



Introduction

Humanity Washed Ashore

Unauthorized migration has become one of the most visible and contentious political issues everywhere. As the catastrophe in Syria unfolds, the more ordinary atrocity of abject poverty continues to uproot populations.¹ Perhaps the most alarming images related to this phenomenon are those of unauthorized migrants crossing the sea in insecure vessels. For years newspapers have been publishing photos of migrants' boats from locations as far from each other as the Canaries and Indonesia. These rickety vessels are overloaded with men, women, and children, drifting upon vast expanses of water. The spectacle has reached a new extreme in two areas of the Mediterranean – the Aegean Sea and the Waterway between Sicily and North Africa. Sunbathers confront exhausted survivors pulling themselves out of the water.² Fishermen fear they might lift dead bodies with every fresh net pulled aboard.³ The most iconic of these images is the widely circulated photograph of a Syrian toddler lying face down on the beach in the Turkish resort town of Budrum. This macabre shot immediately went viral and within hours the hashtag *#KiyiyaVuranInsanlik* – “humanity washed ashore” – became the top trending topic on Twitter. A few days later, the image of the boy – his name became a matter of some dispute – was cast as a

¹ Alice Su, “How Do You Rank Refugees,” *The Atlantic*, November 22, 2013, available at www.theatlantic.com/international/archive/2013/11/how-do-you-rank-refugees/281771/ (last accessed January 5, 2016) (discussing the difficulties East African migrants and refugees are facing in Jordan, with the country facing an enormous influx of Syrian nationals fleeing the civil war).

² Jonathan Samuels, “Emotional Scenes As Sunbathers Help Refugees,” *Sky News*, available at <http://news.sky.com/story/1549651/emotional-scenes-as-sunbathers-help-refugees> (last accessed January 5, 2016).

³ Nick Squires, “Mediterranean Migrant Tragedy: Fishermen and Naval Officers Describe Horror and Despair,” available at www.telegraph.co.uk/news/worldnews/europe/italy/11549236/Mediterranean-migrant-tragedy-fishermen-and-naval-officers-describe-horror-and-despair.html (last accessed January 5, 2016).

symbol of our times.⁴ This book aims to give an answer to one question: What can the phenomenon these images capture tell us about the nature of legality?

It will come as no surprise that the contemporary migration crisis and its maritime aspects are a matter of some significance to legal theory, particularly international legal theory. As Hilary Charlesworth wryly observed, “International lawyers revel in a good crisis.” Crisis becomes a focal point particularly in a genre of international law characterized by a desire for “a counterweight to the formalism of the study of rules.”⁵ Indeed, it has been suggested that for the international lawyer crisis plays the role precedents play in the case method.⁶ As a so-called discipline of crisis, international law has often been exposed to a number of recurring pitfalls that seem to come with this fraught territory. These might be characterized as a certain penchant for drama.⁷ Yet critical engagement with an ongoing crisis that has for too long fallen below the radar of

⁴ Before the end of the day, this article appeared: Ishaan Tharoor, “A Dead Baby Becomes the Most Tragic Symbol Yet of the Mediterranean Refugee Crisis,” *The Washington Post*, September 2, 2015, available at www.washingtonpost.com/news/worldviews/wp/2015/09/02/a-dead-baby-becomes-the-most-tragic-symbol-yet-of-the-mediterranean-refugee-crisis/ (last accessed September 22, 2015). On the dispute over the boy’s name, see “What’s in the Name of a Dead Syrian Child?” *Al Jazeera America*, available at <http://america.aljazeera.com/opinions/2015/9/whats-in-the-name-of-a-dead-syrian-child.html> (last accessed February 5, 2016).

⁵ Hilary Charlesworth, “International Law: A Discipline of Crisis,” *The Modern Law Review* 65 (2002): 377. See also Josef L. Kunz, “Natural-Law Thinking in the Modern Science of International Law,” *The American Journal of International Law* 55, no. 4 (1961): 954 (observing that “periods of profound crisis foster a flight into natural law as ideas and values on which man can rely, as a barrier against the misuse of law”).

⁶ This was Michael Reisman and Andrew Willard’s proposal, which Charlesworth rejects. Michael Reisman and Andrew Willard (eds.), *International Incidents: The Law That Counts in World Politics* (Princeton: Princeton University Press, 1988), 15. See also Martti Koskenniemi’s foreword to Fleur Johns, Richard Joyce, and Sundhya Pahuja, *Events: The Force of International Law* (Oxfordshire: Routledge, 2011), xviii (recalling his work at Finland’s Foreign Office: “for the political decision makers, every situation is always new, unprecedented, and very often . . . a crisis. It then became the legal advisers task to calm down that decision-maker by explaining that . . . far from being singular or unprecedented . . . the situation . . . was in fact a recurrent pattern and could therefore be treated in the same way ‘we’ had done with those previous cases”).

⁷ See Martti Koskenniemi, “International Law in Europe: Between Tradition and Renewal,” *European Journal of International Law* 16, no. 1 (2005): 113–124 (on international law and kitsch); Karen Knop and Susan Marks, “The War against Cliché: Dispatches from the International Legal Front,” in Christine Chinkin and Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge: Cambridge University Press, 2015), 3–22; Gerry Simpson, “The Sentimental Life of International Law,” *London Review of International Law* 1 (2014): 1–27.

international attention can be revealing.⁸ Events of momentous historical importance are unfolding.⁹ In confronting these events, I will argue, the formalism of rules, indeed, does not give us sufficient guidance.

The question what are the appropriate policy responses to the migration crisis has become an obsession of sorts, not only in Europe, but also in other parts of the so-called developed world. The many calls for action are as contradictory as they are dramatic. Juxtapose, for example, two statements by two very different politicians in Europe. Jean-Claude Juncker, president of the European Commission, proclaimed in a resounding speech: “Europe is the baker in Kos who gives away his bread to hungry and weary souls.” He referred to the seventy-six-year-old Dionysis Arvanitakis – an unlikely celebrity who had become famous for distributing his oven’s bread among the island’s newcomers.¹⁰ In contrast, Laszlo Toroczkai, a Hungarian mayor of the far right, characterized Brussels’ ostensible message of welcome: “If one jumps from the 20th floor, one could view this as an expression of freedom from a liberal point of view, while in fact it looks more like suicide.”¹¹

These, of course, are expressions of political sentiment rather than pronouncements of law. But the legal terrain is just as rich with contradiction. The European Court of Human Rights (ECtHR), an often-lauded human rights tribunal, has in its jurisprudence on unauthorized migration developed some of its most fundamental tenets of human rights law. In celebrated decisions it has meted out judgments recognizing the prohibition on inhuman and degrading treatment, the right to asylum, the prohibition on collective expulsion,

⁸ Of course, not entirely; indeed the “crisis” has invoked for quite a long time. See, e.g., Deborah Anker and Michael L. Posner, “The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,” *San Diego Law Review* 19 (1981–1982): 9–90; Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1996); Aristide R. Zolberg, Astri Suhrke, and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford: Oxford University Press, 1992), 37–39.

⁹ Johns, Joyce, and Pahuja, *Events*, 1 (noting that “international lawyers listen, above all, for the screech accompanying an event”).

¹⁰ European Commission, Press release, “State of the Union 2015: Time for Honesty, Unity and Solidarity,” available at http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm (last accessed February 5, 2016). I will spend some time interpreting this image below, in Chapter 6.

¹¹ Dan McLaughlin, “Borderless’ Europe in Peril Amid Refugee Crisis,” *Al Jazeera America*, available at <http://america.aljazeera.com/articles/2015/9/19/borderless-europe-in-peril-as-hungarys-fence-brings-calm-and-chaos.html> (last accessed January 5, 2016).

and the right to effective remedy.¹² In the context of maritime migration in particular, it expounded its doctrine of extraterritorial personal jurisdiction. The latter is central to contemporary understandings of human rights law.¹³ Yet it would be misleading to focus on these decisions without putting them in the context of legal instruments formulated by executive agencies to *prevent* migrants and refugees from seeking human rights remedies.¹⁴ Good examples are bilateral and multilateral agreements that outsource border-enforcement activities to developing countries.¹⁵ Developed countries have sought to frustrate the access of refugees to asylum before these people enter their jurisdiction, while seemingly following the letter of the law.¹⁶ They have harnessed international law in efforts to exclude people from human rights remedies.¹⁷

The policies of the various actors participating in the transnational management of migration may seem like different moving parts of one system. But their rationales and their consequences do not fit together comfortably. Many affluent states, in Europe and around the world, make public legal commitments to protecting the world's most vulnerable populations. At the same time they seek to prevent such protections from stimulating demand for access and employ various measures designed to “deter” unauthorized migration. The latter is a polite term for the idea that some migrants must suffer to prevent other migrants

¹² See, e.g., *Khlaifia and others v. Italy*, Application no. 16483/12; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09; *M.S.S. v. Belgium and Greece*, Application no. 30696/09.

¹³ *Hirsi*; See generally, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011); Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015), 22–27.

¹⁴ For a good compilation of the particular role of the executive branch, see Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds.), *Transnational Law Enforcement and Human Rights: The Dark Side of Globalisation* (London: Routledge, forthcoming).

¹⁵ See, e.g., James Hathaway, “The False Panacea of Offshore Deterrence,” *Forced Migration Review* 26 (2006): 56–57; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2013), 63.

¹⁶ James Hathaway and Thomas Gammeltoft-Hansen, “Non-Refoulement in a World of Cooperative Deterrence,” *Columbia Journal of Transnational Law* 53 (2015): 235–284 (arguing against this tendency).

¹⁷ I have argued elsewhere that positive human rights law and particularly human rights tribunals have at times played a role in this process. Itamar Mann, “Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013,” *Harvard International Law Journal* 54, no. 2 (2013): 315–391.

from seeking remedies.¹⁸ Moreover, their executive, judicial, and legislative bodies speak in different technical vocabularies and often express different normative commitments. The international legal environment of “migration management” is thus fragmented and confusing (even in comparison with other subfields of international law).¹⁹ James Hathaway and Thomas Gammeltoft-Hansen have gone so far as saying that the prevailing attitude is “schizophrenic.”²⁰ “Human rights law” is rhetorically invoked, but there is no “basic norm” that is agreed upon or otherwise available.²¹ It is thus hard to escape the conclusion that underlying this universe of law and policy there are enormous unresolved tensions (and, as explained in this book, an existential embarrassment).²² Everyone understands that migrants clamoring on the doorsteps of one’s country demand a legal response. It is even clear enough that migrants deliver a basic message about the very *nature* of international law.²³ But what is that message?

¹⁸ A textbook violation of the Kantian categorical imperative to “Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.” The imperative has enjoyed some recognition within extant understandings of human rights law, in the context of the principle of human dignity. See Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights,” in Claudio Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Dordrecht, Heidelberg, NY: Springer, 2012), 63–79.

¹⁹ This is of course not true only about migration and is a much commented feature of international law more generally. See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskeniemmi A/CN.4/L.682 (2006); Vincent Chetail, “Sources of International Migration Law,” in Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (eds.), *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012).

²⁰ Hathaway and Gammeltoft-Hansen, “Non-Refoulement in a World of Cooperative Deterrence.”

²¹ The idea that all of international law ultimately leans on one basic norm (“*grundnorm*”) was advanced by German jurist Hans Kelsen in the 1930s and became central to discussions in international law ever since. For an excellent study of Kelsen’s work, see Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013).

²² Compare with Samuel Moyn, “The Embarrassment of Human Rights,” *Texas Journal of International Law: The Forum* 50, no. 1 (2015): 1–7 (criticizing my position).

²³ For an alternative conceptualization of the significance of this crisis to the basic understanding of international law, see Jaya Ramji-Nogales, “Migration Emergencies,” *draft on file with the author*; Jaya Ramji-Nogales, “Undocumented Migrants and the Failures of Universal Individualism,” *Vanderbilt Journal of Transnational Law* 477 (2014): 699–763. For a good analysis of the significance of unauthorized migration for a critique of human rights, see Moria Paz, “Between the Kingdom and the Desert Sun: Human Rights,

The current global migration and refugee crisis, we are told time and time again, is “a global exodus unlike any in modern times.”²⁴ Yet viewing it as historically exceptional serves to conceal rather than to expose the most important lessons this crisis can teach.²⁵ This book will look to the history of unauthorized maritime migration since the mid-twentieth century in order to articulate a new theory of human rights. This theory will be explained against the backdrop of the argument that the “refugee crisis” is far from being as exceptional as it may seem.²⁶

Human Rights and Bare Life

When bodies are washed ashore, we are made keenly aware of the fragility and indeed the false promises of human rights law. From a historical perspective, the dynamic is a familiar one. The plight of migrants today recalls Hannah Arendt’s insight about the interwar refugee crisis.²⁷ The problem Arendt pointed to, in more powerful terms than anyone before her, was the problem of the relationship between the “citizen” and “human.”

In the political tradition that began with the French Revolution, the rights of humans were to be legally secured through their membership in political communities, imagined as particular social contracts. Article 1 of the 1789 *Declaration of the Rights of Man* reads: “Men are born and remain free and equal in rights.” The natural equality of human beings was to be protected by citizenship. The social contract tradition reflected

Immigration, and Border Walls,” *Stanford Public Law Working Paper No. 2526521* (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526521 (last accessed May 3, 2016).

²⁴ Griff Witte, “New U.N. Report Says World’s Refugee Crisis Is Worse than Anyone Expected,” *The Washington Post*, June 18, 2015, available at www.washingtonpost.com/world/europe/new-un-report-says-worlds-refugee-crisis-is-worse-than-anyone-expected/2015/06/17/a49c3fc0-14ff-11e5-8457-4b431bf7ed4c_story.html (last accessed September 22, 2015).

²⁵ Historicizing the crisis is one way of avoiding the lure of crisis, which international lawyers have often taken as an opportunity for simplified, de-contextualized, and ultimately counter-productive focus on “great men.” See Charlesworth, “International Law: A Discipline of Crisis,” 388.

²⁶ On the regularization of emergencies in the contemporary stage of globalization, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, 1st edition (Stanford: Stanford University Press, 1998), 38.

²⁷ Hannah Arendt, *The Origins of Totalitarianism*, New edition (New York: Harcourt, Brace, Jovanovich, 1973); Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (New York: Oxford University Press, 2015).

in these documents had an enormous influence on contemporary legal theory, both on the domestic and on the international spheres. The imagination of the social contract provides the normative justification for contemporary liberal conceptions of sovereignty.²⁸ For legal theorists of diverse political orientations, domestic law derives its legitimacy from the social contract. This domestic legitimacy in turn allows the state to grant consent to positive international law. The state can accede to treaties. Its behavior – when coupled with a belief that it is carried out under legal obligation (*opinio juris*) – constitutes customary international law. To use Louis Henkin’s often-quoted words, international law forms a social contract among states.²⁹

But in her essay “The Decline of the Nation State and the End of the Rights of Man,” Arendt famously demonstrated the failures of this model of political life. When massive populations in Europe became de facto stateless, the legal regimes of states granted them no protective remedy. When states confronted foreigners and had to choose between protecting their citizens and protecting all humans, the rights of citizens prevailed. *The Rights of the Man* – crown jewel of the French Revolution and of the social contract tradition – proved illusory. As long as human rights were grounded in social contract, there could be no structural commitment to humans per se. As Arendt wrote, humans with no effective citizenship had no “place in the world.”³⁰ In this situation, the fate of “bare life” – human life stripped of membership in a particular political community – is at best that of animals.³¹ Charitable organizations might choose to feed

²⁸ Fernando R. Tesón, “The Kantian Theory of International Law,” *Columbia Law Review* 92, no. 1 (1992): 53–102, doi:10.2307/1123025; Luke Glanville, “The Antecedents of ‘sovereignty as Responsibility,’” *European Journal of International Relations* XX, no. X (2010): 1–23 (on the roots of contemporary views in classical social contract theory); for a critique, see Martti Koskeniemi, “What Use for Sovereignty Today?,” *Asian Journal of International Law* 1, no. 01 (2011): 61–70, doi:10.1017/S2044251310000044. For a critique, see Paul W. Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2008).

²⁹ See Louis Henkin, “That ‘S’ Word: Sovereignty, Globalization, and Human Rights, Et Cetera,” *Fordham Law Review* 68, no. 1 (1999): 12; Anne Marie Slaughter and Jose E. Alvarez, “A Liberal Theory of International Law,” *Proceeding of the Annual Meeting (American Society of International Law)* 94 (2000): 24 (explaining the relationship between liberalism in international law and international relations); Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1998), 28; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press), 253 (explaining the idea of a social contract among states in the context of classical social contract theory).

³⁰ Arendt, *The Origins of Totalitarianism*, 296.

³¹ Arendt, *Origins of Totalitarianism*, 302. Compare with Agamben, *Homo Sacer*.

refugees or the stateless and extend some compassion to them. But law does not give them enforceable rights. This is precisely what seems to be happening today, on a wider, global, scale:³² Humanity washed ashore.

Arendt's critique inflicted a devastating blow on the entire tradition of human rights. For critically inclined scholars at the intersections between law, politics, and the humanities, the debt to Arendt is often explicit and well articulated.³³ Related insights about the lack of enforcement of international human rights generate a persistent concern among scholars that international law is really not "law" at all.³⁴ For some scholars, "human rights law" appears as an urge to wish moral prescription into legal obligation, misleading at best, destructive at worse.³⁵

The post-World War II period – which *Origins of Totalitarianism* does not address – is sometimes regarded as a kind of "international constitutional moment."³⁶ The emergence of human rights treaties takes up the central part in this celebratory rhetoric. During this period the emphasis of human rights law shifted from constituent assemblies and their declarations and constitutions to public interstate agreements. Treaties, some suggest, have allowed human rights to come of age and recognize the rights of the "person," independent of the legal regime of any particular state.³⁷ Special emphasis is given to the United Nations

³² This has been reiterated in contemporary scholarship. See, e.g., Jacques Rancière, "Who Is the Subject of the Rights of Man?" *The South Atlantic Quarterly* 103 (2004): 299 (commenting that Arendt's "analysis, articulated more than fifty years ago, seems tailor-made, fifty years later, to fit the new 'perplexities' of the Rights of Man on the 'humanitarian' stage"); Gündoğdu, *Rightlessness in an Age of Rights*; Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (New York: Oxford University Press, 2012).

³³ See, e.g., Samuel Moyn, *The Last Utopia: Human Rights in History*, Reprint edition (Cambridge, MA: Belknap Press, 2012); Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (Berkeley: University of California Press, 2011); Miriam I. Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (Berkeley: University of California Press, 2011); Nicola Perugini and Neve Gordon, *The Human Right to Dominate*, 1st edition (New York: Oxford University Press, 2015).

³⁴ See, e.g., Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, 1st edition (Oxford and New York: Oxford University Press, 2006); Anthony D'Amato, "Is International Law Really Law," *Northwestern University Law Review* 79 (1985–1984): 1293.

³⁵ See, e.g., Joseph Raz, "Human Rights without Foundations," in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 321–338.

³⁶ See, e.g., Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment," *Harvard International Law Journal* 43 (2002).

³⁷ Article 3 of the UN Charter provides that "Everyone has the right to life, liberty and security of person."

Charter (1945), the Charter of the International Military Tribunal at Nuremberg (1945), the Universal Declaration of Human Rights (1948), and the Geneva Conventions (1949).³⁸ Particularly notable in this context are specialized treaties that protect refugees and stateless people. These two categories were interchangeable for Arendt, but came to be understood as distinct. The Refugee Convention defines refugees as those who suffer from a “well-founded fear” of being persecuted for reasons of political opinion race, religion, nationality, or membership of particular social groups. The preference for these groups was shaped largely by the experience of World War II.³⁹ The two major human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic, and Cultural Rights (both from 1966), are viewed as extensions of this postwar project. The International Criminal Court, established by the Rome Statute (1998), ostensibly reflects the way the international community has incrementally expanded a framework protecting persons the world over.⁴⁰ Taken together, these documents provide the basis for what Ruti Teitel has called “humanity’s law.”⁴¹

But the basis for all these instruments is state consent. The postwar international legal order did not solve the principal problem of the refugee – the one Arendt identified. This was the problem of legal protections *independent* of citizenship or of state consent. Using a formulation that has both inspired and baffled theorists and lawyers ever since, Arendt called this the problem of “the right to have rights.”

Within the terrain of international law the doctrine that most clearly reflects the recognition of rights independent of state consent is *jus cogens*: law deemed binding upon all international actors regardless of their agreement. *Jus cogens* is defined in the Vienna Convention on the Law of Treaties as law that is accepted and recognized by the

³⁸ The creation myth around these legal instruments is one about a world rising “from the ashes of war.” See Barry Carter and Allen Weiner, *International Law*, 6th edition (New York: Wolters Kluwer, 2011), 746.

³⁹ James C. Hathaway, “Reconsideration of the Underlying Premise of Refugee Law, A,” *Harvard International Law Journal* 31 (1990): 129.

⁴⁰ This incrementalist sensibility pervades international law from its enlightenment origins. See Immanuel Kant, Idea for a Universal History from a Comparative Perspective; Martti Koskeniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization,” *Theoretical Inquiries in Law* 8, no. 1 (2007): 9–36.

⁴¹ Ruti G. Teitel, *Humanity’s Law* (New York: Oxford University Press, 2011).

international community of states as a whole, and from which no derogation is permitted.⁴² The most common examples are the norms against slavery, genocide, crimes against humanity, and torture.⁴³ Any person must be protected from these regardless of whether she finds herself within the jurisdiction of a state that agreed to that or not. But of course, the normative bite of *jus cogens* stems precisely from the fact that it is *not* in fact universally adhered to.⁴⁴ Can such norms nevertheless be defined as “law,” rather than moral prescription or political interest?⁴⁵

Whatever one’s answer, it is relevant to the question if rights can exist regardless of a state’s consent. If no such rights exist, the idea that some rights are granted to all persons will need to be discarded. The conclusion, in other words, would be that, as Arendt observed at her time, the “bare life” of humans continues to be “rightless.”⁴⁶ Through the history I examine below, I argue that as long as some people feel bound by human rights, humans are never rightless. I do this based on one particular context, only controversially included in the list of *jus cogens* norms: this is the duty of *non-refoulement*, which prohibits the deportation of a person to where he or she may be subject to torture or cruel, inhuman, or degrading treatment.⁴⁷ When interpreted correctly, this duty can shed light on the moral and legal structure of the entire normative universe of human rights.

⁴² Article 53 of the Vienna Convention.

⁴³ The International Law Commission, the United Nations’ authoritative body for the interpretation of international law, also adds the prohibition on aggression, racial discrimination, and the right to self-determination as “preemptory norms that are clearly accepted and recognized.” See para. 5 of the Commentary to Draft Article 26 on state responsibility.

⁴⁴ Georges Abi-Saab put this point elegantly, saying that even if the normative category of *jus cogens* were to be an “empty box, the category was still useful; for without the box, it cannot be filled.” Georges Abi Saab, “The Third World and the Future of the International Legal Order,” *Revue Egyptienne de Droit International* 29 (1973): 53.

⁴⁵ On the temptations and the perils of the language of *jus cogens*, see Koskenniemi, “International Law in Europe,” 122.

⁴⁶ Gündoğdu, *Rightlessness in an Age of Rights*.

⁴⁷ For a discussion, see Guy S. Goodwin-Gill, “The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement,” *International Journal of Refugee Law* 23, no. 3 (2011): 443–457, doi:10.1093/ijrl/eer018 (discussing *non-refoulement* and torture, and suggesting that the former is “sharing perhaps in some of the latter’s *jus cogens* character”); Aoife Duffy, “Expulsion to Face Torture? Non-Refoulement in International Law,” *International Journal of Refugee Law* 20, no. 3 (2008): 373–390; Alice Farmer, “Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection,” *Georgetown Immigration Law Journal* 23 (2008): 1.