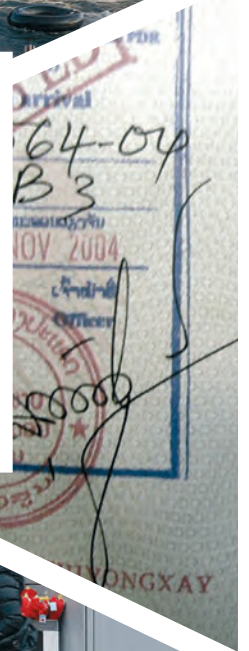




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Johannes Servan

**'What Justice Requires' –  
a State-Centric Bias in the  
Ethics of Migration**

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# 'What Justice Requires' – a State-Centric Bias in the Ethics of Migration

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## Abstract

In this paper I clarify and scrutinize some of the implications of a state-centric bias in political philosophy. Based on Serena Parekh's analysis of "the ethics of admission" (2014, 2017), the main example of this bias I will present is how political philosophers have addressed the question of what justice requires of states in relation to refugees. I begin by clarifying the central features of the state-centric bias in political philosophy and how it is given concrete expression in the ethics of migration as an emphasis on obligations of hosting states to admit immigrants. Further, I present one central implications of the ethics of admission that seem morally unacceptable: the cherry-picking of problems. This is a shortened version of a paper in progress.

## Keywords

State-centric bias; ethics of migration; refugees; cosmopolitan law

## DOI

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Although philosophers don't like to be reminded of it, they are often as vulnerable to arguing in a biased manner as everyone else. What is most often pointed out is perhaps their lack of interest for the world outside, leading their philosophy to become "armchaired". Philosophers are also easily ridiculed for their lack of interest for their own life. There's often a stunning discrepancy between theory and practice; building (as Kierkegaard put it) a castle in their mind, but continuing to live in a shack of ethical

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virtue. More recently, experimental moral psychology has revealed how strongly moral reasoning is influenced by implicit biases and dispositions.<sup>2</sup> Except, perhaps, from a few very dedicated utilitarian philosophers, little suggests that philosophers are less prone to this kind of influence than others.<sup>3</sup>

In this article I will look closer at a rather stable state-centric bias among political philosophers. In particular, I will describe this bias as it comes to expression in an overall trend in the political philosophy of migration as an “ethics of admission”. (Parekh 2017) In general a state-centric bias implies an agent-based perspective that takes for granted the role of states as the moral agents who distribute legal membership and redistribute wealth. In the specific thematic field of migration ethics, it is easily noticed in the definition of the basic problem: migration is a problem of *immigration*, and hence a problem of admission.

On face value there is nothing controversial about this. To the contrary, this bias reflects deep-seated assumptions of our social imaginary and political culture. So why bother pointing it out? After having defined the state-centric bias in more detail, I will present some of the problematic moral consequences of this bias. It seems plausible to argue that the influence of the state-centric bias is connected to a number of worrisome tendencies in the ethics of migration: the main problem is that it tends to selectively pick problems that are pressing for a few affluent hosting states, and not for most of the refugees.<sup>4</sup>

For those who might not find these worries persuasive, I suggest Kant’s distinction of domestic and cosmopolitan justice as a possible common ground. I argue that this conceptual alternative might remedy some of the consequences of the state-centric bias, because the notions of “cosmopolitan obligations” and “cosmopolitan rights” are more specific than “universal human right” (or some similar term). Unlike the traditional terms and in contrast to domestic issues and issues of charity, cosmopolitan justice specifies what justice requires in the distinct situations where the relevant moral agents are states and foreigners. Independent of one’s view

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<sup>2</sup> See for instance <https://plato.stanford.edu/entries/experimental-moral/> for an overview.

<sup>3</sup> See “Implicit Bias, Stereotype Threat, and Women in Philosophy” by Jennifer Saul for feminist critique along similar lines, in *Women in Philosophy: What Needs to Change?* (2013), ed. K. Hutchison and F. Jenkins.

<sup>4</sup> In the full version of this paper I present two additional problematic tendencies: secondly, the tendency to depoliticizing foreigners is increasingly inadequate as the ground for a moral response, and proportionally so to the density of cross-border relations in a globalized world; and, thirdly, it leads us to tolerate crimes against humanity, such as permanent statelessness and long-term encampment, which are continuously reproduced by the modern state system.



of the exact character and scope of the state's cosmopolitan obligation, we could at least improve the clarity on what problems we are discussing.

## **Symptoms of the problem: defining traits of the state-centric bias**

The state-centric bias of political philosophy seems to be rooted in deep-seated habits of how we imagine the social world and the norms we hold as central to political culture. (Taylor 2007) Hence, it is difficult to pinpoint the exact properties of the bias. In the following I will present two rather superficial symptomatic features: taking the state as the central moral agent and neglecting the perspective of the foreigner. These are the most salient features of the state-centric bias as presented by Aleinikoff (1992) and Parekh (2014, 2017).

Before I present these two features, I want to make clear that although the term “centric” usually implies the biased favoring of one group or agent at the expense of others (as in anthropocentrism or ethnocentrism), state-centrism is not synonymous with the normative position of statism. Whereas *statism* is a view on global justice according to which (most) duties of justice depend on the existence of the institution of the state and are limited to the relation of the state towards its own citizens and the relations between these citizens, most contributors to the debates in political philosophy that are biased in this state-centric manner are actually proponents of some sort of the counter model of statism, namely *moral cosmopolitanism*. In other words, the state-centric bias is not cancelled by rejecting the statist idea that self-enforced limits on state power are empty or unfounded. As we will see in the case of the ethics of migration, all the central contributors provide state-centric moral criticism of state behavior.

However, there seems to be some relation between taking a strong normative position of moral cosmopolitanism and contributing with ideas that might remedy the bias. My suggested explanation to this plausible connection is connected to Hannah Arendt's diagnosis of the current human rights regime: It is overly confident in the belief that the rightful claims of individuals and the corresponding obligations of the states – developed historically to solve domestic problems – are well designed to solve cosmopolitan problems. (Menke 2007) Promoting strong moral cosmopolitanism does not directly seek to respond to this diagnosis, but it might reflect a stronger concern for cosmopolitan issues, i.e. issues involving states and foreigners. Hence, promoters of strong cosmopolitanism are more likely to stumble upon and criticize the problematic implications of the attempt to “domesticate”

cosmopolitan problems. I'll come back to these problematic implications of state-centrism after discussing its defining features.

### State as moral agent

The first feature of the state-centric bias can be described as inherent to the liberal international regime of states, as a reformed Westphalian system. The basic idea is to imagine states as sovereign and self-regulating moral agents that are committed to a certain standard, usually conceived as universal and normatively independent of enforced legislation. This standard can be expressed as certain requirements or constraints on the state in its interaction with other states or with individuals. In the case of the obligations a state has toward individual agents, it is common to distinguish between its specific obligations to its own citizens, and its general obligations to all moral subjects (lately including animals as well). Corresponding to these state obligations, it is common to distinguish citizen rights from human rights.

Although this notion of the state as a moral agent committed to certain liberal and democratic principles seems clearly preferable to an absolutist notion of state sovereignty, these theoretical ideas, and its concrete expression in the historical regime of liberal-democratic states, offers for the most part a standard on how to treat one's own citizens (or more widely the residents of the state's territory).<sup>5</sup> It has little to say on how to deal properly with global issues where the scope of affected parties goes clearly beyond the domestic sphere. (Benhabib 2004)

Nevertheless, the recognition of states and individuals as the relevant moral agents sets the frame for the possible distribution of duties and rights. In this context I will put justice between states aside<sup>6</sup>, and focus on state obligations and rights in relations to individuals. When we discuss the principles of justice regulating the relation between the state and its citizens, I suggest we call it "domestic justice", and when we discuss those principles concerning the relation between the state and foreigners, I prefer to call it "cosmopolitan justice".

The classical liberal variants of political philosophy emphasize what domestic justice *forbids* or *permits* of the states in their relation to individual agents. These

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<sup>5</sup> This wider "cosmopolitan" notion of state responsibility seems to have gained support after the UN declaration of Human Rights (1948). The status of foreign resident does, however, in most cases imply a secondary status compared to citizens.

<sup>6</sup> Although relevant for the coordination of realizing commitments, such as "burdensharing"-schemes, I understand it to take on an instrumental value in order to realize state obligations to individual agents.

constraints on state behavior are typically articulated in the language of individual rights or freedoms. The negative duties of the states implied in this liberal view are less controversial and contested than the positive duties of the state, especially when considering cosmopolitan justice. Hence, the question of what justice *requires* tends to divide political philosophers on the scope and character of the obligations the states have to their own citizens compared to foreigners.

It is common to ascribe specific obligations of the state to protect the interest and welfare of its own citizens, whereas foreigners are ascribed with less demanding and more generic moral obligations. For instance, Michael Walzer – perhaps the most influential contributor to the ethics of migration – understands citizenship as a “primary good”, because it sets the boundaries within which all other distributive choices can be made. (Walzer 1983) This defining view bears clear similarity to John Rawls domestic version of the Original Position, where we are asked to consider the most preferable principles of justice for citizen of a “closed society”. (Rawls 1971, 1993) Both express a view where “justice” is more or less synonymous with “domestic justice”.

In comparison foreigners are for the most part excluded from the question of what justice requires. There seems, however, to be a general consensus among the central contributors to the ethics of admission that all human beings are of equal moral worth. In other words, there seems to be a general agreement on at least the basic feature of moral cosmopolitanism. In its weakest interpretation, moral cosmopolitanism implies the obligation to consider all affected parties of our actions, and to provide justifications for unequal treatment. (Miller 2016, p. 23-5) So, even though Walzer and Rawls agree that the issue of *what justice requires* is generally limited to the scope of citizens, there are some hard cases where the moral claim of foreigners is strong enough to make the justification of special obligations to one’s own members difficult for the state. The claim of the refugee for asylum is such a hard case.

From the perspectives of Walzer and Rawls, which stay quite close to the bureaucratic perspective of the state, it is not surprising that there is an absence of concern for global problems. We would, however, be wrong to assume that the state-centric bias is limited to these liberal-democratic accounts of “bounded” justice. Both Joseph Carens (2013), perhaps the most important opponent to the “bounded justice” view, and Seyla Benhabib (2004), who explicitly criticizes the neglect for state-centrism even in cosmopolitan political philosophy (of Thomas Pogge and Charles Beitz), are biased in this way! Let me explain why I believe that this is indeed the case.

For some reason most contributors to the ethics of migration still seem to accept Walzer's legalist definition of what a refugee is deprived of: the non-exportable good of citizenship. The state's assistance to refugees cannot be a matter of offering extra-territorial charity, the way it may assist the starving and the sick. Within this framework, and in contrast to other migrants, refugees are seen as having a particularly strong claim to assistance. Partly this is because they are in greater need of protection or sanctuary than most other migrants. But, it is probably also because refugees pose a threat to the legitimacy of the system of states since they are excluded from this order. The urgency of their situation, caused by a breakdown of the relation to the state of origin, reflects a crisis for the other states as well. All of this is explicitly acknowledged by the contributors to this debate.

On most accounts that recognize the equal worth of all human beings, the positive duty of a state to offer assistance to foreigners in need of sanctuary is recognized. The corresponding right to asylum is probably the most widely accepted principle of cosmopolitan justice. But, if the numbers of those requesting admission is high enough, it forces the hosting state into a dilemma: on the one side, to respect the refugees' equal moral worth, and on the other hand, to sustain the sovereignty and integrity of the hosting state. To maintain its moral legitimacy, the state is required to provide reasons to justify their excluding policies. To justify the special obligation (or what Miller calls "compatriot partiality") for one's own citizens, there are various strategies. Those who put strong constraints on our obligations to foreigners tend to appeal to the social cohesion or welfare of citizens, such as the "communities of character" (Walzer 1983) or "the welfare state"<sup>7</sup>. The softer and more liberal approaches emphasize minimal requirements of domestic integrity such as "public autonomy" (Benhabib 2004) or "public order" (Carens 1987, 2013). In each case the appeal is meant to draw a justified line for the threshold of cost that a hosting society should take before having good reasons to close its borders.

To summarize, it seems even proponents of a stronger moral cosmopolitanism – like Benhabib and Carens, who render territorial borders and citizenship less (or in principle *no*) significance in the question of what justice requires – are caught up in the state-centric problem of justifying excluding admission policies. Consequently, the moral challenge posed by those excluded from the modern state system is reduced to a question of finding a sound justification for allowing some and denying others admission. Although the case of the refugee presents an anomaly to this system, and

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<sup>7</sup> In the conference (Bielefeld) Miller suggested the concern for the welfare state as the main reason for the attention devoted to the issue of admission.



hence a potential threat to the legitimacy of the system if not included, it is usually marginalized as a problem by framing it as an ethics of admission. (Parekh 2017) I think this is because the ‘ethics of admission’ has a tendency to *domesticate* cosmopolitan justice in the sense that it conceives the problem posed by the refugee as analogue to historical issues of domestic justice; i.e. as another category of excluded individuals that are entitled to territorial residency and legal protection. This tendency marginalizes large groups of those excluded from the modern state system since only a fraction is able to seek admission through resettlement, leaving the large majority of the long-term excluded in the shadows of the current debate.

### The depoliticized foreigner

The second feature of the state-centric bias is a tendency to marginalize the perspective of foreigners. The character of this marginalization I think is best explained as the way foreigners, i.e. subjects of cosmopolitan justice, are reduced to moral subjects with generic, basic needs. Parekh relates this reduction to the humanitarian principle of mutual aid.

For Walzer, the moral claim of the refugee is peculiar because it combines the appeal to the positive duty of mutual aid with the need for a new membership. Hence, similar to offering assistance to a complete stranger that you meet (like the good Samaritan), there is no need to facilitate political deliberations to reach mutual agreement on what is just or good in the cases of admitting refugees. The needs of the victim of assault and the refugee are rendered self-given or pre-defined by our common (animalistic) nature. T. Alexander Aleinikoff (1992) identifies two main examples of this depoliticization of foreigners in recent history associated with the international regime of refugee law:

After the Second World War, resettlement was seen as the preferred durable solution in refugee law. Aleinikoff refers to this preference as the “exilic bias”. The emphasis on resettlement was grounded in the legal conception of a refugee:

The definition [of refugee]<sup>8</sup> is quite clearly based on the idea that a refugee is someone who has lost the protection of his or her state, is now located outside that state, and is in need of a new guarantee of protection. That is, the “problem” to be solved is the de jure or de facto loss of membership [i.e. citizenship], as measured by the likelihood of persecution on the specified grounds. (Aleinikoff 1992, p. 123)

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<sup>8</sup> Referring to the 1951 convention.

Clearly the idea of what the refugee needed was defined in a top-down manner. According to the legal conception, a refugee is someone who is deprived of citizenship, and prefers resettlement as the solution to it. Some refugees were probably consulted, and outspoken refugees like Hannah Arendt readily admitted that in the case of German Jews repatriation was not an option. It bore, nevertheless, the character of a generic assumption. The inclination of hosting states to insist on offering resettlement might seem counterintuitive today, but it was articulated in a situation where many refugees could clearly not be asked to return, and where most Western countries were in need of labor and army forces.

The theoretical parallel to the exilic bias is quite easily recognizable in Walzer's account. Although Walzer is often associated with a rather conservative view on migration, his view allows for quite large quotas of refugees within the threshold of cost carried by the communities of character. This threshold level is circumstantial, and the post-war period offered favorable circumstances for those refugees who preferred to be resettled in Western states.

The second example Aleinikoff discusses is a "dramatic shift" of the refugee regime in the 1980's. As the moral battle of the Cold War was settled in the late 1970's, the regime of resettlement was replaced by the current regime of repatriation. From the early 1980's the "resettlement solution" was criticized theoretically and new humanitarian positions (both liberal and communitarian) became dominating, arguing in the support of voluntary repatriation as the basic solution to the problem.

The new dominating view established that it was in the interest of the refugees to stay close to their "home" in order to ensure an easier return. Again, the assumed need of the refugees takes on a generic form, despite the radical shift of view. This new emphasis on repatriation as the preferable solution to the refugee problem is labelled the "source-control bias" by Aleinikoff, because it applies a human rights discourse to address the root causes of the refugee flows.

In his latest book, *Strangers in our midst* (2016), David Miller holds a definition of refugees based on the individual need<sup>9</sup> rather than the causes of flight. In other words, his definition emphasizes less the juridical requirements of a refugee, and argues rather from a moral ground. His theory shares this trait with the humanitarian discourse since the end of the Cold War. This seems to be an improvement of a rather narrow and less robust definition based primarily on persecution as the only legitimate cause

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<sup>9</sup> Which he defines in terms of the deprivation of some "basic human rights".

of flight. Miller defines refugees (in the wide sense) as “people whose human rights cannot be protected except by moving across a border, whether the reason is state persecution, state incapacity, or prolonged natural disasters.” (Miller 2016, p. 83)

Since Miller’s definition focus on the deprivation of basic human rights, rather than the loss of membership, his view on resettlement is also less committed to it as a permanent solution. According to Miller, what justice requires is temporary residency, and not necessarily permanent membership.<sup>10</sup> Although Miller makes clear that this temporary status is only an acceptable solution for a few years, it is quite clear that the relevant concerns are not to attract labor force, but to avoid a disproportionate share of the “burden” of the poor and unskilled migrants from the Global South.

The moral claim of the refugee corresponds to the obligation of the international community of states to find durable solutions for all, and for each state to take its fair share of the burden. The fair share must be measured according to the capacity of each state, but Miller is not very specific on the distributive mechanisms one should put in place or the criteria for measuring the relative capacity of each state. The point seems to be a more general one: if the claim for asylum is justified, ‘what justice requires’ is for each state to take its fair share of the burden, until a threshold of cost is reached. (Miller 2016)

Although Miller is clearly critical to long-term encampment, the humanitarian account of a durable solution for refugees has been criticized for giving a nice facade to a refugee regime that in reality functions as policies of containment or warehousing of the undesired. Whether or not this is a completely intended consequence of the shift to repatriation, it seems clear to me that Aleinikoff addresses this feature of the state-centric bias in an adequate manner when he calls for a shift from a control-based aid to a facilitating one. Gibney raises a similar point, when he suggests: “let the refugees’ strongest preferences be built into the system of asylum distribution.” (Gibney 2015, p. 461)<sup>11</sup>

## **The ethics of admission - a case of the state-centric bias**

Further, one might ask: why is state-centric biased political philosophy so problematic? In the following section I’ll begin by defining more specifically the state-

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<sup>10</sup> This is compatible with the shift in discourse from resettlement to repatriation and the emphasis on safe return in the situation after the civil war in former Yugoslavia (1993).

<sup>11</sup> A rather formal variant of this concern was built into the original Dublin IV-proposal.

centric tendency within the ethics of migration, known as “the ethics of admission”. Parekh provides this label to point out a tendency among political philosophers on migration to emphasize the question of what obligations Western (or Northern) hosting states have for immigrating foreigners. Since refugees have the strongest claim, they also present the strongest ethical challenge.

I’ll present three arguments as to why this tendency is problematic. First, the ethics of admission cherry-picks problems that are important for some states. These problems are not likely to correspond to the most pressing issues of cosmopolitan justice. Second, the rapidly increasing global scale of the problems at hand alters the non-relational character of the circumstances, which once made the state-centric depoliticization of foreigners appear adequate and legitimate. Third, the state-centric ethics of admission seems to dispose those who benefit from the current international order with a certain tolerance for grave systemic injustice, i.e. crimes against humanity, such as encampment reproduced over generations.

### **Ethics of admission**

According to the first feature of the state-centric bias, Parekh identifies in the ethics of admission a tendency to frame the cosmopolitan issue of refugees as perceived from the hosting state. From this perspective the central question of the moral agent is: “Are we obliged to admit refugees to our country?” (Parekh 2014, p. 647) Parekh blames Walzer, with his strong influence, for this tendency to define the issue of refugees in such a way that our obligations can only be met by *admission*. She claims that: “Since Walzer, all philosophers stress the legal/political dimension of the harm of statelessness and the importance of ethical consideration of admission standards.” (Parekh 2014, p. 647)

This framing is noticeable in contributors to the debate that are quite close to Walzer’s position. For instance, Miller’s account mainly “explores the basis on which refugees can make their claims to be admitted and the extent of the obligations incurred by the state in which asylum is sought” (Miller 2016, p. 77). But, it is also found in the proponents of much more liberal views on the topic, such as Benhabib and Carens.

### **Cherry-picking admission as the central problem of cosmopolitan justice**

In general, political philosophy and social sciences has historically marginalized issues where foreigners are to be considered affected parties. In social science this is called methodological nationalism. In political philosophy the state-centric bias has yet to

find a commonly accepted label. In any case, there is also a clear tendency in political philosophy to marginalize what I will call problems of cosmopolitan justice, i.e. problems involving the relation between the state and foreigners.

As already mentioned, the state-centric interpretation of the state as a moral agent is noticeable in Rawls' conception of justice: We are asked to imagine the domestic sphere as a closed society, bracketing out concerns of justice among states or in relation to foreigners. Methodologically this has the obvious advantage of simplifying reflections on justice in a highly complex world. The downside is that it marginalizes or postpones pressing global issues such as environmental destruction, extreme poverty and long-term encampment. Immigration is conceived as an anomaly and as a result of failure of other states to provide their own citizens with proper life conditions.

During the last ten years the ethics of migration has gained significant interest among political philosophers. It is no longer postponed as a problem. Still, the basic framing of the issue seems to remain the same. The states obligations are mainly domestic, and the obligations to foreigners are first and foremost "territorial", i.e. concerning foreign residents or new arrivals at the borders. Consequently, the global, extra-territorial scope of the problems associated with migration is marginalized by the main state-centric problem, i.e. to find an ethical standard of admission.

In recent years we've also seen an increased emphasis on providing assistance to refugee camps in neighboring areas and on improving the conditions in the countries of origin. On one side, this might be a way to remedy some of the consequences of a state-centric approach to the issue. On the other side, we should be cautious not to allow this new emphasis to deteriorate into a self-serving humanitarian discourse of containment and source-control. That is, we should explicate the problem which solutions, as such repatriation and improved condition in long-term camps, are answering to. If the problem is still defined by the ethics of admission, these solutions easily take on the function of containment and control-based aid.

Although "cherry-picking" usually refers to selective use of empirical findings, I think there is good reason to speak of a "cherry-picking" of problems in political philosophy. For instance, we might understand the ethics of admission as a way to cherry-pick a problem that focus on the responsibility of an individual state (including its fair share of burden/responsibility) at the expense of problems related to systemic outcomes or the net effect of individual state actions.



From a state-centric position one easily gets the impression that forced displacement is an exceptional anomaly to the system. In Parekh's view, this problem can be traced back to the influence of Walzer's defining premise of the debates on admission and its implied normative blindness:

*Prolonged encampment and long-term displacement*, which are in many circumstances the result of uncoordinated policies of various sovereign states each acting to preserve their "communities of character," *are never raised as moral issues* (!). (My exclamation, Parekh 2017, p. 57)

Accordingly, the main criticism that Parekh raises against "the ethics of admission" is how the centrism seems to leave the vast majority of refugees in a normative blind spot. Many of the most prominent contributors (Walzer 1983, Benhabib 2004, Carens 2013, Miller 2016) to this debate focus "predominantly on the obligations raised by refugees for Western states in terms of resettlement". (Parekh 2017, p. 51) Since, in practical terms, this leads the debate to address an irrelevant fraction of the numbers of refugees, the main consequence is that the vast majority of stateless people become *normatively invisible*. (Parekh 2014, p. 646) Resettlement is, at least in theory, considered an important element of a global response to refugees, mainly because it facilitates a burden sharing that involves the affluent states of the global North. In practice, however, resettlement only affords assistance to an insignificant fraction of the refugees in need of protection.<sup>12</sup>

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In the full version of this paper (work in progress) I aim to defend the two more controversial claims in this second part, where the critique of the state-centric view is presented. First, I address the question on how a non-relational, humanitarian response becomes increasingly more inadequate as globalization develops. Second, I also promote the even stronger claim, following Arendt and Carens, that independently of this Kantian requirement of affected parties, there are duties connected to the predictable institutional failures of the modern state system as a whole (because it is a globalized whole, i.e. with nowhere else to go for those excluded from it). When these failures are willingly ignored or intentionally reproduced, they are no longer conventional crimes, but, in Arendt's terms, crimes of humanity. In the third part, I further aim to provide at least one contribution to a remedy of the state-centric bias by offering a revitalization of the Kantian triad of law as a way to domesticate the discussion on what justice requires.

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<sup>12</sup> Today 1,2 out of 19,9 million refugees are registered as in need of resettlement by the UNHCR, in 2017 only 75.500 (less than 0,5 % of the refugees worldwide) was resettled.

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