world below". This raises two problems for Benhabib's theory: (i) its universalist nature, which is a product of Enlightenment thinking and Western commitment to human rights, a position which has often been problematically imposed upon non-Western cultures; (ii) the fact that Benhabib's cosmopolitan theory is conditional. Like Kant's cosmopolitanism, Benhabib's imposes certain guidelines for how states and communities should act and interact, based on universalist principles. Honig (ibid. 115) points out that Habermas and his followers sought the solution to the paradox of democratic legitimation (when the people upon whom a state's legitimacy depends will the wrong thing) in a form of statism, in which deliberative and democratic norms are protected from the potential capricious nature of the majority or the people. This solution gives rise to the next paradox: the undemocratic nature of the democratic state. In answer to this paradox – the fact that democratic self-determination excludes certain people without consulting them on the matter – Benhabib offers her *cosmopolitan* universalism. Honig (ibid. 116) writes: "at each register, universalism [...] seeks a new harbour: liberalism, constitutionalism, state institutions, and now – cosmopolitanism. But no harbour is safe [...] because the universal is never really as we imagine it: truly unconditional, context-transcending, and unmarked by particularity in politics".⁷ Universalism, contrary to what it suggests, still comes with certain standards and restrictions, and these reflect the ideals of the West. Benhabib's universalism is a conditional universalism.

⁷ It should be noted that this claim of Honig's is itself a universal claim, which weakens the impact of her criticism of Benhabib's universalism.

Benhabib (2006: 61) realises this:

[I]t is clear that all future struggles with respect to the rights of Muslim and other immigrants will be fought within the framework created by the universalistic principles of Europe's commitment to human rights, on the one hand, and the exigencies of democratic self-determination, on the other.

This does not seem to concern her, in Honig's opinion. The problem is that Benhabib's democratic iterations are not "an open futurity dotted by new or emergent rights" (Honig 2006: 110) but rather a normative validity in which rights claims are assessed in terms of their appositeness to the existing (European or Western) model. Were there only refugees fleeing to European countries, this would have been less problematic. However, non-Western countries such as Lebanon also receive refugees who lay claim to these 'universal' rights. All rights claims, as particulars, are or must be subsumed under this (Western) universal. The upshot of this is that European universalism becomes the opposite of the foreigner's particularity. Benhabib sees these two as two moments in dialectic; however, as Honig (*ibid.* 110) points out, the two are not equal. This is evident when one considers, as Derrida does (in Honig 2006: 110), that the foreigner asking for hospitality has to do so in a language which is by definition not his or her own, immediately placing him or her at a disadvantage. The particular is always judged by the standards provided by the universal, while the universal categories themselves never change. It is only the relation of the foreigner or the subject to those categories that change, and rights claims remain a practice where the foreigner petitions for recognition under existing categories. Honig contrasts this with the Derridean approach, in which a universalism that subsumes the foreign under its categories, without itself undergoing change, is shown to be alien.

Honig (*ibid.* 105) proposes an unconditional cosmopolitics as an alternative to Benhabib's (conditional) universal. She derives this from Derrida's reading of hospitality, which she proposes as an alternative to Benhabib's neo-Kantian interpretation. In Derrida's reading, hospitality belongs to two discontinuous orders: the conditional and the unconditional. In conditional hospitality, distinctions are made and limits set. One finds this in Kant's right to hospitality, in terms of which the right to entry can be denied, and which does not guarantee (permanent) residence. Kant's reason for doing this is twofold: first, to avert the risk of dispossession that comes with unconditional or unlimited hospitality, and second, to assure some degree of hospitality. People are, presumably, more open to giving if they can retain

some of their possessions. Derrida, on the other hand, insists that this risk and its implications must be faced: “That those who claim a right to hospitality position their hosts inevitably in an ambiguous and undecidable terrain marked by both hospitality and hostility” (ibid. 106). Benhabib’s analysis erases this undecidability by identifying hostility with the particular (the nation-state that refuses entry to foreigners, to protect its culture, etcetera) and hospitality with the universal. Hostility is therefore always something separate from hospitality, and ideally not present when a foreigner lays claim to their right to hospitality. Honig (and Derrida) holds that the right to hospitality does not only take its motivation from a moral law or universal human rights, but also (problematically) from the idea of an unconditional hospitality, which is betrayed when expressed by any table of values, or when hospitality is enacted (as it is never fully unconditional).

This double gesture – that hospitality is motivated by and betrays the unconditional – illuminates Arendt’s right to have rights in a new way: “we need rights because we cannot trust the political communities to which we belong to treat us with dignity and respect; however, we depend for our rights on those very same political communities” (ibid. 107). Benhabib attempts to solve this problem with recourse to sub- and supranational bodies that can protect these rights, but Honig points out that this just changes the venue of membership, without dispensing with the need for membership. This kind of hospitality is still conditioned. Benhabib therefore does not provide a way out of the paradox of rights, but simply moves it to a different level. However, Honig (ibid.) does admit that there is no way out of this paradox, but an awareness of it can meaningfully influence our politics. Benhabib (2006: 19) also recognises this, and therefore states that “the discourse ethicist insists upon the *necessary disjunction as well as the necessary mediation between the moral and the ethical, the moral and the particular*”. She realises that our right to have rights as human beings (the moral) can never be fully realised (the political), but, like Honig, she thinks that we need to remain aware of this paradox and mediate between the different spheres.

Honig (2006: 111) points out two ways in which Benhabib’s mediation between the political, the moral, and the ethical (or her attempt to deal with the paradox of rights) differs from her (Honig’s) approach: (i) Benhabib’s approach relies on a linear temporality, with rights claims becoming increasingly realised and cosmopolitan norms spreading; (ii) Benhabib does not recognise the remainder that is the product of any conditional order of right. Benhabib’s model is one of particular rights claims being subsumed under the universal, and this presupposes a linear and progressive temporality, in which the idea of human rights and

cosmopolitan rights will become increasingly adopted by individuals and states alike, until we arrive at a “desirable democratic outcome” (ibid.) or a situation of cosmopolitan right. On this account, we are slowly but surely moving toward the ideal of the cosmopolitan society. It is not clear that this assumption of Benhabib’s reflects reality. Honig (ibid. 112) points out that Benhabib fails to recognise that, while women and African Americans, for example, now have full possession of formal rights in the USA, these subjects do not bear their rights in the same way as the original bearers of those rights (white men). While rights and suffrage have been extended, they have not been equally extended. Honig also makes the point that in some cases, there was not an increase in the application of cosmopolitan norms. While some were being enfranchised, others were being disenfranchised. Before the First World War, for example, alien suffrage was an uncontroversial practice in the United States and Canada. Importantly, for Honig, alien suffrage was granted without border attenuation, pressures on state sovereignty and extranational institutions – all things Benhabib considers necessary to ensure alien suffrage (ibid. 112).

The unconditional, on the other hand, does not make any such promises for the future. It does inspire future conditional orders of rights, while also haunting them, constantly illuminating the ways in which they fall short of their ideal:

From the vantage point of the unconditional but not from that of Benhabib’s universal, for example, even a full realization of universal human rights on earth would be seen as necessitating further political work, generating new claims, each of which would make its own universal appeal, perhaps on behalf of those forms of life remaindered by the order of universal human rights, which is itself a conditional order. (ibid. 111)

This brings me to the second difference between Benhabib’s and Honig’s approaches: the unconditional, unlike the conditional, recognises that there are always *remainders* within any system of right. Benhabib sees the refugee crisis as a sign that cosmopolitan or universal norms need to be expanded – that cosmopolitan law is imperfect but progressive – while Honig (ibid. 113) sees it as a remainder produced by the conditional order of universal hospitality. This echoes Rancière’s position that there will always be a miscount – in the count of the parts that make up the whole, there will always be a part that remains uncounted.

While agreeing with Benhabib’s position on some fronts, Honig believes her unconditional cosmopolitics can unsettle elements of Benhabib’s universalist position. Her approach, which

she calls “agonistic cosmopolitics”, is characterised as a double gesture, located in the paradox of founding, “that irresolvable and productive paradox in which a future is claimed on behalf of people and rights that are not yet and never may be” (ibid. 117). Rights claims (as particulars), within an agonistic politics, would not be subsumed under universal categories or universal norms, but will always cast light on how the universal produces remainders. Benhabib counters this point of critique by arguing that her account does not subsume the particular to the universal:

When rights are appropriated by new political actors and filled with content drawing on experiences that could not have guided those rights in their initial formulation, they *open up new worlds and create new meanings*. (Benhabib 2006: 159, my emphasis)

It is precisely because she does not want the particular simply subsumed under the universal, but rather for the universal to be adaptable to particular contexts, that she draws on Derrida’s notion of ‘iteration’. The universal in Benhabib’s account is not unchanging; its interpretation and reiteration creates new meaning. As the notion of ‘iteration’ suggests, the ‘original’ (in this case, a universal norm) is transformed and enriched with every iteration until it no longer makes sense to speak of an ‘original’ to which all particulars must conform. What we have, rather, is “historically encrusted practices of interpretation as well as action that are always open to future modifications, but always within certain constraints imposed by the weight of past practices” (ibid.). Universal norms are always open to new ways of being interpreted; however, they *are* conditioned by past forms or practices of interpretation. When we judge how we should treat the stranger in our midst, previous treatments of strangers create precedents, casting light on both what we should and what we should not do. Without recourse to some universal standard, it seems hard to imagine how we would be able to condemn oppressive or exclusionary practices (for example, if a state limited citizenship to men). For Benhabib, it is crucial to recognise that there is a disparity between the universal (or moral) and the particular, but it is crucial to attempt to mediate between the two.

Democratic iteration does not reduce the one to the other, but mediates between the two. For Benhabib, this need not imply the subsumption of the particular under the universal. That is only the case when considering the dialectic of the abstract universal (which, according to Hegel, is constituted by negating difference), but not when considering the dialectic of the concrete universal. Benhabib (ibid. 161) writes that the Hegelian position emphasises that

particularity cannot exist without universality, and that the subsumption of the former under the latter is ubiquitous. Simple concepts like ‘tree’ function by abstracting from particulars (oaks, willows) and subsuming them under a universal category. However, the universal concept does not only subsume. Where abstract universals are concerned, particulars are merely examples of the universal. Thus Honig sees the democratic iterations of universal norms as mere instantiations of those norms, unchanged, in particular circumstances. The concrete universal, on the other hand, contains differences and particulars – it is a “unity of distinct determinations” (Hegel in Bauman 2011: 78). The concrete universal only exists where there are two (or more) distinct entities, from which it can abstract in order to subsume, the act of which illuminates their differences.⁸ The universal concept therefore shows how

the particular is itself caught in the dialectic of the universal and the particular, and that the concrete universal is itself a manifestation of the contradictions *within* the particular. The concrete universal captures the dynamic process through which the particular is constituted. (Benhabib 2006: 162)

It is therefore (i) impossible to think of the particular without thinking of the universal, and (ii) possible to think of the universal while also recognising difference and recognising that it takes a dynamic process to constitute particulars, or then to mediate between the universal and the particular. Democratic iteration, as a process which constantly gives new meaning to existing norms, is such a dynamic process. It is also, as Benhabib (*ibid.*) points out, a form of immanent critique, as it exposes the self-contradictions of universalism and seeks to undermine the logic of exclusion inherent in democratic membership. As both Benhabib and Honig point out, it is inevitable that some will be excluded in any order of citizenship (the remainder, to use Honig’s term). If this will always be the case – if it is an “ontological truism” – Benhabib (*ibid.*) questions whether continually pointing out that “every universality is afflicted by some particularity and difference which it [...] must repress” really helps. She argues that the institutional, normative, and cultural resources within this order should be mobilised to perform an immanent critique, and that there is an *interplay* between the kind of politics Honig suggests – “the unofficial public sphere of citizens’ actions and social movements” – and the official public sphere. This interplay informs democratic iterations and

⁸ Bauman (2011: 78) uses love as an example to explain this. Love is a relation between two distinct beings, and their love only exists through their difference. The beloveds are distinct, but also identical, as both love and are loved. Love, as the universal, and the lovers, as particulars, only exists in this unity

jurisgenerative politics. Honig dismisses this interplay and, it would seem, Benhabib herself downplays the potential of one side of it. I return to this in the next section.

4.3.2 *Getting used to one another*

Jeremy Waldron (2006: 84) argues that Benhabib's position focuses too much on institutional processes and "high profile issues" and undervalues the extent to which quotidian norms and mundane interaction contribute to the emergence of cosmopolitan norms and, eventually, the codification of those norms into law. He argues that our everyday interactions already exhibit a cosmopolitan order:

So: there is an array of cosmopolitan norms that structure our lives together. Considered not just with reference to particular societies but as lives lived *in the world*, the interaction of people and peoples on the face of the earth is not an anarchy. Although there is not world state, these interactions exhibit a certain order, which we may call a cosmopolitan order. (ibid.)

Because *individuals* interact, and cosmopolitan norms deal with *individuals* (if we accept Kant's account), questions surrounding cosmopolitan norms should be addressed to individuals and not to states. What distinguishes cosmopolitan law from international law is that it offers rights and protections to individuals, and consequently it also imposes certain obligations on individuals and not on states (ibid. 86). Waldron (ibid. 89) holds that we should situate cosmopolitan hospitality not in the realm of the right of nations, but between "people and peoples". Waldron argues that mundane contact – travel, commerce, presumably also living together – does more toward spreading and entrenching cosmopolitan norms than does a bottom down approach (imposing cosmopolitan norms from an institutional level). He connects hospitality with what he calls Kant's "principle of proximity": the idea that states are to be formed among those who are "unavoidably side-by-side" and likely to enter into conflict with one another in the absence of juridical arrangements" (ibid. 92). Such juridical arrangements are the products of mundane interaction. To protect themselves and their property, a certain order is created to ease living together. This eventually becomes law. Waldron (ibid. 94) uses commerce as an example of how repeated contact between different people and peoples paves the way for cosmopolitan norms to be adopted without the need of an already existing formal juridical apparatus. Positive law does not simply "spring into existence": "positive law, particularly in its customary form, often emerges, which means that

its existence as law can be a matter of degree” (ibid. 95). The risk Benhabib’s theory faces is underestimating the jurisgenerative potential of human interaction and practice (ibid.).

Benhabib replies to Waldron’s criticism by pointing out that, firstly, Kant’s notion of cosmopolitan right as discussed in his third article of perpetual peace, should be read against the background of the preceding two articles:

[T]he right or law of hospitality ascribes to the individual the status of being a right-bearing person in a world civil society [...] The discourse of hospitality moves from the language of morals to that of juridical rights [...] Kant’s three articles of “Perpetual Peace,” taken together articulate principles of *legal cosmopolitanism*. (Benhabib 2006: 149)

Kant’s first category of right corresponds to the relation between citizen and state. International right corresponds to the relations between different states. His last category of right, cosmopolitan right, corresponds to the relation between an individual (or individuals) and a foreign state. Waldron is therefore not right when he sees hospitality as not concerning states at all (see Waldron 2006: 89). Hospitality is about states *and* civil society (Benhabib 2006: 150).

Benhabib further questions Waldron’s position by pointing out that mundane and repeated interaction or contact is no guarantee of the spread of cosmopolitan norms, or of preventing violence between different people(s) living together. She (ibid. 153) refers to empirical studies of genocide to highlight the paradox that neighbours, not distant strangers, are often the ones massacring one another. At such times, an imposition of positive law is needed.

Both Waldron and Benhabib have a point. While it is certainly so that genocide – the 1994 genocide in Rwanda, for example – is often committed by neighbours or takes place between groups sharing the same territory, it is also the case that in certain areas increased exposure to those who are different has led to (at the very least) toleration of difference. Appiah (2006: 78), drawing a distinction between *agreeing* with someone who is different and *understanding* the other person, argues that we simply need to *get used to one another*. He cites the increased toleration of lesbians and gays in Europe and North America as an example:

[W]here a generation ago homosexuals were social outcasts and homosexual acts were illegal, lesbian and gay couples are increasingly being recognised by

their families, by society, and by the law. This is true despite the continued opposition of major religious groups and a significant and persisting undercurrent of social disapproval. (ibid. 77)

Appiah believes that social change – increased tolerance of different sexual preferences, for example – comes about as a result of a gradually acquired new way of seeing things, which is the consequence of getting used to new ways of doing things. He therefore urges

that we should learn about people in other places, take an interest in their civilizations, their arguments, their errors, their achievements, not because that will bring us to agreement, but because it will help us get used to one another. (ibid. 78)

There are limitations to this view: it is also true that society is still incredibly homophobic and that some people are explicitly and even violently so. Appiah's emphasis is, therefore, on truly attempting to understand those that are different from you. He calls for “conversations across boundaries of identity” (ibid. 85) which aim not at persuasion – as if partaking in a debate – but engaging with the experiences and ideas of others. This engagement is an *imaginative* engagement. We can imagine beliefs that we do not share, we can make sense of things even if we find them strange, we can come to understand that which is strange through learning more about it (ibid. 93). There are countless differences between individuals and different groups of people, but there are also things that we share:

[S]tarting with our common biology and the shared problems of the human situation (and granted that we may also share cultural traits because of our common origins), human societies have ended up having many deep things in common. Among them are practices like music, poetry, dance, marriage, funerals; values resembling courtesy, hospitality, sexual modesty, generosity, reciprocity, the resolution of social conflict; concepts such as good and evil, right and wrong, parent and child, past, present, and future. (ibid. 96-97).

Richard Sennett (2013: 3) believes that the problem in the United States and in Europe lies in a form of tribalism, which sees solidarity with those who are like you and aggression against those who are different as two sides of the same coin. This echoes the argument made by Amartya Sen, discussed above, that a too rigid understanding of (tribal, ethnic, religious) group identity leads to violence. Identity is seen as black and white, us versus them, kill or be

killed. To protect *my* identity (and therefore myself), I have to harm you. It is tribalism that causes neighbours to kill neighbours. The question, then, is how to sever the link between solidarity (or group identity) and aggression or violence. Sennett discusses various possible responses to the presence of people who are different from us in our communities, but I briefly touch upon two such responses that stand in opposition to one another. The first response, as borne out by research conducted by Robert Putnam, is that people withdraw from the community when confronted with diversity within the community, whereas people in homogeneous communities are more sociable and more curious about the world (ibid. 4). The result of this withdrawal is that people live next to each other, often peacefully, but without knowing or understanding each other. The danger of this situation is that in times of crisis – scarcity of resources, for example – ignorance of the other and fear could lead to discrimination and violence between groups. This is similar to the danger with group rights in multicultural societies I pointed out earlier: by putting up barriers (whether physical, legal, or personal) between ‘us’ and ‘them’, ‘they’ will always be seen as completely different from us, and this can make us feel threatened (their culture will contaminate ours) or can blind us to their humanity. This reaction only entrenches tribalism.

The second response to difference Sennett finds in the thought of the nineteenth century German-Jewish sociologist, Georg Simmel. Simmel’s observations are similar to Putnam’s: inhabitants of expanding and increasingly cosmopolitan cities show signs of stranger-shock. City-dwellers are constantly stimulated in new ways, and therefore they “[don] a cold, rational mask in public to protect him- or herself against the waves of stimulation coming from outside; if the presence of others is felt, the urbanite seldom shows what he or she feels” (ibid. 38). This ‘mask’ Simmel calls ‘sociality’. However, sociality differs from Putnam’s withdrawal. It “[recognizes] those wounds of mutual experience that do not heal”, it is “a mutual awareness instead of action together [...] [it] asks you to accept the stranger as a valued presence in your midst” (ibid.). The mask is a coping mechanism, like withdrawal, but one that allows you to live in the world with those who are different, to tolerate them, whereas withdrawal is not only withdrawal from the other, but also from the world. The difference between the two responses – both reactions born out of stranger-shock – is that the former deepens the us/them divide, while the latter recognises that the presence of strangers “can also deepen social awareness; the arrival of the stranger can make others think about values they take for granted” (ibid.).

Of course, it is easier said than done to say that people should just start acting and reacting differently when confronted with strangers. Sennett (ibid. 221) proposes what he calls “everyday diplomacy” as a way to live alongside or together with people we do not understand, cannot relate to or are in conflict with. When utilising everyday diplomacy, members of communities acknowledge trauma and create social spaces within which to interact using coded gestures (ibid.). Everyday diplomacy also utilises a (social) mask, but this is not a mask worn to protect us, or as the after-effect of stranger shock. This can be one function it fulfils, but its main aim is to express. The social mask, a neutral mask, enables expression. Sennett refers to the neutral masks – neither smiling nor frowning – sometimes worn by actors in the theatre. This mask can be worn by any actor, regardless of gender or physical appearance. The actors cannot express with their faces, and therefore have to work hard to reveal their emotions to the audience with their hands and bodies; their gestures create a common space with the audience (ibid. 245). What is important for him is that we actively participate in the same sphere as others, and are not just passively present. So if the stranger arrives, we should not withdraw, nor should we simply put on masks and leave it at that. The arrival should lead to thinking about what we take for granted, which should lead us to actively seek a way to cooperate, which is done through everyday diplomacy. To my mind, the process of democratic iteration is precisely this act of taking that which we took for granted (the universal) and questioning it. Universalism is also the neutral mask we don, as a reaction to the increasing diversities of our communities, but it is precisely this neutrality which allows us, with some hard work, to interact with the strangers entering our community, like the actor interacts with his audience, and to create a common space.

Cosmopolitan norms already form part of many documents in international law as well as the constitutions of democratic states. As I have also mentioned, bodies such as the UNHCR and local organisations exist precisely in order to implement and protect these norms and rights. Perhaps this is a bit of a chicken/egg situation: do cosmopolitan norms become entrenched in society through codifying them into laws which citizens then have to obey, or do they become laws only after they have become habits, the products of everyday interaction? As Benhabib correctly points out, the latter by no means *guarantees* the spread of cosmopolitan norms. However, neither is the spread of these norms guaranteed by turning them into positive law and imposing it on situations where these norms are absent. Both seem necessary. Benhabib, in responding to Honig, recognises that there is an interplay between formal public institutions and informal public action. The institutionalisation of cosmopolitan

norms act as a guide and a safety net in times of crisis, but they mean nothing if they are not also developed through human interactions. On the other hand, human interaction or mundane interactions cannot guarantee these norms, as Sennett (2013: 55) points out: “[the] results of bonding in the community have to lead somewhere; action needs a structure, it has to become sustainable”.

This “bonding in the community” or “mundane interaction” could indeed spread cosmopolitan norms on an individual level. Increased interaction could lead to social awareness and more tolerance and understanding between different groups, which could snowball into social movements that bring about change. However, this is only of limited help to refugees. As with political narrative (discussed earlier), mundane interaction offers a partial solution to a very big problem. Interaction with people who are other is only possible if we encounter them – if we already share the same space with them. Where refugees are concerned, this is often not the case. The issue is not how to interact with them in a shared space, but whether they should be allowed to enter that space at all. It is an issue which plays out mostly at our borders and in refugee camps and detention centres. Therefore, it is not primarily an issue of individual responsibility toward the other, but one of the state’s responsibilities toward refugees.

Benhabib and Waldron are therefore talking about two different things: individual responsibility and state responsibility. The refugee crisis certainly calls individuals to action, but it is primarily an issue that states need to address. As mentioned above, Waldron seems to miss the importance of institutions in Kant’s idea of cosmopolitan right. All three of Kant’s categories of right are concerned with establishing institutions that can bring about a situation of right. Domestic right relies on a republican constitution which dictates that the legislative powers of the state should guarantee the equality of citizens and safeguard their legal personhood. It is only when these institutions are in place that members of the state can freely interact. The second category of right not only deals with the interaction between different nations, but provides a universal constitution (the republican constitution), which governs the interaction between different nations. Finally, Kant’s cosmopolitanism (like the earlier two categories) is a legal cosmopolitanism, which rests on the idea that every individual has the right to hospitality. It is therefore concerned with juridical right. This right must be established before interaction is possible; it is recognition of this right which causes host nations to open their borders to refugees and grant them certain rights (Benhabib 2006: 148-149). Domestic, international, and cosmopolitan institutions therefore guide or structure our

individual interactions. These interactions can, to a certain extent, spread cosmopolitan norms, and they definitely help to entrench cosmopolitan norms, but these norms first have to be established and institutionalised in cosmopolitan and international law, and in domestic constitutions.

4.4 Conclusion

In this chapter, I considered the question of political membership for refugees and specifically Benhabib's response to it. In the first section, I demonstrated the importance of the notion of speech and active participation in political processes inherent in the deliberative model of democracy, following Hannah Arendt. Arendt argues that (i) politics is concerned with the relevance of speech, (ii) where individuals are deprived of a place in which their speech makes sense, their full humanity is denied, and (iii) the ability to speak and to be understood is closely linked with the ability to act in public. Drawing on Rancière, I discussed the very political nature of the distinction between those with speech and those without. Many refugees do not have a political voice, and therefore their rights claims are dismissed. Benhabib's suggested model of deliberation would give refugees a voice and allow them to become members of political communities.

In the second section, I looked at the different possibilities for political membership. Benhabib sees the right to belong to a political community as a human right. Membership on some level can therefore not be denied indefinitely. I discussed three ways of extending membership: the distribution of membership on different levels (sub- and supranational), political protest as a means of demanding membership, and political narratives as a way of influencing and changing the norms which determine who we include and exclude from our polities. However, both protest and narratives are limited if not supported by institutions (such as those I suggested first) – refugees need spaces within which they can tell their stories or protest.

In the final section, I discussed two points of critique levelled against Benhabib's theory. In the first, Bonnie Honig criticises Benhabib's universalism, arguing that her cosmopolitan hospitality is too conditioned by a Western or European model of universalism. In its stead, Honig puts forth a notion of unconditional hospitality, in which rights claims will not be

subsumed under a universal and will remain open to change. Benhabib counters Honig's criticism by pointing out that democratic iteration leads to the universal being adopted in new ways; it is therefore open to change. Secondly, I turn to Jeremy Waldron's argument that Benhabib underestimates the role mundane, everyday interaction plays in spreading cosmopolitan norms. I discussed various ways in which interaction between different people could further tolerance and cosmopolitan values. However, I concluded that while cooperation and interaction *can* spread cosmopolitan norms, making living together easier, the refugee crisis is one that should be addressed by states and state institutions. Cosmopolitan right is concerned with the interactions between foreign individuals and states, and should therefore focus on political institutions.

Concluding remarks

The aim of this thesis was to establish the responsibility of democratic states toward refugees and asylum seekers. This question was asked within the broader framework of the constitutive dilemma facing democracies: the tension between the sovereignty of the state, and the universal or cosmopolitan human rights norms upon which the constitution of the state is founded. Inherent in the idea of a democratic people is the fact that they are self-determined: the members of the democratic state decided to establish themselves as a people. In this act of self-determination, a border is erected between them (“we, the people”) and those who will remain outsiders. It is therefore an act of inclusion and exclusion, justified to those who are included (as an expression of their will), but not to those who are excluded. However, self-determination is not the only defining characteristic of modern democracies. In their constitutions, democratic states formulate rights which their citizens are entitled to. These rights are not, however, citizens’ rights – they are *human* rights. Democratic constitutions therefore adhere to the idea(l) of universal human rights and cosmopolitan norms. Because these norms are universal, they impose a standard which should govern, or at least influence, the actions of the state. This, however, undermines the sovereignty of the state. The question of the responsibility of states is also the question of how this tension should be resolved.

My answer was worked out in four stages. First, it had to be shown why the figure of the refugee specifically brings this tension to the surface, and what the possible responses from the state could be. When refugees enter foreign territory, they seek protection. As I have argued (in Chapter 1), refugees are people who are left without the protection their state should offer them. Refugees are also fleeing danger: war or persecution, for example. They are therefore individuals who are in desperate need of protection. The protection a state should offer its citizens includes a protection of their fundamental human rights. When refugees enter a foreign country seeking protection, they in effect lay claim to their human rights. If this country has a democratic constitution, they lay claim to the rights that form part of that constitution. From the cosmopolitan perspective, the state’s responsibility is clear: take them in, protect them, and ensure their rights. From the perspective of sovereignty, it is less clear. States should have the right to decide whether they give refuge to these strangers or not, and no universal standard should impose itself on this decision.

In Chapter 1, I examined these two options by looking at arguments for closed borders (or absolute sovereignty) and for open borders (or extreme cosmopolitanism). I found neither of these alternatives desirable. Bar the practical difficulties, arguments in favour of one or the other of the positions fail to convince. Arguments for closed borders rest on an exclusionary politics which belies the human rights norms found in the constitutions of states. States cannot claim to be modern (and specifically liberal) democracies, and deny the importance of *human* – not citizen – rights. The other alternative would be to remove all borders, abolish all states, and form a world-state. If practical matters could be overcome, and language and cultural differences not be a problem – i.e. if everyone conformed to a universal culture – it is still not clear that we should desire this kind of uniformity. Furthermore, the world-state is undesirable as it has the potential of gaining too much power, with no bodies outside of the state which could exert influence when it abuses the rights of its citizens. While it would not make sense to talk of a refugee fleeing his or her country were such a system in place, the fundamental characteristic of refugeehood still holds: in a world-state, an individual can still be left without the protection of his or her state. Only in this system, he or she has nowhere else to go.

The second stage of my answer therefore focused on finding a way to balance, or, to use Benhabib's term, to mediate between the two extremes. Kant seems to believe that it is possible to build a global society which is governed by the same principles, without demolishing the state system. His three definitive articles for perpetual peace describe how it is possible to bring about a global situation of right. For this to be achieved, a situation of right must be realised on three levels: the civic or domestic, the international, and the cosmopolitan. These three spheres of right respectively deal with the relations between citizens and states, different states, and foreign individuals and states. These three spheres are interdependent: citizens are represented in international relations by their states, states form a federation and so ensure that each state acts in accordance with the standard of right, and cosmopolitan right ensures that individuals who are outside of their states are protected and received hospitably. Where the relation between citizen and state is broken – as is the case with refugees – cosmopolitan right ensures that that person is welcome in another state, while other states in the federation can influence the refugee's (former) state to bring about a situation of domestic right. Where an individual's life is in danger, the right to hospitality cannot be denied (although Kant does place limitations on this right in other situations) – the state has to grant entry. This, then, is the first responsibility democratic states have toward

refugees. If states are to meet their responsibilities, the right to hospitality should in some way be institutionalised. It is beyond the scope of this thesis to discuss all the various ways in which this can be done, and I therefore only briefly discussed a few alternatives. This right has already been codified in the UN Declaration and similar documents of international law, rendering every individual not only a citizen of their country, but also a world-citizen. Another way to bring about cosmopolitan right, as suggested by Nussbaum and Pogge, would be to reform national and international political and economic institutions. As I identified the refugee problem as primarily a political problem, I favoured a more political solution (which can work alongside suggestions for economic reform and distributive justice).

In my third chapter, I discussed three influential approaches to questions of global justice, specifically pertaining to the issue of welcoming the stranger into our midst, or living alongside people who differ from us. I showed that both multiculturalism and the ‘law of peoples’ do not provide us with a way of institutionalising the right to hospitality. Neither provides arguments for why states should admit refugees. Multiculturalism primarily focuses on the rights of minorities that are already part of the state (while also facing several other problems), while Rawls restricts himself to Kant’s second category of right. I argued that Benhabib’s proposed solution offers the best response to the question of institutionalising hospitality. Following Kant, Benhabib proposes that states form a world-federation. The federation would be based on cosmopolitan norms, which can be interpreted and given new meaning by each state through the process of democratic iteration. Democratic iteration allows the reformulation of membership norms to become more inclusive. If this is done, institutions can also be reformed in a way that would secure entry for refugees. But democratic iteration and reformulated membership norms would not only help refugees to gain entry into the state; these strategies would also help them become members of the state by allowing them to take part in political processes. Within the Kantian framework this is possible, as Kant sees citizenship (and patriotism) as membership to and (loyalty to) a republican state (and constitution), and therefore not based on which cultural or ethnic group you belong to. This means that refugees can, in principle, become members of a democratic state.

I devoted my final chapter to the question of membership. If states have a duty to allow refugees to enter their territories, do they also have a duty to extend membership to refugees? To answer this, I questioned why Benhabib chooses a deliberative model of politics – why she emphasises the importance of speech and dialogue. Arendt provides an answer: speech

and action are closely linked, and the ability to do these things is a fundamental human ability. However, the one only makes sense if accompanied by the other, and both only make sense or carry meaning if they are seen and heard by others. Appearing before others, acting and speaking before them, is a confirmation of one's humanity. Where one cannot speak or act, one's humanity is denied. This implies that, for one to live a fully human life, one should at least have the option of appearing in public, of having a voice. This, in turn, implies political participation, which is a privilege of members of a political community. If refugees cannot voice their concerns, and if they do not partake in political processes which influence them, they are rendered voiceless. To regain their voices, they need to have membership extended to them. Democratic iterations do not only change existing membership norms, but they also afford refugees the opportunity to make their voices heard. From this I concluded that states do not only have the responsibility to receive refugees hospitably, but also to extend political membership to them. I then turned to the possible ways in which this can be achieved. While discussing informal actions that refugees (and citizens of the host countries) can take to incorporate the former into political processes (such as protest action and constructing political narratives), I emphasised that the issue must primarily be addressed by state and other institutions. I discussed Benhabib's suggestion of political membership on levels other than that of national citizenship – sub-national (city-citizenship) and supranational (citizenship to a federation). This would ensure that refugees are represented on some level. Finally, I turned to Honig's and Waldron's criticisms of Benhabib. Honig argues that Benhabib's universalism forecloses the possibility of new rights emerging, as it always subsumes the particular under an existing universal. Benhabib counters this by pointing out that democratic iteration is not a process of subsuming the particular under the universal, but constantly mediating between the two. Every new mediation – every iteration – also gives the universal right new meaning and adapts it to the particular situation. Waldron argues that Benhabib underestimates the potential of mundane interaction in bringing about a situation of cosmopolitan right. Benhabib responds to this by emphasising the importance of institutions in Kant's cosmopolitanism, and specifically the fact that, where refugees are concerned, we are dealing with the relation between an individual and a political institution (the state).

In short: the democratic state has the responsibility to give refuge to those seeking it, and to extend political membership on some level to refugees. Precisely how this is to be done would require more study and deliberation than this thesis allowed. Broadly, I (along with Benhabib) suggest institutional reform on a local, national, and global level. State sovereignty

should be limited by such cosmopolitan norms as would provide equal rights to all. Supranational institutions such as the UNHCR should be supported in their efforts by democratic states. Membership norms should be in principle justifiable to those who are excluded, and open for deliberation and adaptation where needed. Ultimately, I hold that a state cannot call itself democratic if it refuses to grant refugees their rights.

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