The Refugee and the Crisis of Law

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Abstract

The hostility -comprised in a series of anti-immigration politics- that European governments display towards refugees, migrants, asylum seekers reaching the borders of Europe and the concomitant problems that these people are facing in claiming and exercising their rights poses an enigma before us. The frequency of the cases where people are 'left to die' in the Mediterranean and the number of derogations from non derogable rules such as the right to life, disallows us from consider those events as aberrant and thus exceptional. Despite the expansion of human rights norms in the WWII period, the equation of refugees with 'rightless' reveals the limits of these norms. The so called 'refugee crisis' constitutes in fact a crisis of the law itself. To understand these problems, I turn to the work of Hannah Arendt and Giorgio Agamben who highlighted that the phenomenon of 'rightless' far from being accidental constitutes instead a symptom of "the perplexities of the Rights of Man". Both Arendt and Agamben identified the inherent contradictions between state sovereignty and human rights and saw the refugee as the personification of such contradictions. Far from being an exception, the refugee constitutes in fact a systemic condition of an international order based on the power to exclude. I additionally turn to the work of Emmanuel Levinas and Judith Butler to provide the theoretical grounds on which the notion of responsibility could be extended to those considered as non-members within particular political communities and thus unravel our ethicopolitical obligations towards refugees.

Resumé

L’hostilité – observable dans les multiples politiques anti-immigration – que les gouvernements européens déploient à l’égard des réfugiés, des migrants et des demandeurs d’asile qui se présentent aux frontières de l’Europe et les problèmes concomitants auxquels ces personnes sont confrontées pour revendiquer et exercer leurs droits constituent une énigme contemporaine à résoudre. La fréquence avec laquelle des migrants sont abandonnés à leur sort en mer Méditerranée et la quantité de dérogations qui sont accordées à des droits non susceptibles de dérogation – tel le droit à la vie – ne permettent pas d’aborder ces événements comme étant des anomalies et, conséquemment, comme étant des faits exceptionnels. Malgré le développement des normes relatives aux droits de la personne depuis la Seconde Guerre mondiale, la représentation des réfugiés comme des « sans-droit » révèle les limites de la portée de ces normes. La soi-disante « crise des réfugiés » constitue en fait une crise du droit lui-même. Pour comprendre ces problèmes, je réfère aux travaux de Hannah Arendt et de Giorgio Agamben, qui ont souligné que le phénomène des « sans-droit », loin d’être accidentel, constitue plutôt un symptôme des perplexités des ‘Droits de l’Homme’. Arendt et Agamben ont relevé les contradictions inhérentes entre la souveraineté des États et les droits de la personne, et ils ont vu dans la figure du réfugié l'incarnation de ces contradictions. Loin d'être une exception, le réfugié constitue en fait une condition systémique d'un ordre international fondé sur le pouvoir d'exclure. Je me base aussi sur les travaux d'Emmanuel Levinas et de Judith Butler, afin de fonder théoriquement l’argument selon lequel la notion de responsabilité devrait s’étendre aux personnes considérées comme des « non-membres » au sein de communautés politiques particulières, permettant ainsi de clarifier nos obligations éthico-politiques envers les réfugiés.

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"Perhaps you are surprised that we are not hospitable,
'the other said,'
it is not our habits to host,
we do not need strangers" (Kafka, 1995, 22)

Introduction

March 26, 2011; a small boat with 72 migrants onboard (among them some children), that later became known as 'the left-to die boat', left the port of Tripoli to reach Lampedusa. The ship dinghy was shortly found in distress, lacking fuel, and food/water supplies. Italy and the NATO that was by the time conducting UN-authorized military operations in Libya, as well as other vessels that were nearby, were all aware of the coordinates of the boat. In addition, fisherman vessels and the Spanish and Italian military vessels were also close to the vessel in distress. Yet, none launched a rescue operation and 63 out of the 72 migrants eventually died due to dehydration. Italy, French, Malta as well as NATO and Frontex personnel were all involved and complicit in the "non-rescue" of the boat since while they could answer to the distress calls, they didn't. After the tragedy, initially reported by the British newspaper The Guardian,[1] the Council of Europe ordered an enquiry into the incident that resulted in the report to the Parliamentary Assembly that outlines all the details around the death of 63 persons.[2] As is stressed in Resolution 1872 (2012) adopted by the Parliamentary Assembly of the Council of Europe, what made this case significant is that "the people involved in this boat tragedy could have been rescued if all those involved had complied with their obligations".[3]

[1] Shenker J (2011) Aircraft carrier left us to die, say migrants. *The Guardian*, 8 May, available at: https://www.theguardian.com/world/2011/may/08/nato-ship-libyan-migrants (accessed 9 February 2019)
[2] Report | Doc. 12895 | 05 April 2012. Available at : http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18095&lang=en
[3] Strik T (2012) Lives Lost in the Mediterranean Sea: Who Is Responsible? Report for the Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Council of Europe, 29 March , PACE Resolution 1872 (2012), available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18234&lang=en
See also Heller C, Pezzani L and Situ Studio (2012) Forensic Oceanography – Report on the 'Left-to-Die Boat'. Centre for Research Architecture, Goldsmiths, University of London, available at: https://www.forensic-architecture.org/wp-content/uploads/2014/05/FO-report.pdf

The word 'crisis' in the Greek language has two meanings, it denotes the existence of a problem, but it also means the evaluation of a situation. Both meanings of the term 'crisis' are relevant for this study, since within the realm of the so-called 'refugee crisis', I am interested in highlighting both the problems of law and also evaluate the law itself. Global displacement worldwide marked record numbers[4] and the total number of displaced persons, stateless, refugees or asylum seekers has increased in a level not seen since WWII[5]. Due to sharp social, economic, political and environmental conditions, there is not only an unceasing migration, but also an increase in the movement of people from low income or less developed countries to the developed ones. A parallel reality of our time is the deployment of anti-migration policies from destination countries and the consequent failure of EU states to provide access to asylum for refugees. Under the term 'anti-migration' policies, I place the deployment of a range of technologies of power that destination countries have employed to govern the refugee population. These technologies of power take different forms, depending on whether they target refugees before or after their arrival in destination countries. In the first case, they work preemptively taking the form of 'non-entrée' politics.[6] Under the term 'non-entrée' politics[7] are subsumed practices such as the erection of border walls and physical barriers at the borders,[8] the creation of 'international zones' in the airports (so-called as 'airport waiting zones'[9]) in which states' legal obligations are deemed as non-applicable and consequently the persons found there are excluded from existing

[4] UNCHR estimates that around 68,5 million people have been displaced worldwide by the end of 2017, see Global Trends, Forced Displacement in 2017 (25 June 2018), available at https://www.unhcr.org/5b27be547.pdf

[5] United Nations High Commissioner for Refugees. 2016. Global Trends: Forced Migration in 2015. /The United Nations High Commissioner for Refugees, 2016. "UNHCR Global Appeal Report: 2016-2017".

[6] For a detailed analysis of the whole range of non-entrée politics see Gammeltoft-Hansen T, and Hathaway J.C. 2015, "Non-Refoulement in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law* 53 (2): 235-84.

[7] Commenting the 'non-entrée' politics, James Hathaway, spoke about the "decimation of the practical value of formal refugee law by policies of non-entrée, and the containment of refugees in their country of origin". See Hathaway James C. 1997. *Reconceiving International Refugee Law*. Nijhoff Law Specials, V. 30. The Hague: M. Nijhoff, p. xxiv.

[8] It needs to be mentioned that the erection of border barriers constitutes a quite recent phenomenon. More specifically, according to a research conducted by Élisabeth Vallet at the University of Québec in Montréal, while there were fewer than 5 border walls in the world in the end of World War II and 15 walls by the by the time Berlin Wall fell in1989, the number exploded to 70 in 2015. See Vallet Élisabeth. 2014. *Borders, Fences and Walls State of Insecurity?* Border Regions Series. Farnham, Surrey. UK: Ashgate.
Moreover, over 40 countries have constructed walls since the fall of the Berlin Wall, more than 30 of these walls have been constructed after 9/11 and 15 walls have been built only in 2015, with 8 of these 15 found in Europe. See The Economist (2016) 'More neighbours make more fences', available at: https://www.economist.com/graphic-detail/2016/01/07/more-neighbours-make-more-fences

[9] An example of a waiting zone at airport constitutes the Paris Charles de Gaulle airport.

rights regime, the externalization of border controls beyond states' geographical borders[10] and the criminalization of rescue and assistance at sea.[11]. Once refugees manage to reach destination countries, these technologies take the form of detention centers,[12] hot spots, refugee camps,[13] waiting zones, imprisonment, collective expulsions, limited access to health care and education.[14] Within this broad spectrum of anti-immigration politics I place also more concrete policy actions aimed to impede refugees' movement like the February 2017 EU supported Memorandum of Understanding (MoU) between Italy and Libya[15] aiming at outsourcing border control by assisting the capacity of the Libyan Navy and Coast Guard[16] and the 2016 EU-Turkey agreement defined as "Joint Action Plan[17] aiming to stop the movement of migrants to Greece,[18] that sealed the Balkan route and trapped thousand of people in inhuman conditions in the Greek islands.[19]

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[10] This practice has been alternatively named as "de-territorialization" of border controls. See Trevisanut Seline. 2004. "The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea." *Leiden Journal of International Law* 27 (3): 661-75.

[11] Rescue NGOs have been criminalized with the purpose of limiting their activities, while cases See the report Charles Heller and Lorenzo Pezzani "Blaming the Rescuers Criminalizing Solidarity, Re-enforcing Detterence", available at: https://blamingtherescuers.org/

[12] Bigo relates the detention of foreigners to a specific form of governmentality, what he calls the 'banopticon' and places this *dispositive*, within the broader context of a logic of a "permanent exceptionalism or of derogation by the government of the basic rule of law in the name of emergency". See Didier Bigo, "Detention of Foreigners, States of Exception and the Social Practices of Control of the Banopticon", in Rajaram, Prem Kumar, and Carl Grundy-Warr, eds. 2007. *Borderscapes: Hidden Geographies and Politics at Territory's Edge. Borderlines,* V. 29. Minneapolis: University of Minnesota Press.

[13] The number of people found in camps reached also a record during the years of 'refugee crisis'. More specifically, the camp in Calais, France, which is largest camp in Northern Europe (in the northern edge of EU's Schengen area) housed 6000 refugees by the end of 2015 and more than 9.000 in 2016. This camp is called as 'Jungle Camp'. https://fullfact.org/immigration/counting-number-migrants-calais-jungle/

[14] Gervin Ane Apatinga, "Biopower and Immigration": A Biopolitical Perspective on Anti-Migration Policies", Vol. 7, No. 20, 2017, Imogen Tyler, "Welcome to Britain' the cultural politics of asylum." *European journal of cultural studies* 9, no. 2 (2006): 185-202.

[15] https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf An unofficial translation of the Italy-Libya MoU is available at: http://www.statewatch.org/news/2017/feb/it-libya-memo-eng.htm The 2017 Italy-Libya MoU was signed by the then-Italian Prime Minister Paolo Gentiloni and Fayez al-Serraj, head of the Tripoli-based Government of National Accord.

[16] According to the Italy-Libya 2017 Memorandum, Italy would provide technical and technological support to Libya, while Libya would close its southern border and would stop migrants' boats from heading to Europe. The Memorandum between Italy and Libya, in fact reactivated the 2008 Friendship Treaty between Italy and Libya that has been signed by Gheddafi and then-Italian Premier Silvio Berlusconi.

[17] https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 28 February 2019).

[18] The aim of the EU-Turkey deal was to return every person arriving irregularly at the Greek islands (including asylum seekers) back to Turkey, while EU member states agreed to take one Syrian refugee from Turkey for every Syrian returned to Turkey from the Geek islands.

[19] See the report from the Council of Europe's assembly arguing that the "EU-Turkey Agreement, [..], at best strains and at worst exceeds the limits of what is permissible under European and international law." Parliamentary Assembly, " The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016" and the

The result in both cases of anti-migration politics, (namely either they take place before or after refugees' arrival on destination countries), is that the people indistinctly referred as "stateless", "refugees", "asylum seekers" "immigrants", "undocumented migrants" or "sans-papiers",[20] and in general all those classified as aliens to a specific nation-state, found themselves in a state of exception, outside the rule of law, thrown to what Balibar calls "death zones of humanity".[21]

It needs to be stated at this point that within the framework of this study, I use the term 'refugees' to refer to people fleeing persecution and not only to those that have been officially recognized as refugees and granted refugee status. The term "refugees" is thus used here as an 'umbrella' term that encompasses people indistinctly referred as 'asylum seekers', 'migrants' 'illegal/undocumented migrants' or 'sans-papiers'. By the term 'refugees', I mean both the 'de jure' refugees (those that have been granted the refugee status and officially recognized as refugees), as well as those whose recognition has not yet taken place, namely those usually termed as 'migrants', 'asylum-seekers' etc. This approach is in accordance with the declaratory and not constitutive character of the determination of refugee status. As Judge Pinto de Albuquerque pointed out in his concurring opinion in *Hirsi Jamaa and others v. Italy* (hereinafter *Hirsi* case)[22]: "a person does not become a refugee because of recognition, but is recognised because he or she is a refugee. As the determination of refugee status is merely declaratory, the principle of *non-refoulement* applies to those who have not yet had their status declared (asylum-seekers) and even to those who have not expressed their wish to be protected."[23] The reason behind the long dispute between the use of the terms 'refuges' and 'migrants' lies in the assumption that there are specific obligations owed to refugees stemming

report from Amnesty International. *A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal*, London, 2017.

[20] The expression 'sans-papiers' has been established in France when on the 18th of March 1996, 324 undocumented migrants (among them women and children) occupied a church in Paris as a response to the restrictive immigration policies that turned into illegal many foreigners living for many years in France. The so-called 'sans-papiers' movement ended up in being one of the most important mobilizations of migrants, with their actions constituting political practices that brought in forth new subjects and proposed new rights. Through their mobilizations the 'sans-papiers' made their voice to be heard and got out of their anonymity and became 'visible' in the political community.

[21] Balibar, Étienne. 2004. *We the People of Europe?: Reflections on Transnational Citizenship.* English. Translation/Transnation. Princeton, N. J. : Princeton University Press, p. 128.

[22] ECtHR, *Case of Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012.

[23] *Hirsi Jamaa v. Italy*, App. No. 27765/09 (ECtHR. Feb. 23, 2012), Concurring opinion of Judge Pinto, p. 63. In support of his argument, the Judge cites Recommendation No. R (84) 1 of the Committee of

from the 1951 Geneva Convention on the Status of Refugees (hereinafter the 1951 Refugee Convention)[24], contrary to migrants, who are defined by public discourse as the people that move in search of a better economic life. In a press statement of Frontex it is stated for example that "*there are both illegal immigrants with no particular needs and refugees in need of international protection"* (emphasis added).[25] The statement is inaccurate since even if a person fails to be recognized as a refugee within the meaning of Article 1 of the 1951 Refugee Convention, she still enjoys the application of the principle of *non-refoulement* by virtue of human rights law. The ECtHR has recognized the applicability of the *non-refoulement* principle to any person who might suffer a violation of his or her right to life or freedom from torture.[26] Although international law insists on maintaining this distinction, in practice it is impossible to put a strict boundary separating these two categories. In other words, we can neither deny that people fleeing persecution on the basis of the grounds listed in the 1951 Refugee Convention, are also in search of a better standard of life, nor to assume that people found in a situation of absolute destitution are not facing a life-threatening situation, even if nobody 'threatens' their lives in the wording of the 1951 Refugee Convention. The definition of the refugee provided by law cannot deal with reality as it is shaped by the ferocity of global capitalism and neo-liberal forms of governmentality. Commenting on the impossibility to discern in practice between migrants and refuges and the paradoxical situation that arises because of the insistence on keeping such a distinction, Seyla Benhabib notes emphatically that "…if you are, for example, in Iraq, or even in Turkey, and you cannot find employment because you are Sunni or Shia, a Kurd or an Alawite, or your business is being bombed – no one is threatening your life, but you are in a position of destitution, you have no possibilities. What are you then, a refugee or an economic migrant? So, we are in a catch-22 situation, where international law gives protection to refugees and not migrants, yet what we see not just in Europe, but the world over, is that these categories are inadequate in dealing with realities".[27] However, even if we assume for the sake of argument,

[24] *Convention Relating to the Status of Refugees,* 28 July 1951, 189 UNTS 150. The 1951 Refugee Convention applied originally only to refugees generated in Europe, due to events that took place before 1 January 1951. The 1967 Protocol Relating to the Status of Refugees (606 UNTS No. 8791) abolished these limitations. Reference made here to the 1951 Refugee Convention means the Convention as amended by the 1967 Protocol.
[25] MEMO O6/454, Reinforcing the management of the European Union's Southern Maritime Borders", 30.11.2006, at p. 3, available at: http://europa.eu/rapid/press-release_MEMO-06-454_en.htm
[26] See *Hirsi* case, para. 114 and *Chacal v. The United Kingdom*, Application No. 22414/93, Judgment, 15 November 1996, para. 74.
[27] Seyla Benhabib, Slawomir Sierakowski, "Nobody wants to be a refugee. A Conversation with Seyla Benhabib", 7 October 2015, available at: https://www.eurozine.com/nobody-wants-to-be-a-refugee/

that it is indeed possible to draw a strict line and distinguish between refugees and migrants, we have to bear in mind that because of the anti-immigration politics employed by destination countries, vessels are intercepted in an indiscriminate manner, a practice that prevents access to asylum and undermines the principle of non-refoulement. Independently of the reasons that motivated their departure both refugees and migrants have the same illegal status once they reach destination countries and are placed in the same legal limbo concerning their international rights.

The fact now that these acts of exclusion take place within a globalized world, where states are called to conform to universal standards of human rights standards reveals that state sovereignty, understood as the power to exclude certain populations from the body politic and their banishment to a sphere of exceptionality, remains predominant despite globalization. Thus, within the context of a globalized capitalist economy and a post national political order as the EU, while goods and capitals move across borders, certain categories of people, refugees among them, do not enjoy the same freedom of movement. In other words, capitalism incites the movement of capital across borders but at the same time prevents specific categories of people from moving freely towards specific destinations. It becomes thus evident that the so-called 'refugee-crisis' constitutes in fact a crisis of capitalism itself.[28] As Deleuze and Guattari argued, "capitalism is continually reterritorializing with one hand what it was deterritorializing with the other".[29] Thus, under Deleuze and Guattari's terms, capitalism reterritorializes migrants' right to freedom of movement through the fortification of border controls, while deterritorializes the movement of capital.

As a result, state borders, as demarcations of the geographical limits of sovereign power have come to the forefront and become a political issue. Writing in 1951, Hannah Arendt argued that "in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion'"[30]. What is of

[28] See among others Collyer, Michael and King, Russell, "Narrating Europe's migration and refugee 'crisis'", *Human Geography*: *a new radical journal*, 2016, 9 (2). pp. 1-12, who by drawing upon Jurgen Habermas's work on the crisis of capitalism argue that today crisis is not one of migration nor refugees or humanitarian action, but one of "legitimation" of capitalism.

[29] Gilles Deleuze and Félix Guattari, *Anti-Edipus, Capialism and Schizophrenia*, (trans. by Robert Hurley, Mark Seem and Helen Lane), Ney York, 1972, at p. 259. De-territorialization and te-rritorialization are terms that appear in the work of Deleuze in Guattari *Capitalism and Schizophrenia* (*Anti-Oedipus* is Volume I and *Thousand Plateaus* is Volume II of the book) to characterize a spectrum of different phenomena.

[30] Arendt, Hannah. 1973. *The Origins of Totalitarianism*. New edition/. A Harvest Book, Hb244. New York: Harcourt Brace Jovanovich, p. 278.

interest is to reflect on the timeliness of Arendt's assertion considering the institutionalization of human rights on the international level that took place after WWII.[31] This institutionalization between states and individuals standing outside them, has been achieved through the proliferation of human rights conventions and mainly through the establishment of the right to asylum[32] and the principle of *non-refoulement*.[33]

The starting point of this study has been the hostility -comprised in the anti-migration policies- that European governments displayed towards refugees arriving at the borders of Europe during the so-called 'European refugee crisis'[34] At that point, it should be noted that the fact that there was a sharp rise in the number of people reaching Europe to claim asylum in 2015[35] and 2016 while arrivals comparatively dropped in the following years, does not mean that the 'crisis' itself has been ended. On the contrary, the mortality rate in the central Mediterranean route has increased from 1,96% in 2017 to 3,63% in 2019.[36] As a response to this reality, European states

[31] Some examples are the adoption of the European Convention on Human Rights (1953) and the establishment of the European Court of Human Rights (ECtHR) in 1959, the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) that came into force in 1976, the establishment of the Inter-American Commission on Human Rights (1959) and the Inter-American Court of Human Rights (1969), the adoption of the International Convention on the Reduction of Statelessness (1961).

[32] Even in a non-binding form articulated in the text of the 1948 Universal Declaration of Human Rights.

[33] Article 33 of the 1951 Refugee Convention.

[34] The increase in the number of refugees worldwide has been called as 'refugee crisis' by both media and academic scholars. However, I found the term inappropriate and biased, as it places the emphasis for such a crisis upon refugees themselves, making the connotation that the refugee constitutes an already superfluous human being within the neoliberal order of things. The word 'crisis' indicates an abnormal situation and such one that needs to be treated by exceptional measures. The Refugee Law Initiative published a blog discussing exactly Europe's 'refugee crisis' asking questions about the meaning of the words and the makings of a crisis. article (available at: https://rli.blogs.sas.ac.uk/2018/04/16/refugee-crisis-three-perspectives-on-the-makings-of-a-crisis/). In addition, the term 'European refugee crisis' has been used to describe the movements of people from the East and North Africa to Europe, even though the vast majority of refugees are found in non-European countries. In fact, 84% of refugees are living in developing countries according to the UNHCR's latest annual Global Trends report (available at: https://www.unhcr.org/5943e8a34). According to a study published by the *Economist* the countries with the highest % refugee populations in 2017 are (in order of the largest % number) : Jordan, Lebanon, Chad, Iraq, Yemen, Cameroon, Uganda, Syria, Ethiopia, Turkey, Sudan, Tanzania, Niger, Egypt, Congo-Kinshasa, Somalia, Kenya, Afghanistan, Mauritania, Algeria, Pakistan, Guinea-Bissau, Iran, Rwanda, Ecuador, South Sudan, China, PNG, Liberia, Bulgaria,. *The Economist*, Pocket World in Figures, 2019 edition.

[35] According to the estimations by the United Nations High Commission on Refugees (UNHCR), 1,015,877 refugees arrived in Southern Europe by the end of 2015 and 3,771 have been reported as dead or missing. See UNCHR (United Nations High Commission on Refugees) (2015) Refugees/migrants' emergency response — Mediterranean. Available at: http://www.data.unhcr.org/mediterranean/regional. php (accessed 8 January 2019).

[36] https://www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071

intensify their border controls[37] and are engaged in a variety of activities aimed to impede refugees' entrance upon their territories. More specifically, they use both traditional ways of bordering namely physical barriers at the borders, like fences or walls,[38] as well as other practices, such as the extra-territorialization of border controls beyond the outer-edge of the geographical limits of the states. States' anti-migration policies can also simply take the form of 'practices of non-assistance', namely the abstention from rescuing people found in distress at sea. Because of these practices, border crossing has become "a matter of life and death"[39] for refugees. The common feature and underlying basis of all those practices is to prevent refugees from reaching destinations states where they could make a claim to their right to asylum. Consequently, they all result in an annulment of the right to asylum in practice. For that reason, I argue that the so-called 'refugee-crisis', constitutes also a crisis of the right to asylum as well.

The situation is of course not better at the other side of the Atlantic, or the Pacific, since both USA and Australia have deployed and continue to deploy a series of anti-migration policies and display the same hostility towards refugees that try to enter their territories to seek protection seek protection. Nevertheless, I chose to restrict my study to the European context not only because the migration routes across Mediterranean are the most lethal in the world,[40] but also because European Union represents an interesting case study of an 'experiment' to construct a post-national political order through the institution of a European, supra-national, citizenship. EU citizenship's purpose is succeeding nationality as the only form of belonging within a political community, it is in other words a way to reconfigure the right to political membership beyond

[37]The strengthening of both border controls and asylum procedures and the subsequent restriction on movement constitute part of a series of practices that have been declared -or to be more accurate- have been escalated in the aftermath of 9/11, within the framework of what has been called as 'war on terror', justified on the premise of a state of exception.

[38] Nea Vyssa in Greece, Melilla in Spain, Calais in France, Lesovo in Bulgaria, Bogorodica in Macedonia, Roszke in Hungary are just some examples of fences established by European states. It is worth mentioning that in 2015 alone, 15 new fences have been constructed by states.

[39] William Walters, 'Foucault and frontiers: Notes on the birth of the humanitarian border', in Ulrich Bröckling, Susanne Krasmann, and Thomas Lemke (eds), Governmentality: Current Issues and Future Challenges (London: Routledge, 2010), pp. 138–164 at p. 138.

[40] IOM, Missing Migrants Project, Latest Global Figures (2017), available at https://missingmigrants.iom.int/latest-global-figures

See also, Fargues Philippe and Bonfanti Sarra. 2014. 'When the Best option is a Leaky Boat: Why Migrants Risk their Lives Crossing the Mediterranean and What Europe is Doing about it', *MPC-EUI* Policy Brief., where it is stated that "Crossing the Mediterranean is more lethal, indeed, than crossing the Rio Grande from Mexico to the USA, the Indian Ocean from Indonesia to Australia, or the Gulf of Aden from the Horn of Africa to the Arabian Peninsula."

nationality. Yet, despite European citizenship's cosmopolitan ambitions, the reality of EU's restrictive asylum policies and anti-immigration politics reveal that the achievement of a post-nationalist space and consequently of a post-nationalist sense of identity have failed so far. Deleuze's and Guattari's reflections on the use of space and peoples' relation to it become pertinent here to understand how the formation of our identity is shaped and determined by our relation to space itself. European nation states have been structured on a model that can be described by what Deleuze and Guattari name as 'sedentary', a term that they differentiate from 'nomadic'. Under a sedentary order like the EU, those that move are constituted as exceptions, since a 'sedentary space' is one "striated by walls, enclosures, and roads between enclosures". The function of a sedentary road is "to parcel out a closed space to people, assigning each person a share and regulating the communication between shares". On the contrary, a nomad space is "smooth, marked only by 'traits' that are effaced and displaced with the trajectory[41] and the so-called nomadic trajectory functions in an opposite way to the sedentary, namely, "it distributes people…in an open space, one that is indefinite and noncommunicating".[42] Thus, while under the sedentary model land is distributed to people, under the nomadic model people themselves are distributed on the land. EU remains stuck in a sedentary logic that reproduces the binary logic of 'we' and the 'other'. Deleuze and Guattari use the terms 'striated' and 'smooth' to describe respectively the resistance and facilitation of the flows:

> "One of the fundamental tasks of the State is to striate the space over which it reigns, or to utilize smooth spaces as a means of communication in the service of striated space. It is a vital concern of every State not only to vanquish nomadism but to control migrations and, more generally, to establish a zone of rights over an entire "exterior," over all of the flows traversing the ecumenon".[43]

The practice thus of the extraterritorialization of states' borders in the high seas could be read as a striation of a smooth space in Deleuze and Guattari's terms, while the detention of migrants in detention centers as the use of a smooth space as a means of striation.

[41] Deleuze, Gilles, and Guattari Félix. 1987. *A Thousand Plateaus: Capitalism and Schizophrenia*. Minneapolis: University of Minnesota Press, p. 381.
[42] Thousand Plateaus, 380.
[43] Deleuze, Gilles, and Guattari Félix. 1987. *A Thousand Plateaus: Capitalism and Schizophrenia*. Minneapolis: University of Minnesota Press, p. 385.

The reinforcement of states' borders today reflects the ongoing change in the understanding of asylum from a matter concerning the protection of refugees to a matter of security.[44] The most evident example of shift from protection toward securitization is the termination in 2014 of *Mare Nostrum*, the search and rescue initiative established by the Italian Navy that was credited for saving more than 130,000 people[45] and its replacement by *Frontex-led Triton* whose mandate was "while saving lives [was] an absolute priority', the focus was 'primarily border management'[46]. Moreover, in contrast with *Mare Nostrum* that was conducting search and rescue operations across the Mediterranean, Triton just patrols within 20 miles of the Italian cost. In addition, despite a significant reduction in the operation of resources for Triton that accounted for a third of Mare Nostrum's, the most significant change occurred in the operation itself of Triton, as the question was no longer how to save migrants, but how to patrol EU territorial waters.[47] Mare Nostrum operation was terminated mid-October 2014 and the results were obvious soon after. More specifically, the numbers are once more revealing as the mortality rate

[44] Hyndman and Alison Mountz, 2008, p. 250. Andersson notes that it is since 1990s, that migration "has increasingly been treated as a 'border security' issue in Europe, as seen in its most extreme form in the association between migration and terrorism". Ruben Andersson, "Europe's Failed 'Fight' against Irregular Migration: Ethnographic Notes on a Counterproductive Industry", *Journal of ethnic and migration studies,* 42(7): 1055-1075 at p. 1060.

[45] Mare Nostrum was established in October 2013 by Italian Navy as a search and rescue operation with the goal of engaging migrant vessels in distress outside the Italian SAR region and transporting them to Italy. Mare Nostrum's establishment came as a response to the deaths of 359 migrants at the coast of Lampedusa. *Mare Nostrum's* purpose was thus to save as many migrants as possible and it could intervene for that purpose until the costs of Libya. See Alexandre Pouchard, "Migrants en Méditerranée: après "Mare Nostrum", qu'est-ce que l'operation "Triton?", *Le Monde*, 07 Avril 2016.

Kouvelakis summarizes the events following the tragic shipwreck in Lampedusa leading to the establishment of Mare Nostrum as following: "A tragic shipwreck off Lampedusa in October 2013, with the loss of 366 migrant lives, galvanized Italian public opinion. Enrico Letta, centre-left Prime Minister at the time, launched a large-scale naval operation aiming to help shipwrecked migrants and deter smugglers, with clear priority accorded to the first objective. Italian vessels sailed as far as Libyan waters, and in less than a year saved around 150,000 migrants, a remarkable figure given that the IOM's total number of arrivals by sea in Italy for the whole of 2014 was 170,000. However, after the EU refused to make a significant contribution to the high cost of the operation, some €9m per month, the right-wing Interior Minister, Angelino Alfano, took the lead in calling a halt, and Mare Nostrum ceased operations at the end of August 2014. Frontex, the EU's border guards, then took over"., Stathis Kouvelakis, "Borderland: Greece and the EU's Southern Question", *New Left Review 110,* March April 2018, pp. 5-33, at p. 21. See also Adam Smith, Uncertainty, Alert and Distress: The Precarious Position of NGO Search and Rescue Operations in the Central Mediterranean, Revue Maroco-Espagnole de Droit International et Relations Internationals 2017, p. 37, available at: http://catedras.uca.es/jean-monnet/revistas/paix-et-securite-internationales/abstracts/new/eng/05/info001eng

[46] See Frontex http://www.europarl.europa.eu/cmsdata/84687/FRONTEX%20AAR%202014_13.05.2015.pdf and https://euagenda.eu/upload/publications/untitled-6302-ea.pdf .

[47] See Stathis Kouvelakis, "Borderland: Greece and the EU's Southern Question", *New Left Review 110,* March April 2018, pp. 5-33, at p. 21.

was 1 per 50 migrants during the year 2014, when Mare Nostrum's ships were active, exploded to 1 per 14 since January 2015 after Mare Nostrum's termination.[48]

In addition, the widespread practice throughout the European Union (found also in United Stated and Australia) of detention of refugees (including children) in prisons or detention centers, as long as their adjudication of asylum is pending,[49] is but a reflection of the global securitization of border control. The so-called 'securitization' of asylum is used as a 'tool' through which states declare states of emergency and suspend the rule of law to manage the refugee flows. The establishment of this link between asylum and security is therefore crucial in understanding the reinforcement of border controls today and refugees' precarious position. Within that context, refugees and immigrants defined through the fear of the Other,[50] are portrayed by public discourses as a threat to security and the national idea of purity. However, since due to this emphasis on security, border crossing has become, as already mentioned, a matter of "life and death" for certain groups of people, humanitarian discourses on the other side of the spectrum, portray the refugees as 'human beings' in need of care.[51] The ambivalence in these discourses concerning the representation of refugees is more than obvious. While in the first case, the nation-state on which refugees make a claim for asylum is presented as being victimized by the presence of refugees, on the second one, the refugees themselves are being 'victimized' through their representation as victims in need of care. What is common however in both cases, is that they fail to recognize refugees' political status and exclude refugees, placing them in a sphere of exceptionality.

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[48] Carine Fouteau, "Morts en Méditerranée: Les dirigeants européens n'ont plus d'excuses", *La Méditerranée, Cimetière Migratoire* (2/25), 22 Avril 2015.

[49] The practice of imprisonment of people that have committed no crime while their adjudication of asylum is pending in total defiance of international law, reminds us Arendt's observation made in *Origins* that "it is harder to kill the juridical person in a man who is guilty of some crime than in a totally innocent person". *Origins*, p. 448. The refugees as "wordless" person "is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do". Origins 296. Arendt referring to stateless as rightless further notes that "innocence in the sense of complete lack of responsibility, was the mark of their rightlessness at it was the seal of their loss of political status", Origins, p. 295.

[50] Papastergiadis, Nikos. 2006. "The Invasion Complex: The Abject Other and Spaces of Violence." *Geografiska Annaler*. Series B, Human Geography 88 (4): 429-42.

[51] Zembylas Michalinos. 2010. "Agamben's Theory of Biopower ad Immigrants/Refugees/Asylum Seekers, Discourses of Citizenship and the Implications for Curriculum Theorizing", *Journal of Curriculum Theorizing*, 26 (2), 31-45, at p. 31; Violeta Moreno Lax, "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through Interdiction/Rescue-Without-Protection' Paradigm", *JCMS* 2018 Volume 56. Number 1. pp. 119–140, at p. 120.

The simultaneous and contradictory deployment of humanitarianism and security in the government of 'precarious lives' (like those of refugees), has been described through the employment of the notion of 'humanitarian government'.[52] Fassin defines 'humanitarian government' as "the administration of human collectivities in the name of a higher moral principle which sees the preservation of life and the alleviation of suffering as the highest value of action".[53] From this definition, it entails that the agents of humanitarian government are not restricted to state organs and therefore, humanitarian government should be understood as an activity that can be "carried out by all sorts of agents, in various contexts, and towards multiple ends".[54] Where the 'problem' with humanitarianism lies, is in the fact that it does not limit itself to practices of care, but entails a process of depoliticization that subsequently affects the modes of subjectivity produced by this mode of government. Here, we are interested in the effects that such a mode of government has upon the subjectivity of the people indistinctly referred as refugees, undocumented/illegal migrants,[55] namely the recognition of those individuals as rights-bearing subjects whose lives need to be protected and saved. Although the depoliticizing effects of humanitarian government upon the recognition of individuals as subjects of rights will be further analyzed within the framework of *Khlaifia and Others v. Italy*[56], it suffices to say for now that they turn the recognition of an individual as a legitimate subject of rights being dependent upon its recognition as a 'suffering body', namely a vulnerable individual in need of care. Moreover, what is of special interest for us here, is the peculiar and parallel co-existence of humanitarianism and security that takes place today, nicely captured by the term 'humanitarian border,' a term coined by William Walter.[57] In short, it could be argued that the term

[52] See Luca Mavelli, "Governing Populations through the humanitarian government of refugees: Biopolitical care and racism in the European refugee crisis", Review of International Studies, (2017), pp. 1-24 at p. 1.
[53] Fassin, Didier 'Humanitarianism: A Nongovernmental Government', in Michel Feher (ed.) *Nongovernmental Politics*, New York: Zone Books (2007), pp. 149-160 at p. 151.
[54] William Walters, 'Foucault and frontiers: Notes on the birth of the humanitarian border', in Ulrich Bröckling, Susanne Krasmann, and Thomas Lemke (eds), Governmentality: Current Issues and Future Challenges (London: Routledge, 2010), pp. 138–164, at p. 143.
[55] For an anthropological analysis (as opposed to a legal) analysis of legality in order to better understand the term 'illegal migrant', see Martina Giuffrè and Caterina Cingolani, "Questioning Illegality in the Everyday Life: An Ethnographic Overview of African Migrant Groups in Rome", (2013), Griffith Law Review, 22:3, 729-751.
[56] The case concerns the detention of undocumented migrants at the Italian border followed by their expulsion from Italy to Tunisia.
[57] William Walters, 'Foucault and frontiers: Notes on the birth of the humanitarian border', in Ulrich Bröckling, Susanne Krasmann, and Thomas Lemke (eds), Governmentality: Current Issues and Future Challenges (London: Routledge, 2010), pp. 138–164, at p. 143.

'humanitarian border' entails a logic of both enhancing border security and saving lives, a zone where practices of rescue merge with practices of policing. In other words, search and rescue operations overlap with policies of fencing, criminalization of migrants, detention centers and deportations (even in non-safe countries where it is more than certain that migrants will face extreme forms of violence and violation of their human rights). Jill Williams further notes that, "while humanitarianism has long been the handmaiden of imperialist and militarized interventions … the humanitarianization of borders and border enforcement is a relatively new phenomenon linked to the rise of more restrictive and violent enforcement regimes".[58] Scholars thus note and bring attention to the "rise of humanitarian and care dimensions" of today border control regimes.[59] Looking at the EU's security agency Frontex, equipped with a double mission of both security and rescue, allows us to understand the way through which European borders have been tuned into humanitarian zones. It is obvious that within the context of humanitarian government emerges an auto-immunity logic,[60] since the very same lives that are deemed as in need of protection, become also targets and possible threats through the apparatus of security.

The rather oxymoron notion of 'humanitarian border', namely the conjunction of a universal concept encompassing the whole of humanity (humanitarian), with one being restrictive (border), can only be understood if we take into account that what lies behind this conjuncture: the biopolitical rationality of modern nation state. This rationality distinguishes between lives worthy of living and thus lives worthy of being saved. Therefore, although phenomenally antithetical, 'humanitarianism' and 'security' are in fact two sides of the same coin. This is because what lies behind both of them, is in fact biopolitical[61] rationality as a mode of

[58] Williams Jill, "From humanitarian exceptionalism to contingent care: Care and enforcement at the humanitarian border". (2015), *Political Geography* 47: 11–20 at p. 14. Little and Vaughan-Williams also stress that "the conjoining of 'border security' with 'humanitarian concerns' for 'irregular' migrants and refugees is itself a very recent policy development," even though the entanglement between humanitarianism and security carries a long history. See Adrien Little and Nick Vaughan-Williams, "Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia", European Journal of International Relations 2017, Vol. 23(3) 533-556, at p. 542.

[59] Little Adrien and Nick Vaughan-Williams. 2017. "Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia", *European Journal of International Relations*, 23(3): 533-56, at p. 542. See also, Tugba Basaran. 2015. "The saved and the drowned: Governing indifference in the name of security", *Security Dialogue*, 46(3): 205–20.

[60] Esposito Roberto. 2008.*Bios: Biopolitics and Philosophy*. Trans. T. Campbell. Minneapolis: University of Minnesota Press.

[61] For Foucault, biopolitics constitutes a modern condition under which the life of individuals as well as the life of populations became the object of power. He notes that since the classical age, the West has gone through a radical

government of the host populations. This rationality informs the government of non-citizens, those considered as aliens to a state either classified as refugees or migrants. The line therefore between lives worthy and non-worthy of living is drawn based on their potential to enhance to the well-being of the host populations. What needs to be stressed here is that the humanitarian border is not a fixed zone, it is not a determined line, but rather a space that moves geographically following the movement of migrants. Therefore, the externalization of migration control as the dominant strategy used by EU (but also US and Australia) to manage migration control, has changed our conception of the border itself. Rather than being a clearly demarcating line found at the geographical outer edge of a sovereign territory, the border should rather be understood as a zone where a humanitarian and a militarized logic overlap and make it impossible to clearly demarcate a line between inside and outside.

It needs to be mentioned that anti-immigration politics and especially the strengthening of border controls, do not reduce the number of people seeking asylum, but merely change the paths they take to more dangerous ones, in absence of legal ways to enter Europe. For example, the fences built in the Greek and Bulgarian[62] borders have obliged refugees to take the uncertain road through the Aegean Sea. The result is an unprecedented number of people found dead at the Mediterranean Sea.[63] More specifically, from 2014 to 2018, 17,819 people are known dead or missing[64] (from the total number of 1,906,616 that are known to have arrived in European countries).[65] Although the numbers speak for themselves, it is worth noting that from 1988 to March 2012 at the maritime border of the EU, there were documented 13,417 deaths, while 6,226 deaths occurred solely in the Sicily Channel during the same period.[66]

transformation of the mechanisms of power, from the sovereign power to take life to the biopolitical power to make live. See Michel Foucault, *The History of Sexuality* Vol. I, Ney York 1978, at p. 136.

[62] Bulgaria has also constructed a has constructed a 146km barrier along its border to Turkey.

[63] Mediterranean has been reported as being the 'most deadly stretch of water for refugees and migrants in 2011" (UNHCR available at: https://www.unhcr.org/news/briefing/2012/1/4f27e01f9/mediterranean-takes-record-deadly-stretch-water-refugees-migrants-2011.html

[64] UNCHR (United Nations High Commission on Refugees) (2015) Refugees/migrants emergency response — Mediterranean, available at https://data2.unhcr.org/en/situations/mediterranean (last accessed January 8 2019).

[65] It is worth noting that the year 2015, 1,015,877 immigrants have arrived in EU.

[66]Heller C, Pezzani L and Situ Studio (2012) Forensic Oceanography – Report on the 'Left-to-Die Boat'. Centre for Research Architecture, Goldsmiths, University of London available at: https://www.forensic-architecture.org/wp-content/uploads/2014/05/FO-report.pdf (accessed 9 February 2019).

Based on the above, the continuation of incidents where people are 'left to die' at sea, as well as the continuation of the practice of 'non-entrée', comes in sharp contradiction with European states' commitment to universal human rights norms. While today states recognize that refugees have rights accorded to them by international law, they nevertheless do not act according to their legal obligations. This provokes subsequently a fundamental question, that constitutes also the research question of this research:
How are supposedly universal human rights norms suspended in the case of the people indistinctly referred as refugees, illegal/undocumented migrants, asylum seekers and how are they subsequently 'left to die' or to use Foucault's words, how are their lives 'disallowed to the point of death'? In other words, how have certain lives come to have less value than others, or no value at all?

The frequency of the cases where people are 'left to die' and the number of derogations from non derogable rules such as the right to life, disallows us from considering those cases as aberrant and thus exceptional. On the contrary, what they are revealing is the fragility of human rights regime within the European context as well as the deficiency of universal human rights. It is therefore argued here, that the destiny of refugees and those people indistinctly referred as 'migrants' is inseparably linked with an inherent paradox of human rights regime.

To unravel this paradox, I turn (in chapter 2) to Hannah Arendt's thought and her conception of 'rightlessness" understood as both a legal and political loss as well as a loss of some fundamental human qualities. Following Arendt, I argue that the *de facto* equation of refugees with 'rightless" within the today ongoing 'refugee-crisis', (as well as the problem of 'rightlessness' itself within the 'era of rights'), reveals what "had been hidden throughout the history of national sovereignty",[67] namely the inherent contradiction between the modern nation state's sovereign power and the notion of universal human rights. Arendt not only stressed sovereignty's power to exclude, but more importantly, she stressed that such power can take totalitarian dimensions in matters of "emigration, neutralization, nationality and expulsion".[68]

[67] Arendt, *Origins*, p. 278.
[68] Arendt, *Origins*, p. 278.

Moreover, to further address the research question and understand how refugees' lives are deemed as non-worthy of living,[69] I subsequently turn (in chapter 3) to Agamben's reading of sovereignty as operating through the mode of exception and the abandonment (or ban), to unravel its utility in the attempt to understand today's anti-migration policies employed by western states. Drawing on Foucault's theory on biopower, Agamben's work brings important conceptual tools in understanding refugees legal and political exclusion. In accordance with Arendt, Agamben also sees refugees' legal and political exclusion to be followed by their simultaneous inclusion in the legal order through the regime of humanitarianism, and like Arendt he remains rather suspicious towards this regime because of its depoliticizing effects. Agamben tries to understand the logic of modern sovereign power that distinguishes between lives worthy and non-worthy of living. Following Hannah's Arendt thought, he finds the figure of refugee as a key one towards this understanding. The rather marginal figure of the refugee therefore, (from the point of view of the dominant sovereign power) becomes central in his theory. Agamben makes a parallelism between *homo sacer,* a figure from Ancient Roman law and refugees since both have been placed outside the rule of law that has been defined for citizens. Found outside law, homo sacer's life becomes a life without value that anyone could kill without committing murder. Prompted by the legitimized violence inflicted upon refugees' bodies, Agamben argues that "it would be more honest and, above all, more useful to investigate carefully the juridical procedures and deployments of power by which human beings could be so completely deprived of their rights…that no act committed against them could appear any longer as a crime".[70] For Agamben the refugees, as the personification of bare life, namely a life deprived of rights, not only constitute a product of sovereign power, but the fundamental act of sovereign power and in that way they "put the originary fiction of modern sovereignty in crisis".[71] Both Arendt and Agamben identified the inherent contradictions between state sovereignty and human rights and saw the refugee as the personification of such contradictions.

Moreover, I argue (in chapter 5) that the suspension or the non-application of universal human rights norms in the case of refugees seeking asylum in the so-called Western states, does not

[69] Judith Butler by introducing the concept of 'grievability' contends that the ability to be mourned within the West demonstrates which lives are worthy or non-worthy of living, those that are valued and the non-valued ones. See Butler, Judith, 2010. *Frames of War: When Is Life Grievable?* Pbk. London: Verso.

[70] Agamben, Giorgio. 1988. *Sovereign Power and Bare Life. Homo Sacer,* 1. Stanford, Calif.: Stanford University Press, p. 97. (hereinafter *Homo Sacer*).

[71] Agamben, *Homo Sacer,* p. 77.

constitute a mere discrepancy between formal rights and their application. What lies behind norms' suspension has to do with the fact that refugees are not recognized as subjects of rights by destination countries where they seek asylum. In other words, behind laws' suspension lies our inability to recognize all lives as equally vulnerable or what Judith Butler names as 'grievable'.[72] Refugees' and migrants' lives being discursively and.. figured as 'inhuman' entails that that the violation of their lives is not perceived as a violation. To understand and theorize the differential allocation of vulnerability and grievability which ends up in considering some lives as 'livable', while others as lives that do not count, I use as conceptual tools Judith's Butler notions of vulnerability, precariousness and precarity. In addition, in chapter 5, I engage with Emmanuel Levinas and Judith Butler to provide the theoretical grounds on which the notion of responsibility could be extended to those considered as non-members within particular political communities and thus unravel our ethicopolitical obligations towards refugees and consequently the legal norms that are being suspended in the Mediterranean. Before my engagement with Arendt, Agamben, Levinas and Butler, I first outline (in chapter 2) the legal norms that are presumed to apply but end up being suspended in practice.

[72] Butler links the fact that certain lives are not protected and consequently do not qualify as 'grievable' with the fact these lives fail to be recognized as human lives. being omitted from human discursivity, are figured as inhuman, or less than human. See Butler, Judith. 2004. *Precarious Life: The Powers of Mourning and Violence*. London: Verso, and Butler, Judith. 2010. *Frames of War: When Is Life Grievable?* Pbk. London: Verso.

Chapter I: Legal Norms

In the following pages, I outline migrants' fundamental rights that are being affected by the anti-immigration politics adopted by destination countries[73] alone, or in collaboration either with transit countries[74] or with migrants' countries of origin.[75]

a) The right to freedom of movement

The first right that migrants and refugees are denied because of destination states' anti-immigration policies that prevent their departure, is their freedom of movement, what Hannah Arendt characterized as "historically the oldest and also the most elementary" of all specific freedoms.[76] States 'non-entrée' politics ignore the fundamental right to leave any country including one's own enshrined in article 13 of the 1948 Universal Declaration of Human Rights (hereinafter UDHR)[77] and binding human rights treaties. The 1948 UDHR recognizes the freedom of movement and inscribes the right to leave a country within it. Although the Declaration, being a document adopted by the UN General Assembly, does not constitute a *stricto sensu* legally binding text, most of the norms it contained in it have progressively acquired the status of customary international law. In addition, the Proclamation of Tehran held that: "The UDHR states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community."[78] The right to leave a country was subsequently codified in a legally binding form in the International Covenant on Civil and Political Rights (ICCPR)[79] and Protocol 4 of the European Convention on

[73] By the term 'destination country', I mean migrants' intended destination country.
[74] By the term 'transit country', I mean the country that a migrant will or aim to transit *en route* to her travel to the destination country.
[75] By the term 'country of origin', I mean the country from which a migrant has departed, independently of whether she is a citizen or not of that country.
[76] Arendt, Hannah. 1968. *Men in Dark Times*. [1St ed.]. A Harvest/Hbj Book. New York: Harcourt. Brace & Company, p. 9.

[77] Universal Declaration of Human Rights, (1948) GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[78] Proclamation of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 U.N. GAOR, U.N. Doc. A/CONF. 32141 (1968), available at: http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf
[79] International Covenant on Civil and Political Rights (16 December 1966, in force 23 March 1976) 993 unts 171.

Human Rights (hereinafter ECHR)[80]. Article 12(2) of the ICCPR[81] and Article 2(2) of Protocol 4 of ECHR recognize the right to leave as a universal right applicable to every person independent of her status as a citizen or not of a country.

Although the UDHR, the ICCPR and the ECHR recognize the freedom of movement within which they proclaim also the right to leave any country, they nevertheless restrict the application of the freedom within the borders of each state.[82] Article 13 of the UDHR, Article 12 (2) of the ICCPR[83] and Article 2 (2) of Protocol 4 of ECHR codify the right to leave a country, including ones one, but they do not provide for a parallel entitlement to enter the territory of other countries. The right to enter a country is being restricted by Article 12(1) of the ICCPR and Article 2 (1) Protocol 4 ECHR only to those who already are found 'lawfully' within the territory of a state, namely to the nationals or citizens of that state. It needs to be mentioned that although both the ICCPR and the ECHR do not recognize the right to leave as an absolute one, since they accept that restrictions may need to apply to it, they place those restrictions under specific requirements for being permissible. Thus, no restrictions would be accepted to the right to leave but for those that are "provided by law [and deemed] necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant".[84] In any case, when states impose restrictions upon the right to freedom of movement they "should always be guided by the principle that the restrictions must not impair the essence of the right".[85] Consequently, any restrictions that nullify the right either in law, namely in a theoretical level or in practice cannot be accepted. To the extent that the right to move is dependent upon a sovereign's decision, its application can be suspended any time. Indeed, what we witness today is that within the broader context of states' anti-immigration politics, states suspend the right of migrants' movement in the name of security and thus prevent them from reaching their territories. Nevertheless, migrants are denied their freedom of movement not only

[80] European Convention on Human Rights (in force 3 September 1953) ets No. 5, 213 unts 222..
[81] Article 12 of the ICCPR codified for the first time the right to freedom of movement in a legally binding text.
[82] Article 13 of the UDHR stipulates that: 1) Everyone has the right to freedom of movement and residence *within the borders of each State*. (2) Everyone has *the right to leave* any country, including his own, and *to return to his country* (emphasis added).
[83] Article 12 of the ICCPR codified for the first time the right to freedom of movement in a legally binding text.
[84] Article 12 (3) of the ICCPR and Article 2 (3) Protocol 4 of the ECHR. Both texts proclaim the same requirements for the restrictions to the right to leave to be lawful.
[85] Human Rights CCPR General Comment No. 27: (Freedom of Movement), CCPR/C/21/Rev.1/Add.9 at para. 13.

because of these 'preventive' practices, but also as a result of the practices of confinement that take place once they reach the territories of the destination countries. The transformation of hotspots into places of confinement, where migrants' rights are suspended has become the rule today in host countries.[86].

As noted above, Hannah Arendt stressed the importance of freedom of movement and considered it as the most important among all the other freedoms. Furthermore, she linked the right to freedom of movement with freedom itself. In her own words: "being able to depart for where we will is the prototypal gesture of being free, as limitation of freedom of movement has from time immemorial been the precondition for enslavement".[87] What is most important however, is the link that Arendt establishes between freedom of movement and action, by stressing that "freedom of movement is also the indispensable condition for action, and it is in action that men primarily experience freedom in the world".[88]

Arendt found freedom to be a precondition for action due to the nature of action, since action "always establishes relationships and therefore has an inherent tendency to force open all limitations and cut across all boundaries".[89] Although the importance that Arendt places upon action will be analyzed subsequently, it suffices for now to say that the reason I stress the fundamental place of action in Arendt's theory lies in the fact that her account of action is reflected in her critique of the doctrine on human rights. Arendt found rather problematic the endeavor to find a normative grounding for human rights and places them instead within the domain of the political. However, since it is action and speech in conjunction with plurality that make politics,[90] it entails that rights cannot be understood as inherent qualities attributable to every being by virtue of her birth. On the contrary, the "birth" of the subject of rights takes place through the insertion of one's self into the political world.[91]

Finally, it is important to stress that the right of an individual to leave his or her country is the first right on the route to the right to asylum since as it will be made clearer below, as a refugee in terms of the 1951 Geneva Convention is considered a person one is found outside the borders

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[86] See Stathis Kouvelakis "Borderland: Greece and the EU's Southern Question", *New Left Review 110,* March April 2018, pp. 5-33, at p. 18 and Hayden Patrick, "From Exclusion to Containment: Arendt, Sovereign Power and Statelessness", *Societies Without Borders*", 3 (2008) 248-269.
[87] Arendt, *Men in Dark Times,* 1968, p. 9
[88] Arendt, *Men in Dark Times,* 1968, p. 9.
[89] Arendt, *Human Condition* p. 190.
[90] Arendt, *Human Condition,* p. 7.
[91] *Arendt, Human Condition* p. 186.

of her state of nationality. Annulling therefore in practice the right to the freedom of movement, ends up in an abolition of the right to asylum itself.

b) The right to asylum

As man's search for a place of asylum of refuge goes back to history,[92] it is considered that the practice of asylum is as old as humanity itself.[93] The concept of 'asylum' being both global and ancient, has undergo a change throughout the years, from the notion of a sacred and safe place to the notion of legal status recognized in specific (and narrowly defined) circumstances to certain persons. Although a definition of 'asylum' is not provided today in any international convention so far, it can be considered as "the grant to a non-citizen of lasting protection in the territory of a State, the opportunity to make a life and a living, and the possibility to enjoy fundamental human rights and freedoms."[94]

With interceptions occurring today in places like the high seas, or even in the territory of states of origin or transit, migrant boats are prevented from reaching Europe's coasts and as such the right to asylum is annulled in practice. These interceptions are the result of agreements signed between destination and countries of origin. In *Hirsi* case, the first case heard before a human rights court concerning search and rescue operations, the Court examined the legality of the agreement between Italy and Libya under the terms of which migrants were intercepted by Italy in the high seas and subsequently pushed back to Libya. The ECtHR found that bilateral agreements of this kind do not displace the obligations under the Convention and as such "Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya".[95] Nevertheless as the practice of bilateral agreements continues, those intercepted are in fact denied first their right to an asylum procedure and subsequently the right to asylum itself. There is therefore because of these practices a gradual abolition in practice of

[92] There are references to the practice of assisting people fleeing persecution in texts written 3,500 years ago during the blossoming of the great Babylonian, Hittite, Assyrian and Egyptian empires of the Middle East. See UNCHR in Protecting Refugees & the Role of UNCHR, (2014), available in: https://www.unhcr.org/509a836e9.pdf
[93] Sinha, S. Prakash. 1971. *Asylum and International Law*. The Hague: Martinus Nijhoff, p. 5.
[94] Guy S. Goodwin-Gill,"The 1967 Declaration on Territorial Asylum, *Audiovisual Library of International Law*, pp. 1-12 at p. 8 available at: http://legal.un.org/avl/ha/dta/dta.html
[95] *Hirsi* case para. 129.

the right to asylum. As Jacques Derrida noted in a text written for the first conference on 'cities of refuge', in 1996 in the Council of Europe in Strasbourg, "asylum-seekers knock successively on each of the doors of the European Union states and end up being repelled at each one of them. Under the pretext of combating economic immigrants purporting to be exiles from political persecution, the states reject applications for the right to asylum more often than ever".[96]

A few decades ago, in 1950, Hannah Arendt already lamented the gradual abolition of the right of asylum. In chapter nine entitled "The decline of the nation-state and the end of the rights of Man", of her book *The Origins of Totalitarianism*,[97] she remarked the gradual annulment of the right of asylum, "the only right that had ever figured as a symbol of the Rights of Man",[98] due to the arrival of hundreds of thousands of stateless people in the interwar period. In chapter nine of *Origins* devoted to the perplexities surrounding human rights, Arendt reminded us of the "long and sacred history" of the right of asylum which also constitutes "the only modern remnant of the medieval principle that *quid est in territorio ese de territorio*".[99] Writing in 1950, she remarked the absence of the right to asylum from international agreements[100] and noted that in a world organized around nation-states, this right was 'felt to be an anachronism and in conflict with the international rights of the State'.[101]

Despite the progress in the field of international law since Arendt's time,[102] the right to seek asylum despite its incorporation within the 1948 UDHR, has not been inscribed so far in any legally

[96] Derrida, Jacques. 2001. *On Cosmopolitanism and Forgiveness. Thinking in Action*. London: Routledge, p. 13. The text was first published in 1997 in French entitled 'Cosmopolites de tous les pays, encore un effort!'.

[97] Arendt, Hannah. 1973. *The Origins of Totalitarianism*. New edition/. A Harvest Book, Hb244. New York: Harcourt Brace Jovanovich. (hereinafter, *Origins*).

[98] Arendt, *Origins*, p. 280.

[99] Arendt, *Origins*, p. 280.

[100] Arendt explicitly refers to the absence of the right of asylum from the Covenant of the League of Nations. See Origins p. 280. Given the fact that the 1948 Universal Declaration has already been signed when Arendt was writing the *Origins*, the absence that she identifies, must be understood as an absence of the right to asylum from the field of hard law documents.

[101] Arendt, *Origins*, p. 280.

[102] By the term 'progress' I mean the proliferation of international conventions on human rights since Arendt made her critique on the meaningless of human rights as opposed to civil rights. By signing and ratifying these conventions, states voluntarily agree to limit their sovereignty and assume the responsibility to respect, protect and fulfill rights for non-nationals as well. Principal among these conventions adopted are the 1951 Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights adopted both in 1976 and also the institutions that monitor states' compliance to the obligations assumed by the Conventions such as the European Court of Human Rights, the United Nations Human Rights Committee, the United Nations High Commissioner on Human Rights and Refugees. As a result of the emphasis placed upon human rights since WWII, we can now talk about a *regime* of human rights comprised of human rights conventions, regional and international courts, NGOs.

binding document. More specifically, Article 14(1) of the 1948 UDHR states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution". However, although there is by the UDHR, a right to seek asylum this right does not entail a correlative duty upon states to grant asylum,[103] nor a right to enter the jurisdiction of another state for the purpose of asking asylum (Article 13 UDHR). Thus, every sovereign state retains the right to deny or provide asylum to persons seeking asylum and found under its jurisdiction. The right of asylum in international law is therefore considered as a right of a state, rather than the right of an individual.[104]

c) The principle of *non-refoulement*

Nevertheless, the adoption of the 1951 Refugee Convention and its 1967 Protocol changed the scenery surrounding asylum and marked a significant step towards fulfilling refugees' protection by enshrining a right to *non-refoulement*. Article 33 (1) of the 1951 Refugee Convention provides that: "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". The obligation of non-refoulement applies to individuals grasped by the definition provided in Article 1 of the 1951 Refugee Convention, as modified by the 1967 Protocol Relating to the Status of Refugees (the 1967 Protocol)[105]:

"[the term 'refugee' shall apply to any person who] owing to *well-founded fear of being persecuted* for reason of race, religion, nationality, membership of a particular social group or opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

[103] The drafting history of Article 14(1) of the Universal Declaration is quite illuminating at this point since in its initial formulation Article 14(1) provided that: "Everyone has the right to seek *and to be granted*, in other countries, asylum from persecution" (emphasis added). The words "to be granted" of the initial draft were replaced by the words "to enjoy" in the final text to avoid any connotation that states have an obligation to admit persons seeking entrance upon their territories. Moreover, the fact that the 1974 Convention on Territorial Asylum did not finally gained support of the international community, is another proof of states' reluctance to give over control of their borders.

[104] Roman Boed. 1994 "The State of the Right of Asylum in International Law", *Duke Journal of Comparative & International Law*, Vol. 5(1, 1994), pp.1-33, at p. 4.

[105] Protocol relating to the Status of Refugees.

outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.".[106]

States have thus an obligation not to expose refugees to further persecution and danger. The question that emerges is whether Article 33 para. 1 binds states parties outside their territory. It is thus important to look on the ratione loci application of Article 33, that is whether the obligation not to refouler is limited to individuals already physically present within the territory of a state, or it is applicable irrespectively of any territorial qualifications. Recent literature argues in favor of the extraterritorial application of the principle of non-refoulement.[107] Moreover, an argument can also be made in favor of the extraterritorial application from the wording of Article 33 para. 1 itself. Contrary to other articles of the 1951 Refugee Convention that contain a territorial criterion concerning their application and condition the rights accorded to refugees on their lawful residence, Article 33 para 1 contains no such restriction. Instead it prohibits the return of refugees "*in any manner whatsoever*" to the borders of states where they fear persecution. As it has been pointed out, the prohibition to return in any manner, includes extradition, expulsion, deportation or rejection at the frontier.[108]

In addition, Article 31 para.1 of the Vienna Convention on the Law of Treaties,[109] provides that a treaty -in our case the 1951 Refugee Convention- should be interpreted in line with its context, object and purpose. It is worth quoting here the words of the French representative Mr Juvigny, who during the discussion of the draft of the United Nations Convention relating to the Status of Refugees at the Ad Hoc Committee, said that "there was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country, quite apart from the reprisals awaiting him there".[110] The purpose of Article 33 prevents thus the return *to* a specific territory and not *from* a specific territory.[111] Therefore, since the context, object and purpose of the 1951 Refugee Convention

[106] Emphasis added.
[107] UNHCR: "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol", para 24 and following; HRW, "By Invitation Only: Australian Asylum Policy" 40, Goodwin-Gill, Guy S, and Jane McAdam. 2007. *The Refugee in International Law.* 3rd ed. Oxford: University Press, p. 244.
[108] Goodwin-Gill, Guy S, and Jane McAdam. 2007. *The Refugee in International Law.* 3rd ed. Oxford: University Press, p. 246.
[109] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980),
[110] UN Doc. E/AC.32/SR.40.
[111] See Trevisanut Seline. 2004. "The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea." *Leiden Journal of International Law* 27 (3): 661-75, at p. 666.

was to assure refugees the "widest possible exercise" of their fundamental rights and freedoms as recognized by the UDHR,[112] it entails that non-refoulement binds states outside their territory as well. consequently, the principle of non-refoulement "applies regardless of whether the relevant action occurs 'beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc."[113]

The principle of *non-refoulement* is supported by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (hereinafter CAT),[114] which in Article 3 stipulates that: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".[115] In addition, the prohibition of refoulement is also found in Article 2 of the ECHR, Article 22(8) of the 1969 American Convention on Human Rights (hereinafter ACHR), as well as Article 5 of the 1981 African Convention on the Protection of Human and Peoples' Rights
These norms should be considered in the interpretation of the 1951 Refugee Convention. As the International Court of Justice (ICJ) in its Advisory Opinion in *Namibia (South West Africa) Case*, stated that "interpretation cannot remain unaffected by subsequent development of law" and that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[116]

Concerning now the status of the prohibition to *refouler*, there is also enough evidence that the rule falls into the realm of customary international law and as such is binding even upon the states that have not signed the 1951 Refugee Convention.[117]
However, even if we accept that the rule is not (at least yet) a peremptory one, due to lack of consistent state practice concerning its application, the rule still forms part of customary law as a

[112] See *Preamble* of the Refugee Convention.
[113] Goodwin-Gill, Guy S, and Jane McAdam. 2007. *The Refugee in International Law.* 3rd ed. Oxford: Oxford University Press, p. 246.
[114] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., at 197, U.N. Doc. A139/51 (1984).
[115] In the *JHA v. Spain (Marine I)*, No. 323/2007, 21 November 2008 *case*, the Committee against Torture affirmed the extraterritorial application of the principle of *non-refoulement*. This case is particularly important because it explicitly confirmed states' responsibilities under CAT when they engage in interceptions or rescue activities at sea.
[116] *Namibia (South West Africa) Case,* Advisory Opinion, 1971 I.C.J. 31 (June21), para. 53 at p. 19.
[117] *Hirsi* case para. 23 at p. 7 and Concurring opinion in *Hirsi Jamaa* case, of Judge Pinto de Albuquerque at p. 64. See also, Lauterpacht, Elihu, and Daniel Bethlehem. 2003. The Scope and Content of the Principle of Non-Refoulement: Opinion. *in* Feller, Erika, Türk, Volker and Frances Nicholson. 2003. *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed.. Cambridge: Cambridge University Press.

component of the prohibition of torture which constitutes a *jus cogens* norm. States are therefore disallowed from returning a refugee to a country where she was or will be persecuted.

Consequently, even though states do not have an obligation to grant asylum, they do have an obligation deriving from the *non-refoulement* principle, to provide access to their asylum procedures and in that way, an obligation to allow the would-be asylum claimants to enter their territories. In other words, although states have the sovereign right to control their borders, the "right to seek and to enjoy asylum" in conjunction with the principle of *non-refoulement,* do provide a "de facto right to enter.[118]

This interpretative approach has been confirmed recently by the European Court of Human Rights (ECtHR) in the 2012 *Hiri* case. In its judgement the Court reiterated states' obligation to abide by the principle of *non-refoulement,* which held it to be the "logical complement to the right to seek asylum", as well as a "fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment".[119] The Court found that the principle of non-refoulement has now "come to be considered a rule of customary international law binding on all States".[120] Moreover, in his concurring opinion, Judge Pinto de Albuquerque elucidated further the normative framework of the *non-refoulement* principle and stated that the principle has two "procedural consequences", namely "the duty to advise an alien of his or her rights to obtain international protection" and most importantly, the obligation to provide to individuals "fair and effective refugee-status determination and assessment procedures".[121]

Consequently, despite the lack of a legally binding right to 'seek asylum' in the field of international law as well as the lack of an obligation on behalf of states to admit refugees in the countries where they seek entrance, (to grant asylum), states have an obligation to provide access to their asylum procedures and thus to allow entrance on their territories since it is rather unlikely for a refugee determination procedure to be effective if taken outside the state's territory.[122]

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[118] See inter alia Hirsch, Asher Lazarus and Nathan Bell. 2017. "The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime", *Human Rights Rev*iew 18 (4): 417-37.

[119] *Hirsi* case, para. 23 at p. 7.

[120] *Hirsi* case para. 23 at p. 7.

[121] *Hirsi* case, p. 72 Concurring Opinion of Judge Pinto de Albuquerque.

[122] In his Concurring Opinion in *Hirsi* case, Judge Pinto de Albuquerque held that in order for a refugee-status determination procedure to be individual, fair and effective, it must follow at least the following features: (1) a reasonable time-limit in which to submit the asylum application; (2) a personal interview with the asylum applicant before the decision on the application is taken; (3) the opportunity to submit evidence in support of the application and dispute evidence submitted against the application; (4) a fully reasoned written decision by an independent first-instance body, based on the asylum-seeker's individual situation and not solely on a general evaluation of his or her

In that way we could argue in favor of a de facto right to enter for refugees in the territories where they seek asylum.[123]

d) The duty to rescue people in distress at sea

The obligation to rescue people found in distress at sea constitutes a fundamental rule of customary[124] international law codified in Article 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[125] according to which ships are required "to render assistance to *any person found at sea* in danger of being lost;" and "to *proceed with all possible speed to the rescue of persons in distress*, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (emphasis added).[126] The duty to save life at sea is also regulated in a number of international maritime law treaties. More specifically, it is found in the 1974 Convention for the Safety of Life at Sea (SOLAS Convention),[127] the 1979 Search and Rescue Convention (SAR Convention),[128] as well as in Article 10 of the 1989 International Convention on Salvage.[129] The rule is founded on fundamental human rights principles; namely, the right to life, as well as the right to dignity and human treatment.[130] Importantly, the duty to render

country of origin, the asylum-seeker having the right to rebut the presumption of safety of any country in his or her regard; (5) a reasonable time-limit in which to appeal against the decision and automatic suspensive effect of an appeal against the first-instance decision; (6) full and speedy judicial review of both the factual and legal grounds of the first-instance decision; and (7) free legal advice and representation and, if necessary, free linguistic assistance at both first and second instance, and unrestricted access to UNHCR or any other organization working on behalf of UNHCR.

[123]Hirsch, Asher Lazarus, and Nathan Bell. 2017. "The Right to Have Rights As a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime." *Human Rights Review* 18 (4): 417-37.

[124] ILC, Articles concerning the Law of the Sea with Commentaries, *Yearbook of the International Law Commission*, 1956, Vol. 2, p. 281. See inter alia Goodwin-Gill, Guy S, and Jane McAdam. 2007. *The Refugee in International Law*. 3rd ed. Oxford: Oxford University Press, p. 278.

[125] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

[126] Although Article 98 of UNCLOS is found in Part VII which refers to the rules applying to the High Seas, the scope of application of the duty to rescue people at sea applies also to the exclusive economic zone (EEZ), by virtue of Article 58(2) of UNCLOS. Equally the duty is applicable to a state's territorial waters by virtue of Article of Article 18(2) which refers to rendering assistance in case of distress.

[127] Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 1861.

[128] Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97.

[129] International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 193.

[130] Cacciaguidi-Fahy, S, (2007) "The Law of the Sea and Human Rights", 19 *Sri Lanka Journal of International Law*. 19 (1): 85-108, at p. 91.

assistance entails the disembarkation of the rescued persons "to a place of safety."[131] Disembarkation of the rescued persons to a safe place is therefore the last phase for the completion of the rescue procedure. However, the term 'place of safety' is not defined further by the SAR Convention. There is only one definition found in the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea as "a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met".[132] Despite the clear articulation of an obligation of disembarkation, in practice it has turned out difficult to find a state that will allow the disembarkation of the rescued people in its port. Although the SAR Convention was amended in 2004 in order to clarify the duties of States, its text remains ambivalent. According to the added paragraph 3.1.9. of the SAR Convention:

"Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise *primary responsibility for ensuring such co-ordination and co-operation occurs*, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [Inter- Governmental Maritime Consultative] Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effective as soon as reasonably practicable."[133]

Although the article provides for the co-operation and co-ordination among states concerning disembarkation of survivors from the assisting ship, it fails to determine the state to which the rescued people should be disembarked. The limitation of responsibility of the responsible state for the SAR zone to merely "ensuring that co-ordination occurs", in combination with the sovereignty that states exercise upon their territories entails that entering a State's port is left at the discretionary power of the coastal State since there is no right of entry into a State's port.[134] As Irini Papanicolopulu notes, the duty to rescue people in distress at sea can be considered as "the other side of the coin of the right to life, which every individual enjoys under international human rights law."[135] The decisive question that arises is whether the duty to render assistance

[131] SAR Convention, Ch. 1.3.2.
[132] Resolution MSC. 167 (78), adopted on 20 May 2004.
[133] SAR Convention, Ch. 3.1.9. Emphasis added.
[134] For an analysis of the gaps in UNCLOS and SAR see Papanicolopulu, Irini. 2018. *International Law and the Protection of People at Sea*. Oxford, United Kingdom: Oxford University Press, p. 188 and following.
[135] Papanicolopulu, Irini. 2018. *International Law and the Protection of People at Sea*. Oxford, United Kingdom: Oxford University Press, p. 189.

consists in a mere obligation to provide the means or it entails also the achievement of certain results.[136] It is in other words an obligation of conduct or of result?[137] This question is of particular importance since arguing in favor of the existence of an obligation of result would give rise to an individual 'right to be rescued'. To the extent that the purpose of UNCLOS, SOLAS and SAR Convention is the allocation of competences among States on the rescue at sea, without any further reference to peoples' rights to be rescued, it seems rather ambivalent to argue in favor of an obligation of result under the terms of these Conventions. Nevertheless, a 'right to be rescued' can be found under the terms of human rights law as it will be argued below.

e) The 'right to be rescued

The right to life is protected under a number of international human rights treaties. More specifically, the International Covenant on Civil and Political Rights (ICCPR),[138] the European Convention on Human Rights (ECHR),[139] the American Convention on Human Rights (ACHR)[140] and the African Charter on Human's and People's Rights,[141] all contain provisions that bound states to protect the life of individuals under their jurisdiction. The ECtHR has affirmed and illuminated through its jurisprudence States' obligations that the implementation of the right to life entails. In *Osman* case, the ECtHR held that Article 2 of the ECHR requires states not only to refrain from causing death, but also to take measures to protect the lives of individuals found within their jurisdiction.[142] The crucial question is whether an individual 'right to be rescued' could arise from states' positive obligations under the right to life. The decisive point here is the establishment of jurisdiction, to the extent that human rights treaties protect

[136] See Seline Trevisanut 2014. "Is There a Right to be Rescued at Sea? A Constructive View", 2014, *QIL, Zoom-in 4*, pp. 3-15.
[137] For a distinction between obligations of conduct and obligations of result, see "Sixth Report on the Responsibility of States" United Nations, *Yearb. of the Int, Law Commission*, 1977, II (part I), at 4-47, para. 5-7.
[138] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[139] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[140] American Convention on Human Rights (22 November 1969, entered into forced 18 July 1978) 1144 UNTS 123
[141] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58.
[142] See *Osman v. United Kingdom*, App no 87/1997/871/1083 (ECtHR 28 October 1998). See also *L.C.B. v the United Kingdom*, App no 14/1997/798/1001 (ECtHR, 9 June 1998), para 36, where the Court stated that "the Court considers that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".

individuals who are within the jurisdiction of states. The ECtHR had the chance to rule on the issue of jurisdiction in *Hirsi* case. The case concerned an action brought by eleven Somali and thirteen Eritrean nationals who have been intercepted at sea, south of the island of Lampedusa in their attempt to reach Italy. The applicants after being intercepted by Italy were returned to Libya. Concerning the establishment of jurisdiction of the Italian state the ECtHR held that: "the events took place entirely on-board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities."[143] Of course, the establishment of jurisdiction might be more difficult in cases where the rescued persons are not taken on board. The decisive factor is therefore whether the persons concerned are under the control of state institutions or are affected by their actions.[144] In addition in *Hirsi* case, the ECtHR confirmed that the evaluation of a state's obligations is not affected by its obligations under other legal regimes, nor by its agreements with other states. The Court clearly stated that "Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas".[145] Thus states' obligations arising under other regimes like the law of the sea and the subsequent search and rescue obligations, do not dismiss the obligations arising under the Convention.
My view is that an individual 'right to be rescued' as inherent to the right to life, results from states' positive obligations that the implementation of the right to life entails. Although such a right has not been recognized so far, its recognition is more urgent than ever.[146]

It needs to be mentioned that in *Hirsi* case, the Court made also reference to Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe (PACE) on the interception and rescue at sea of asylum seekers and irregular migrants that concluded by stating that:

[143] *Hirsi* case, para. 81.
[144] See Fischer-Lescano, Andreas, Tillmann Lohr, and Timo Tohidipur. 2009. "Border Controls at Sea: Requirements Under International Human Rights and Refugee Law", *International Journal of Refugee Law* 21 (2): 256-96, at p. 267.
[145] *Hirsi* case, para.79.
[146] See Trevisanut Seline. 2014. "Is there a right to be rescued at sea? A constructive view", *QIL, Zoom-in 4*, pp. 3-15 and Papastavridis Efthymios.2014. "Is there a right to be rescued at sea? A skeptical view", *QIL, Zoom,* pp. 1-7.

Finally, and above all, the Assembly reminds member states that they have both a moral and legal obligation to save persons in distress at sea without the slightest delay, and unequivocally reiterates the interpretation given by the Office of the United Nations High Commissioner for Refugees (UNHCR), which states that the principle of non-refoulement is equally applicable on the high seas. The high seas are not an area where states are exempt from their legal obligations, including those emerging from international human rights law and international refugee law.[147]
I will elaborate the issue of states' ethical obligations in chapter 5.

[147] PACE Resolution 1821, 2011.

Chapter II: Arendt and the Perplexities of Human Rights

a) Refugees' Loss of Legal and Political Identity

Hannah Arendt, being a stateless person herself for eighteen years,[148] referred to the subject of statelessness in many of her writings. However, she extensively treated the subject in her book *The Origins of Totalitarianism*[149] and specifically in chapter 9 entitled "The Decline of the Nation-State and the Rights of Man". In this chapter, I take up Arendt's analysis of statelessness and her critique of sovereign power to show that the problems that refugees and migrants face today as they claim and exercise rights are linked with the paradoxes of the human rights regime that Arendt identified seventy years ago. I will first analyze the paradoxes and the perplexities of the regime of human rights that Arendt criticized, and I will subsequently show how these paradoxes remain pertinent today despite the progress that took place in the field of international law in safeguarding human rights and the creation of a new geopolitical ordering in Europe with the creation of EU. My thesis is that the inherent paradoxes of the human rights regime that Arendt identified ~~seventy years ago~~, are now reflected in Europe's anti-immigration politics and its failure to create a supra-national-*nomos*[150] within EU and thus a European *demos*, despite the abolition of borders within the Schengen area[151] and the emergence of a 'post-national' form of citizenship within EU.

It needs to be stressed here that Arendt's analysis of statelessness is not limited to the legal definition of the term 'stateless.' On the contrary, Arendt stresses the need to recognize both the *de jure* stateless, namely "person[s] who [are] not considered as […] national[s] by any State under the operation of its law,"[152] and the *de facto* stateless, like refugees, migrants, asylum

[148] Arendt was arrested in Germany in 1933 where she was living. She managed to leave Germany for France. However, seven years later she was detained again in the concentration camp Gurs. She finally obtained the permission to leave for United States in 1941 and ten years later, in 1951, she was naturalized as a United States citizen.
[149] Arendt Hannah, 1973, *The Origins of Totalitarianism*, New edition/A Harvest Book.
[150] By *nomos*, I mean the legal bounding of space as defined by Arendt drawing back to the etymology of the word *nomos* from the Greek verb *nemein* that means to distribute, to possess. See Hannah Arendt, The *Human Condition* at p. 63.
[151] The Schengen area is the European space created in 1985 based on the freedom of movement for persons and merchandise within the member countries.
[152] Article 1 of the 1954 Convention Relating to the Status of Stateless Persons.

seekers etc. For Arendt, "the core of statelessness" is "identical with the refugee question",[153] since both the *je jure* and *de facto* stateless are deprived of their legal status and of a political community where they can exercise and fulfil their rights, because of their ejection from "the old trinity of state-people-territory."[154] Consequently, whenever I use the term 'stateless' in the present text I mean also refuges and migrants.

In 1949, shortly after the adoption of the Universal Declaration of Human Rights in December of 1948, in an article[155] entitled "The Rights of Man: What Are They?",[156] Arendt writes that what the "recent attempts to frame a new bill of human rights" have shown is that "no one seems able to define with any assurance what these human rights, as distinguished from the rights of citizens, really are".[157] Arendt's skepticism towards the adoption of the 1948 UDHR, derived from what she defined as the Declaration's "lack of reality'.[158] What prompted Arendt's critical remarks[159] was the fact that although the 1948 Declaration came as a response to the 'barbarous acts' committed by totalitarianism that have "outraged the conscience of mankind",[160] it could not be a response to these acts, much less an effective one. In other words, although the Declaration was structured as an antidote to the 'disease', namely the crisis of human rights that followed the period of the First World War (WWI), it contained the very same features that caused the disease.
More specifically, the emergence of statelessness in an unprecedented number in the period that followed WWI, "had the effect of confronting the nations of the world, with an unescapable and perplexing question: Whether or not there really exist such "human rights, independent of all specific political status and deriving solely from the fact of being human".[161] Although, nation-states, through their conduct, by equating statelessness and refugees with rightlessness, gave a clear and unambiguous negative answer to the above question, the UDHR, following the model of the 1789 *Declaration of the Rights of Man and Citizen*, proclaimed human rights as natural

[153] Arendt, *Origins*, p. 279.
[154] Arendt, *Origins*, p. 282.
[155] Most of the critical remarks appearing in that article were subsequently incorporated in chapter 9 of *The Origins*.
[156] Hannah Arendt, "The Rights of Man: What Are They?", 1949, 3 (1), *Modern Review*, pp. 24-36.
[157] Ibid., p. 26.
[158] Arendt, "The Rights of Man: What Are They?", p. 37.
[159] Arendt's skepticism is evident already from the title of the chapter 9 in Origins. More specifically, Arendt talks about the "end of the rights of Man", shortly after the adoption of the 1948 Universal Declaration of Human Rights.
[160] Preamble of the 1948 Universal Declaration
[161] Arendt, "The Rights of Man: What Are They?" p. 25.

rights, in the sense that rights are accorded to each person by virtue of birth.[162] The 'Man' as the right bearing subject of the 1789 Declaration became the 'human' of the 1948 UDHR and the rights were again proclaimed as inherent features attributed to each human being by virtue of birth.

Arendt criticizes[163] the men of the French Revolution precisely for ignoring juridical *persona*, for having no respect for "the legal personality which is given and guaranteed by the body politic".[164] The revolutionaries believed that they had "emancipated nature herself, as it were, liberated the natural man in all men, and given him the Rights of Man to which each was entitled, not by virtue of the body politic to which he belonged but by virtue of being born."[165] The results of this 'ignorance' or omission to safeguard *persona* became obvious with the emergence of the phenomenon of stateless people in the period that followed WWI. Referring to the stateless of the first half of the 20th century, one of Arendt's central arguments is that the stateless found themselves in a "fundamental situation of rightlessness,"[166] since together with the loss of their citizenship rights, they also lost their human rights. Deprived of a political community, "a place in the world,"[167] that could guarantee their rights, the stateless lose their legal personality, and their right to action and opinion.[168] Referring to the concept of legal personality, Arendt writes in *Origins* that:

> "The human being who has lost *his place in a community*, *his political status* in the struggle of his time, and the *legal personality* which makes his actions and part of his destiny a consistent whole, is left with those qualities which usually can become articulate only in the sphere of private life and must remain *unqualified, mere existence in all matters of public concern*."[169]

Consequently, according to Arendt, the loss of a person's legal personality does not affect only her legal standing, but it has also a political and ontological dimension, that is it affects as well a person's political standing and reduces her to 'mere existence'. As Gündonğdu notes, it is not

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[162] Article 1 of both the 1789 Declaration of the Rights of Man and the 1948 Universal Declaration state that "All human beings (or Men in the text of the 1789 Declaration) are born free and equal in rights".
[163] Before Arendt, Bentham, Burke and Marx also expressed their reluctance or hostility towards natural rights. For an extensive analysis, see Douzinas Costas, 2000, *The End of Human Rights: Critical legal Thought at the Turn of the Century*, Oxford: Hart Pub.
[164] Arendt Hannah, 2006, *On Revolution*, Penguin Classics, New York: Penguin Books at p. 98.
[165] Arendt, *On Revolution*, p. 98.
[166] Arendt, Origins, p. 296.
[167] Arendt, Origins, p. 296.
[168] Arendt, Origins p. 296.
[169] Arendt, *Origins* p. 301; emphasis added.

from a first reading evident why the issue of recognition as a person before the law has "such existential consequences".[170] To understand how the deprivation of a person's legal personality reduces her to "unqualified, mere existence" and consequently to fully grasp Arendt's claim concerning refugees' precarious legal, political and human standing, I will first look at the way Arendt conceived the notion of legal personality itself.

Arendt goes back to the etymology of the word "person" and reminds us that it derives from the Latin word *persona*,[171] which in its original meaning signified "the mask ancient actors used to wear in a play".[172] Moreover, she reminds us that it was the Romans who first used the word *persona* in its metaphorical sense, to denote a person who had civil rights.[173] Romans turned thus the term *persona* synonymous with legal personality and used it to draw a distinction between a Roman citizen who had a *persona* and a private individual who did not.[174] Romans thus conceived personhood as a state accorded by law, namely as a legal artifact and not as an quality inherent to the humanity of all human beings. As Arendt notes, "the point was that 'it is not the natural Ego which enters a court of law. It is a right-and-duty-bearing person, created by the law, which appears before the law".[175]

A peculiar feature of the actor's mask was that it was formed in a way that it existed "a broad opening at the place of the mouth through which the individual, undisguised voice of the actor could sound."[176] The word *persona*, was derived from the verb *per-sonare*, that is to "sound through".[177] *Persona* had therefore two functions: "it had to hide, or rather to replace, the actor's own face and countenance, but in a way that would make it possible for the voice to sound through."[178] It is therefore *via* and because of the mask of law that a person's voice can be heard. Bringing to our attention the theatrical origins of personhood, Arendt stresses the fact that legal rights and consequently the subjects of rights are an artifact of law and therefore dismisses any metaphysical understanding of rights that would base them on some inherent nature of all human

[170] Gündonğdu Ayten, 2015, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants*, New York, NY: Oxford University Press, at p. 99.
[171] Arendt Hannah and Jerome Kohn, 2003, *Responsibility and Judgment*, New York: Schocken Books.
[172] Arendt, *On Revolution*, pp. 96-97 and Arendt, *Responsibility and Judgment*, p. 12.
[173] Arendt, *Responsibility and Judgment*, p. 12
[174] Arendt, *On Revolution*, p. 97 and Arendt, *Responsibility and Judgment*, p. 12.
[175] Arendt, *On Revolution*, p. 97.
[176] Arendt, *Responsibility and Judgment*, p. 12.
[177] Ibid, p. 12.
[178] Arendt, *On Revolution*, p. 97.

beings. When Arendt criticizes the revolutionaries for having no concept for the juridical *persona*, she criticizes them for adopting a metaphysical approach that grounds rights in an inherent essence of human beings and for looking for an essential being, behind the mask, that would be entitled to rights by nature. The subject of rights is thus a product of law itself and does not precede its recognition as a subject of law. To put it differently, it is thanks to the artificial mask of the law that we are entitled to our rights since there is no 'being' behind the artificial mask of law. Deprived of her *persona*, a person appears to others in her bare humanity, without her legal and political status. As Arendt writes: "without his *persona* there would be an individual without rights and duties, perhaps a 'natural man' - that is, a human being or *homo* in the original meaning of the word, indicating someone outside the range of the law and the body politic of the citizens, […] a politically irrelevant being."[179] That is deprived of theirs *persona* and appearing to others as mere human beings, individuals become vulnerable to different forms of violence and discrimination. The treatment of stateless in the first half of the 20th century proved exactly the impossibility of founding human rights in the metaphysical idea of an inherent human essence that is hidden behind the mask. By dismissing any metaphysical understanding of personhood, Arendt dismisses also a metaphysical grounding for human rights:

> The conception of human right based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships-except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[180]

Appearing to others in their bare humanity, people are thus not recognized as equals, confirming that equality is not an inherent quality but the result of political action.

The crucial point here is therefore that for Arendt, legal personality is not an inherent quality attributed to an essential being but on the contrary it "is given and guaranteed by the body politic."[181] That is why Arendt writes that a person who has lost her legal personality has lost her "place in a community."[182] Understanding personhood as the medium that enables a person's voice to "sound through" (*per-sonare*) and conceiving the stateless' deprivation of legal

[179] Arendt, *On Revolution*, p. 97.
[180] Arendt, *Origins*, p. 299.
[181] Arendt, *On Revolution*, p. 98.
[182] Arendt, *Origins, p.* 301.

personhood to be accompanied by a deprivation of their right to action and opinion, Arendt "urges us to understand the legal recognition of personhood not merely as a juridical issue but also as a political one that is directly linked to the question of whose action and speech are taken into account in a given community."[183]

As Arendt explains, equality means that "everybody should be equally entitled to his legal personality, to be protected by it and, at the same time, to act almost literally 'through' it."[184] In other words, equality means equality of participation within the political community. At the same time, it is only within that community and through action or to be more specific, inter-action, that equality can be achieved. "*Man*" writes Arendt, exists-or is realized-in politics only in the equal rights that those who are most different guarantee for each other".[185] Arendt conceived thus equality as a political concept, as a quality that can be achieved and maintained only through politics and not as a natural human feature, arguing that:

> Equality, in contrast to all that is involved in mere existence, is not given us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal", Arendt writes, but "we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.[186]

Arendt's dismissal of a metaphysical notion of human being hidden behind the mask of law and thus the phenomenological approach to personhood that she adopts, is in accordance with her phenomenological approach to politics. Or to be more accurate, her phenomenological approach to politics is reflected in her understanding of the legal personhood as an artificial mask created by law. Arguing against Aristotle's view of man as a political animal, Arendt asserts that there is nothing "political *in* man that belongs to his essence."[187] "*Man* is apolitical," she writes, and "politics arises *between men*, and so quite *outside* of *man*."[188] Denying that there is some kind of "real political substance,"[189] that turns man into a naturally political animal, there is also no real

[183] , Gündonğdu Ayten, 2015, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants,* New York, NY: Oxford University Press.at p. 104.
[184] Arendt, *On Revolution,* p. 98.
[185] Arendt, *The Promise of Politics*, p. 94
[186] Arendt, *Origins*, p. 301.
[187] Arendt, *The Promise of Politics*, p. 95.
[188] Arendt, *The Promise of Politics*, p. 95.
[189] Arendt, *The Promise of Politics*, p. 95.

human substance. Consequently, Arendt denies any natural grounding for human rights. Politics therefore "arises in what lies *between men* and is established as relationships."[190]

On the contrary, the Declaration of the Rights of Man, upon which the 1948 UDHR was structured, aspired to "spell out primary positive rights, inherent in man's nature, as distinguished from his political status, and as such […] tried to reduce politics to nature."[191] Yet, rights cannot be attributes of people as natural beings (as the Declarations proclaims), but can only be understood as characteristics of human life as political life (*bios*). "Rights exist only because of the plurality of Men, because we inhabit the earth together with other Men" and are dependent "on our fellow-men",[192] and thus always presuppose membership to a political community. In his reading of Arendt, Balibar notes that "rights are not … 'qualities' of individual subjects, they are qualities that individuals grant each other, because and whenever they form a 'common world' in which they can be considered answerable for their actions and opinions".[193] Arendt's idea is therefore not that "only institutions create rights, whereas, apart from institutions, humans do not have specific rights, only natural qualities. Her idea is that, apart from the institution of the community (not in the sense of 'organic' community, another form of naturalistic myth, but in the sense of the reciprocity of actions), *there simply are no humans"*,[194] which entails that "humans simply *are* their rights."[195] Plurality constitutes a cornerstone in Arendt's political thought, to the point that she characterizes it "the law of the Earth"[196], and her thought is only understood by taking into consideration the primacy she bestows on that notion. In the same vein, Marx argues in *On the Jewish Question* that "the so-called rights of man, the *droits de l'homme* as distinct from the *droits du citoyen*, are nothing but the rights of a *member of civil society – i.e.*, the rights of egoistic man, of man separated from other men and from the community."[197]

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[190] Arendt, *The Promise of Politics*, p. 95.
[191] Arendt, *On Revolution*, p. 99.
[192] Arendt, "The Rights of Man: What Are They?" p. 34.
[193] Balibar Etienne, 2007, "(De)Constructing the Human Institution: A Reflection on the Coherence of Hannah Arendt's Practical Philosophy", *Social Research*, 74 (3), pp. 727-38 at p.732.
[194] Ibid., at p. 733.

[196] Hannah Arendt, *The Life of the Mind: The Groundbreaking Investigation on How We Think*, at p. 19.
[197] Kalr Marx, "On the Jewish Question" (1843), in: *The Marx-Engels Reader*. Edited by Robert Tucker, New York: Norton & Company, 1978. p. 26 – 46, at p. 42.

Nevertheless, the Declaration ignored the human condition of plurality since it posed the autonomous sovereign subject as the foundation of the universal rights. "Men are born free and remain free and equal in rights" proclaims Article 1 of the 1789 Declaration, while Article 2 states that "the aim of all political association is the preservation of the natural and imprescriptible rights of man." The Declaration renders thus the rights of Man as "the source of all political power" and "the foundation-stone of the body politic."[198] At the same time however, Article 3 of the Declaration stipulates that "the principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation." In that way, that is by proclaiming the nation as sovereign, the Declaration makes the enjoyment of the rights dependent upon membership within a nation-state. Consequently, the subject of rights is not the natural man, but the citizen of each nation-state. As Arendt writes "from the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an 'abstract' human being who seemed to exist nowhere, for even savages lived in some kind of a social order."[199] At the heart of human rights' perplexities lies therefore according to Arendt an inherent and unsurmountable contradiction between the concept of universal human rights and national sovereignty. More specifically, while human rights were supposed to be based upon the metaphysical notion of a sovereign subject, the simultaneous affirmation of national sovereignty as the expression of people's right to self-determination entailed that "human rights were protected and enforced only as national rights."[200] Consequently, as Arendt has put it:

> "No paradox of contemporary politics is filled with more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves."[201]

Therefore, although rights appeared to be grounded upon a human's being natural life, they in fact presumed not only the existence of a polity, but also the people's sovereignty. Arendt points to the problematic merging that takes place within the scheme of the nation state of individual sovereignty representing a person's inalienable rights, with national sovereignty representing

[198] Arendt, *On Revolution*, p. 99.
[199] Arendt, *Origins*, p. 291.
[200] Ardent, *Origins*, p. 230.
[201] Arendt, *Origins*, p. 279.

people's right to self-government. This kind of 'merging' ensued that: "man had hardly appeared as a completely emancipated, completely isolated being who carried his dignity within himself without reference to some larger encompassing order, when he disappeared again into a member of a people."[202] In other words, rights were grounded upon the notion of a metaphysical sovereign subject that pre-exists those rights, while at the same time, the affirmation of national sovereignty signified that the nation was "bound by no universal law and acknowledging nothing superior to itself".[203] The result of this contradiction was that "human rights were protected and enforced only as national rights".[204]

Additionally, this 'merging' of individual with national sovereignty had further repercussions on the legitimacy of the state itself. More specifically, the inherent contradiction between the concept of universal human rights and that of national sovereignty had further repercussions for the legitimacy of the state itself. "The nation had conquered the state," writes Arendt and "national interest had priority over law long before Hitler could pronounce 'rights is what is good for the German people."[205] Nationalism turned thus the state from an entity whose "supreme function [is] the protection of all inhabitants in its territory no matter what their nationality,"[206] to an entity that recognizes "only 'nationals' as citizens" and "grant[s] full civil and political rights only to those who belonged to the national community by right or origin and fact of birth."[207] The result as Arendt writes is that "the state was partly transformed from an instrument of the law into an instrument of the nation."[208] That is why she writes that refugees' calamity is not the loss of their home but 'the impossibility of finding a new one."[209] Hence, in a globally organized system around nation-states, a person's expulsion from a sate amounted to an expulsion "out of the family of nations altogether."[210] Since the state derives its legitimacy from the nation, it entails that, the expulsion of non-nationals should not be read as an occasional or accidental phenomenon but instead as a structural feature of the institution of the nation-state. As

[202] Arendt, *Origins*, p. 291.
[203] Arendt, Origins, p. 230.
[204] Ibid, p. 230.
[205] Ibid, p. 275.
[206] Ibid, p. 230.
[207] Ibid, p. 230.
[208] Ibid, p. 230.
[209] Ibid, p. 293.
[210] Arendt, *Origins*, p. 294.

Tania Mancheno notes, *nomos* in Arendt's political theory - whereby by *nomos* is meant the legal bounding of space in Arendt's theory[211]- is

> a pre-political condition for politics. Political membership to this legal community is given after the building of the community. On the contrary, in the nation-*nomos*, the territorial boundaries of legality and of political membership are the outcome of the same founding event. Political equality is no longer achieved through *nomos*. It is moreover conceived as a necessary condition for it. […] In the development in the European political geography during the 20th century, Arendt's pre-political understanding of nomos became political. […] Equality before law did not depend on the recognition of members within a community. Rather, the quality of being equal by the virtue of birth became dominant in tracing *nomos* and building political communities. Thereby, the meaning of the nomos changed from the spatiality of the law to the fictive idea of an ethnic homogenous nation.[212]

Finally, before closing this section I want to stress that Arendt recognized of course the importance of the 1789 Declaration of the Rights of Man (and subsequently the 1948 UDHR), characterizing the 1789 Declaration as a "turning point in history" and further arguing that it indicated "man's emancipation from all tutelage."[213] What she highlighted and brought to our attention through her analysis is the "antinomic character," to use Balibar's words, between human rights and the institution of the nation-state. As Balibar explains, "the same institutions that create rights, or better said, allow individuals to become human subjects by reciprocally granting rights to each other, also destroy these rights, and thus threaten the human."[214]

As stated in the introduction, the starting point of the current study has been the hostile policies concerning refugees and migrants adopted by European Union and today's refugees' both legal and political precarious status. To put it differently, if "everyone has the right to recognition everywhere as a person before the law",[215] how can we explain rightlessness today? Considering

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[211] Arendt uses the Greek word for law, *nomos,* to denote the legal bounding of space. Highlighting the originally spatial character of legislation, Arendt notes that "All legislation creates first of all a space in which it is valid, and this space is the world in which we can move in freedom. What lies outside this space is lawless and properly speaking without a world.", Hannah Arendt, *Was ist Politik? Fragmente aus dem Nachlaß,* ed. Ursula Ludz (Munich: Piper, 2003[1993]), p. 122, translated and quoted in Hans Lindahl. 2006. "Give and Take: Arendt and the Nomos of Political Community." *Philosophy & Social Criticism* 32 (7): 881–901, at p. 881-882.

[212] Tania Mancheno, "Between Nomos and Natality: Hannah Arendt on the 'Stateless' Condition", Ausgabe 1, Bd. 8, Nr. 1 (2016), *Recht and Gerechtigkeit-Law and Justice,* pp. 110-130 at p. 116-117, available at: HannahArendt.net, http://www.hannaharendt.net/index.php/han/issue/view/16

[213] Arendt, *Origins,* p. 290.

[214] Balibar, Etienne, 2007, "(De)Constructing the Human as Institution: A Reflection on the Coherence of Hannah Arendt's Practical Philosophy", *Social Research,* 74 (3), pp. 727-38 at p. 734.

[215] Article 6 of the 1948 Universal Declaration of Human Rights.

the expansion that human rights regime has undergone since World War II,[216] the question that arises is whether the current inscriptions of personhood in international human rights law afford adequate protection to migrants and refugees. As it will become obvious in the next section through the analysis of two judgments brought before the ECtHR, the tensions and inherent paradoxes of human rights that Arendt highlighted continue haunting human rights regime to the point that non-European populations are found in what Balibar calls as a situation of apartheid within the current European space.[217]

b) The Refugee as Bare Humanity and the Rise of the Suffering Body

So far, I have presented Arendt's critique of human rights and refugees' precarious legal and political status once they lose their political community, as long as it is only within that community that human rights could apply and become meaningful. However, alongside the loss of their legal personality that refugees suffer once they lose their political community, the loss of their political status entails according to Arendt a more fundamental loss, that is the loss of "all clearly established, officially recognized identity"[218] and refugees' expulsion from humanity. As she puts it, it turns out, that Man "can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity".[219] Arendt was thus also concerned with the transformation of a person's officially recognized identity, resulting from the loss of her political status. That is why she stresses the fact that the stateless human being is degraded both politically and ontologically, in the sense that ceases to appear as a fully human being when she is no longer subject to the sovereign power of her nation-state. It is wise to look on the way Arendt perceived the loss of refugees'

[216] For a list of some examples see above supra note 31.
[217] Balibar Étienne, 2004, *We the People of Europe?: Reflections on Translational Citizenship*, English Translation/Transnation, Princeton, N.J.: Princeton University Press.
[218] Arendt, *Origins*, p. 287.
[219] Arendt, *Origins*, p. 297.

identity through her personal experience reflected in her article "We Refugees"[220] published in 1943 in the *Menorah Journal.*

> "We lost our home, which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings. We left our relatives in the Polish ghettos and our best friends have been killed in concentration camps, and that means the rupture of our private lives."[221]

Therefore, according to Arendt, it is as if by traversing borders, refugees' distinctive identities are transformed and they come to appear as human and "nothing but human".[222] "In other words, once found outside their political community, refugees' former identity is replaced by that of the "human being in general", "human and nothing but human", an identity that for Arendt is the most dangerous identity that a person could have, since once found in this state, a person does not appear to be fully human. "The refugee -apparently stripped of the specificity of culture, place, and history- is human in the most basic, elementary sense"[223] writes Malkii. It seems therefore as if by traversing the borders refugees lose except their legal personality, the specific features that constitute their identity and singularity.

"We were told to forget" Arendt writes and "we forgot quicker than anybody ever could imagine". [224] The prompting to oblivion to which Arendt refers seems to be thus the oblivion of refugees' self, of their identity as members of a political community. The loss of refugees' identity resulting from the loss of their legal and political status entails that refugees lose also their names, ensuing a situation that as Arendt highlights, "nobody knows who I am".[225] Once flown into anonymity refugees have less chances to survive, since as Arendt noted in a rather

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[220] Hannah Arendt, "We Refugees", in Kohn, Jerome; Feldman, Ron H. (Org.). *The Jewish Writings*, New York: Schocken Books, 2007, pp. 264-274.
[221] Hannah Arendt, "We Refugees", in Kohn, Jerome; Feldman, Ron H. (Org.). *The Jewish Writings*, New York: Schocken Books, 2007, pp 264- 265. It is characteristic that Arendt uses the first-person plural in that essay, contrary to the more impersonal mode of writing in *The Origins*.
[222] Arendt, *Origins*, p. 297.
[223] Liisa Malkki, 1995, *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania*, Chicago: University of Chicago Press.
[224] Hannah Arendt, "We Refugees", in Kohn, Jerome; Feldman, Ron H. (Org.). *The Jewish Writings*, New York: Schocken Books, 2007, p. 265.
[225] Arendt, *Origins* p. 287.

ironic way, the chances of survival are better when one holds a name, "just as a dog with a name has a better chance to survive than a stray dog who is just a dog in general".[226]

Judith Butler sees the fact that certain persons become nameless as a sign or the result of the "different ways in which human physical vulnerability is distributed across the globe."[227] That means that under the framework of a differential relation to life, certain lives qualify as "highly protected", while others are unqualified even for grief and mourning, they do not thus qualify as "grievable."[228] For Butler, the value of the life appears, "only under conditions in which the loss would matter,"[229] and thus "grievability is a presupposition for the life that matters."[230] Referring to the deaths of the thousands of Palestinians killed by the Israeli military with United States support, Butler points out that we seldom, if ever, hear the names of those Palestinians and asks, "do they have names and faces, personal histories, family, favorite hobbies, slogans by which they live?"[231] Thus, Butler poses the question as following: "after all, if someone is lost and that person is not someone, then what and where is the loss, and how does mourning take place?".[232]

To fully grasp Arendt's remarks on refugees' and migrants' anonymity, and their pertinence to the present day, it is sufficient to think that - with the exception of Alan Kurdi,[233] the three year-old child from Syria who drowned in the Mediterranean and whose lifeless body was found dead on a beach close to Bodrum in Turkey -, we never learned the name of a person drowned while trying to cross the borders of "Fortress Europe". It seems therefore as if the lives of the nameless refugees do not qualify as "grievable". The homogenizing humanitarian way in which refugees and migrants are represented by public discourse depersonalizes them, dooms them to anonymity and consequently entails the loss of their identity. As Malkki highlights, mass displacements are

[226] Arendt, *Origins*, p. 287.
[227] Butler Judith, 2004, *Precarious Life: The Powers of Mourning and Violence*, London: Verso at p. 32.
[228] Butler, *Precarious Life*, p. 32.
[229] Butler, *Frames of War*, p. 14.
[230] Butler, *Frames of War*, p. 14.
[231] Butler, *Precarious Life*, p. 32.
[232] Butler, *Precarious Life*, p. 32.
[233] Alan Kurdi was a three-year-old Syrian refugee who drowned off the coast on Bodrum on 2 September 2015 together with his mother and brother after the boat in which his family tried to cross to the Greek island of Kos in order to reach Europe capsized.

captured as a 'sea', or 'blur of humanity',[234] depicted as a homogenous mass where their differences are obliterated and the actual sociopolitical circumstances that produced them are obscured. The term "anonymous corporeality"[235] used by Feldman describes accurately what is taking place today through these representations that shape the global political imaginary surrounding refugees. The refugee has thus been corporealized through a double negation; that is the negation of her name and the negation of her face. Emmanuel Levinas' thoughts on face are relevant here:

> "What we call the face is precisely this exceptional presentation of the self by self, incommensurable with the presentation of realities simply given […]. To seek truth I have already established a relationship with a face which can guarantee itself, whose epiphany itself is somehow a word of honor. Every language as an exchange of verbal signs refers already to this primordial word of honor. The verbal sign is placed where someone signifies something to someone else."[236]

For Levinas, the face introduces the difference through speech. As he writes:

> "The fact that the face maintains a relation with me by discourse does not range him in the same; he remains absolute within the relation. The solipsist dialectic of consciousness always suspicious of being in captivity in the same breaks off. For the ethical relationship which subtends discourse is not a species of consciousness whose ray emanates from the I; it puts the I in question. This putting in question emanates from the other."[237]

'Dismantling' the refugee's face[238] through her representation as nothing more than a member of a "vast and throbbing mass,"[239] entails also the loss of her voice and thus the ability to speak and be heard.

Arendt linked the loss of refugees' identity and their reduction to mere human beings, what she calls naked humanity,[240] to the fact that they are deprived of their "right to action"[241] and of their

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[234] Mallki, Liisa H. 1996. "Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization, *Cultural Anthropology*, (11) :3, pp. 377-404, at p. 387.
[235] Allen Feldman, "On Cultural Anesthesia: From Desert Storm to Rodney King", *American Ethnologist*, 21 No. 2 (1994), 404-418 at p. 407
[236] Lévinas, Emmanuel, 2007. *Totality and Infinity: An Essay on Exteriority*, Pittsburgh. Duquesne University Press, at p. 202.
[237] Levinas, *Totality and Infinity*, p. 195.
[238] Deleuze and Guattari write that "dismantling the face is no mean affair […] The organization of the face is a strong one. We could say that the face holds within its rectangle or circle a whole set of traits, *faciality traits*, which it subsumes and places at the service of signifiance and subjectification". Deleuze Gilles and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, Minneapolis: University of Minnesota Press, 1987, at p. 188.
[239] Mallki, Liisa H. 1996. "Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization", *Cultural Anthropology*, 11 (3): pp. 377-404.at p. 387.

[240] Arendt, *Origins*, p. 297.
[241] Arendt, *Origins*, p. 296.

"right to opinion."[242] More specifically, she highlighted that the loss of agency constituted in the ability to act and speak entails the loss of a person's identity since "in acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world".[243] Deprived of the chance to show 'who they are' through their own action and speech, refugees are assigned identities by public discourses and are defined either as threats to the well-being of destination states, or as victims that need to be assisted. Ironically, in the first case the recipient nation state is presented as being victimized by the presence of refugees on its territory, while in the second one, discourses of victimhood work to present refugees themselves as victims. Political subjectivity for Arendt is therefore revealed through and *via* action and speech and it is not a pre-determined or inherent feature that she holds. "Action and speech are so closely related because the primordial and specifically human act must at the same time contain the answer to the question asked of every newcomer: "Who are you?"[244]

But how can a person be deprived of her right to action and opinion and thus found in a "fundamental situation of rightlessness"[245] because of the loss of these two rights? To answer the question and understand Arendt's argument we need to look at how Arendt conceived action itself. To act, writes Arendt in *Human Condition*, means "to take an initiative, to begin, […] to set something in motion."[246] In addition, as Arendt writes, "action has the closest connection with the human condition of natality; the new beginning inherent in birth can make itself felt in the world only because the newcomer possesses the capacity of beginning something anew, that is, of acting."[247] But if action is "the actualization of the human condition of natality,"[248] if action is indeed based in natality, then how is it possible for someone to be deprived of her right to action? The answer is that that action although based in natality, "corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world."[249] Action is therefore "never possible in isolation,"[250] but it is "entirely dependent upon the

[242] Ardent, *Origins*, p. 296.
[243] Arendt, *Human Condition* p. 179.
[244] Arendt, Human Condition 178.
[245] Arendt, *Origins*, p. 296.
[246] Arendt, *Human Condition*, p. 177.
[247] Arendt, *Human Condition*, p. 9.
[248] Arendt, *Human Condition*, p. 178.
[249] Arendt, *Human Condition*, p. 7.
[250] Arendt, *Human Condition*, p. 188.

constant presence of others."[251] Action and speech, writes Arendt, "need the surrounding presence of others."[252]

The importance of action and speech lies at the fact, that they constitute the two political activities,[253] without which a life is "literally dead to the world",[254] which means that it does no longer constitute a human life, since it is 'no longer lived among men'.[255] To better understand how refugees are reduced to merely human beings when found in the camps for long and undetermined periods of time, stranded politically in a state of exception, I will look more at what Arendt meant by the right to action, how it is enacted and the ways that refugees are deprived of it.

Action for Arendt is tantamount to freedom. "Men are free" Arendt writes "as long as they act neither before nor after; for to be free and to act are the same".[256] For Arendt, the "raison d'être of politics is freedom".[257] However, since freedom's "field of experience is action",[258] it entails that "action is the political activity par excellence".[259] Moreover, as long as freedom is experienced in action, freedom presupposes also the presence of others, which means that it needs plurality in order to unfold. In Arendt's own words, "we first become aware of freedom or its opposite in our intercourse with others, not in the intercourse with ourselves".[260] Therefore, politics for Arendt "is based on the fact of human plurality",[261] since men, not Man, live on the earth and inhabit the world".[262] Thus, for Arendt action, as well as speech, namely the two political activities,[263] cannot be understood separately from plurality.[264] Consequently, since the essence of politics lies in action, and action presupposes plurality, it entails that plurality is "the

[251] Arendt, *Human Condition*, p. 23.
[252] Arendt, *Human Condition*, p. 188.
[253] Action and speech writes Arendt, "constitute what Aristotle called the *bios politikos*", see Arendt, *Human Condition*, p. 25.
[254] Arendt, *Human Condition*, p. 176.
[255] Arendt, *Human Condition*, p. 176.
[256] Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought*, Penguin Classics. New York: Penguin Books, at p. 151.
[257] Hannah Arendt, *Between Past and Future*, at p. 145.
[258] Hannah Arendt, *Between Past and Future*, at p. 145.
[259] Arendt, *Human Condition*, p. 9.
[260] Arendt, *Between Past and Future*, p. 147.
[261] Arendt Hannah and Jerome Kohn, 2005, *The Promise of Politics*, 1st ed. New York: Schocken Books, at p. 93.
[262] Arendt, *Human Condition* at p. 7.
[263] Arendt, *Human Condition* at p. 25.
[264] Arendt, *Human Condition* at p. 175

conditio per quam of all political life".[265] Hence, action and speech in conjunction with plurality make politics. The place that plurality occupies in Arendt's theory on politics derives from the fact that: "Plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live".[266] For Arendt politics is that which is what "organizes those who are absolutely different with a view to their *relative* equality and in contradistinction to their *relative* differences".[267]

The above analysis entails that for Arendt, the 'who-ness' of a person, namely her distinctiveness from other persons is determined and disclosed through her action and speech in public. In other words, political subjects are constructed *via* action and are not pre-determined. Commenting on the way Arendt conceives the construction of political subjectivity, Bonnie Honig notes that: "Prior to or apart from action, the self is fragmented, discontinuous, indistinct, and most certainly uninteresting … [the] self attains identity-becomes a "who"-by acting in the public realm in concert with others".[268] In the *Genealogy of Morals,* Nietzsche also calls into question the common conception of the notion of agency by claiming that:

> "…popular morality separate strength from the expression of strength, as though behind the strong man there existed some indifferent neutral *substratum,* which enjoyed a caprice and option as to whether or not it should express strength. But there is no such *substratum,* there is no 'being' behind doing…the 'doer' is a mere appanage to the action. The action is everything."[269]

As Bonnie Honig writes, both Arendt and Nietzsche agree that "the deprivileging of action is a threat […] to diversity, plurality, freedom and individuality as well as to meaning itself" and they both respond by "challenging the popular belief in a rational, freewilling, choosing, intending agent, in charge of itself and its actions in order to reassert a primacy of action over actor."[270]

Political subjectivity is therefore dependent, according to Arendt, upon action and speech in public. What is more interesting is that public space, what Arendt calls the "space of appearance"

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[265] Arendt, *Human Condition*, p. 7.
[266] Arendt, *Human Condition*, p. 8.
[267] Arendt, *The Promise of Politics*, p. 96.
[268] Honig Bonnie, "Arendt's Accounts of Action and Authority" in *Political Theory and the Displacement of Politics*, (Cornell University Press, 2016), at p. 78-80.
[269] Friedrich Nietzshce, *The Genealogy of Morals*, Dover Publications 2003, p 25-26.
[270] Honig Bonnie, "Arendt's Account of Action and Authority", pp. 76-125 at p. 78, in: Honig Bonnie, 2016, "*Political Theory and the Displacement of Politics*, Contestations. Cornell University Press.

comes into being "wherever men are together in the manner of speech and action." Action and speech undertaken in concert by people are performative, since they create what she calls the 'space of appearance',[271] namely the public realm.[272] The human condition of plurality is therefore the "condition sine qua non"[273] for the creation of the space of appearance. According to Arendt "wherever human beings come together…a space is generated that simultaneously gathers them into it and separates them from one another".[274] It is within this space "that human beings act and are themselves conditioned, and because they are conditioned by it, every catastrophe that occurs within it strikes back at them, affects them".[275]

The space of appearance is therefore not an *a priori* pre-determined space but an "interspace between men",[276] a space that "can find its proper location almost any time and anywhere",[277] where action and speech takes place. Consequently, Arendt reaches the conclusion that there is nothing "political *in* man that belongs to his essence […] *man* is apolitical. Politics arises *between men*, and so quite *outside* of *man*. There is therefore no real political substance, politics arises in what lies *between men* and is established as relationships".[278]

This 'interspace between men', namely the space of appearance, makes possible the expression of plurality and human relationality, as well as the creation of novelty and the appearing to each other.[279] Hence, the public realm does not unit people into a homogenous mass, but on the contrary "as the common world, gathers us together and yet prevents our failing over each other, so to speak."[280] It preserves, in other words, human distinctness. As Arendt argues, plurality, the condition *sine qua non* for the public realm,[281] has the "twofold character of equality and distinction".[282] For Arendt politics is that which is what "organizes those who are absolutely different with a view to their *relative* equality and in contradistinction to their *relative*

[271] Arendt, *Human Condition* pp. 198-99.
[272] Following Arendt, I use the terms 'space of appearance' and 'public realm' interchangeably.
[273] Arendt, *Human Condition*, p. 220.
[274] Arendt, *The Promise of Politics*, p. 106.
[275] Arendt, *The Promise Politics*, p. 107.
[276] Arendt, *Men in Dark Times*, p. 31.
[277] Arendt, *Human Condition*, p. 198.
[278] Arendt, *The Promise of Politics*, p. 95.
[279] Emma Ingala, "From Hannah Arendt to Judith Butler", pp. 35-53 at p. 37 in: Rae, Gavin and Emma Ingala, eds. 2018, *Subjectivity and the Political: Contemporary Perspectives*, Routledge Studies in Contemporary Philosophy, 98. New York: Routledge.
[280] Arendt, *Human Condition*, p. 52.
[281] Arendt, *Human Condition*, p. 220.
[282] Arendt, *Human Condition*, p. 175.

differences".[283] In addition, action and speech create an 'in-between' among people and in that way by undertaking action and speech they are always entangled in a "web of human relationships".[284] Inserting ourselves into the space of appearance, "with word and deed"[285] is like a "second birth", writes Arendt and it is within that place that the "unexpected can be expected from man".[286] In her engagement with Arendt's argument,[287] Butler conceives the space of appearance in accordance with Arendt, as a space defined "neither [by] my act nor [by] yours, but [by] something that happens by virtue of the relation between us, arising from that relation."[288] In accordance with Arendt, Butler further argues that "freedom does not come from me or from you," but it does "happen as a relation between us, or indeed, among us,"[289] it is a "concerted exercise."[290] Both Arendt and Butler understand therefore the political as a relation, a fact that is reflected on the way they conceive political subjectivity. More specifically, they both understand the human as a relational being and thus as non-sovereign. "No man can be sovereign" writes Arendt, "because not one man, but men, inhabit the earth."[291] The concept of the 'non-sovereign' self has important repercussions in constructing the responsibility for the '*Other'* and it will be analyzed extensively in chapter 5.

Following Arendt, I argue that what refugees are deprived of is "a place in the world that makes opinions significant and actions effective."[292] Refugees are denied their right to action and opinion in the sense that that neither their actions matter, nor their opinions are heard, they are thus *aneu logou*.[293] The use of the adjectives 'significant' and 'effective' next to 'opinions' and

[283] Arendt, *The Promise of Politics*, p. 96.
[284] Arendt, *Human Condition*, p. 183.
[285] Arendt, *Human Condition*, p. 176.
[286] Arendt, *Human Condition*, p. 178.
[287] Butler uses the 'space of appearance' to examine today forms of gathering and assembly, like the singing of the U.S. national anthem in Spanish on the streets of Los Angeles in 2006 by undocumented immigrants who were demonstrating against the new laws on immigration. See Butler and Spivak, Who Sings the Nation-State?, Butler, Notes Toward a Performative Theory of Assembly.
[288] Butler Judith, 2016, *Notes Toward a Performative Theory of Assembly*, Harvard University Press, p. 9.
[289] Ibid., p. 88.
[290] Butler and Spviak, *Who Sings the Nation-State?*, p. 20-21.
[291] Arendt, *Human Condition*, p. 234.
[292] Arendt, *Origins*, p. 296.
[293] As Arendt writes, "When the Greeks said that slaves and barbarians were *aneu logou* (without words), what they meant was that the situation of slaves and barbarians made them incapable of free speech." Arendt Hannah and Jerome Kohn, 2005, *The Promise of Politics*, 1st ed. New York: Schocken Books, at p. 118. Arendt seems thus to follow Aristotle's division between *logos* (as a feature of men through which they express benefit and harm) and *phōnē* (as a feature of animals through which they express their pleasure and pain), Aristotle and Trevor J Saunders, 1995, *Politics*, Vol. Books I and II, Clarendon Aristotle Series, Oxford: Clarendon Press, 1253a7-18.

'actions' accordingly, echoes Arendt's relational political ontology. More specifically, since both action and opinion can only be meaningful within the framework of a community, what refuges are denied is a public space where they could be recognized as equal political subjects, what Arendt names as a 'space of appearance'.[294] To put it differently, action and speech are intersubjective activities, which means that in order to be meaningful, they require to be recognized as such by other persons. That is why Arendt defines the most fundamental human right, that is the 'right to have rights' as the right "to live in a framework where one is judged by one's actions and opinions" and the "right to belong to some kind of organized community".[295] When refugees are placed in camps for a long and undetermined period of time, they are in fact forced to live outside the "common world."[296] Deprived of the right to action they are no longer judged by their actions and opinion, namely by 'who they are', but "according to 'what' they are, according to how they are seen by others".[297] The cases where refugees who have been placed in detention camps sewed their lips in protest to prolonged detention[298] reveal exactly the loss of their voice as a result of the loss of their right to action. Denied a public realm, they are seen by others as 'nothing but human beings', what Agamben calls 'bare life'. Within this context where their differences are erased, they are presented either as victims in need of assistance,[299] or as threats to public security defined through the 'fear of the Other."[300]

So far, I presented Arendt's theory of the construction of the public realm, what she calls as the space of appearance. The space of appearance is for Arendt not an absolute space that exists independently of the people who act in it, but on the contrary a purely relational space, one that emerges out of specific relations. The political arises *between men,*[301] and can not be bound as an

[294] Arendt, *Human Condition*, p. 199.
[295] Arendt, *Origins*, p. 296-97.
[296] Arendt, *Origins*, p. 302.
[297] Parekh, Serena, 2017. *Refugees and the Ethics of Forced Displacement*. Routledge Research in Applied Ethics, 2. New York: Routledge, at p. 95.
[298] In November 2015, refugees stranded at the Greece-Macedonia borders sewed their lips together to protest against restrictions on their movements imposed by Balkan countries.
In 2002 there was also a mass lip-sewing protest by asylum seekers in Woomera detention camp in Australia
[299] Papastergiadis Nikos, "The Invasion Complex: The Abject Other and Spaces of Violence", *Geografiska Annaler*, Vol. *88, No. 4 (2006),* pp 429-442.
[300] Zembylas Michalinos, "Agamben's Theory of Biopower ad Immigrants/Refugees/Asylum Seekers, Discourses of Citizenship and the Implications for Curriculum Theorizing", *Journal of Curriculum Theorizing, Vol. 26, No 2,* 2010: 31-45.
[301] Arendt, *The Promise of Politics*, p. 95.

absolute thing outside of them. Hence for Arendt "politics is not so much about human beings as it is about the world that comes into being between them and endures beyond them".[302] Moreover, the space of appearance has a potential character in the sense that it appears when and in so far people "come together in the manner of speech and action" and disappears when action and speech cease to take place.[303] This space is in other words an effect of action itself. The crucial question that emerges now is the degree of the performativity of the public realm. Is it always possible for those excluded from the polity, in our case refugees, to act in such a way to bring about the space of appearance? In other words, what exactly happens to those that are cast out of plurality and are reduced to 'mere beings', is it possible for anyone to bring about the space of appearance through her action?

I will go through this question in the subsequent section through the examination of Arendt's "right to have rights". Before closing the present section however, I would like to look at how the humanistic representations of refugees' as naked bodies, what Malkki names as "an embodiment of pure humanity and as a pure victim,"[304] is translated within destination states where they apply for asylum. What is thus interesting is to see the repercussions of this international social imaginary of refugeehood as 'naked humanity' upon refugee's rights themselves and specifically upon their right to asylum. I will examine these questions by looking at two cases brought before the ECtHR concerning the expulsion of migrants, the *N. v. UK*[305] and the *Khlaifia and Others v. Italy*.[306] The first case concerns the expulsion of an HIV sufferer to her country of nationality, Uganda, where she would face a high risk of severe suffering and death, while the more recent *Khlaifia* case concerns the detention and subsequent expulsion of undocumented migrants from Italy to Tunisia.

In *N. v. UK* case, Ms. N, a Ugandan national who arrived in UK in March 1998 was diagnosed as HIV positive upon her arrival. She filled an application for asylum in UK alleging that her life would be in danger in Uganda because of the National Resistance Movement and that a return would be in breach of Article 3 of the ECHR because of the lack of the necessary infrastructure to treat her disease properly. Nevertheless, her asylum application failed. Having thus exhausted

[302] Arendt, *The Promise of Politics*, p. 175.
[303] Arendt, *Human Condition*, p. 199.
[304] Liisa Malkki, *Purity and Exile*, p. 12
[305] ECtHR, *N. v. UK*, App 26565/05, Grand Chamber Judgment of 27 May 2008, (hereafter '*N. v. UK'*).
[306] ECtHR, *Khlaifia and Others v. Italy*, App 16483/12, 15 December 2016.

all domestic remedies, N. submitted an application to the ECtHR on the grounds that returning her to Uganda would cause her acute physical and mental suffering, followed by an early death due to the lack of freely available antiretroviral and other necessary medical treatment in Uganda,[307] a situation that amounts to inhuman and degrading treatment in breach of Article 3 of the ECHR as well as Article 8 which secures a right to private life. In 2008, the Grand Chamber of the ECtHR ruled that there would be no violation of Article 3 and 8 in case of N's removal to Uganda.

The majority of the Court agreed with UK's position that the fact that N's life expectancy would be significantly reduced upon her return to Uganda does not amount to a breach of Article 3.[308] According to the Court, Article 3 could be applicable in case of a humanitarian exception, however the facts of this case do not amount to such an exception, since N. was not terminally ill and close to death. Comparing N's case with the case of *D. v. the United Kingdom,* the Court held that what made that case exceptional was that the applicant "appeared to be close to death,*"*[309] affirming in that way the distinction between "ensuring a dignified death" and "prolonging life,"[310] that the UK government introduced. Moreover, the majority held that although many of the rights the Convention contains "have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights."[311] In that way, beyond affirming UK's argument on the distinction between civil and political rights on the one hand and social and economic on the other,[312] the Court classified the *N. v. UK* as a case pertaining to the protection of socio-economic rights. The crucial point here is that by ruling that Ms. N's case is related to socioeconomic and not to political rights, it seems that Ms. N's life has crossed what Agamben names as "the threshold beyond which life ceases to be politically relevant."[313] In other words, Ms. N's life ceased to have any juridical value, exactly or from the moment that it was decided that it was no longer politically relevant and had thus turned into

[307] *N. v. UK* para. 20.
[308] For a critique of the reasoning of the judgment see Mantouvalou Virginia, 2009 "*N v UK*: No Duty to Rescue the Nearby Needy?", *The Modern Law Review,* 72 (5): 815-828.
[309] *D. v. the United Kingdom (*2 May 1997, *Reports of Judgments and Decisions* 1997-III, quoted in *N.v. UK*, para. 33.
[310] *N. v. UK* para. 24.
[311] *N. v. UK* para. 44.
[312] *N. v. UK* para 24.
[313] Agamben, *Homo Sacer*, p. 81.

"sacred life", a life that can be eliminated without punishment.[314] Moreover, this case reveals also the dangers of equating the rights of man with nature and thus making the man's rights to the "necessities of life", "the very content as well as the ultimate end of government and power".[315] What Arendt stressed is that man's rights to the "necessities of life", should on the contrary be understood as "prepolitical rights that no government and no political power has the right to touch and violate."[316]

The dissenting judges criticized such a distinction between rights stating that "there is no water-tight division separating that sphere [of social and economic rights] from the field covered by the Convention."[317] Arguing however that *N. v. UK* is an exceptional case, that meets the "very exceptional circumstances"[318] laid down by the Court in *D. v. the United Kingdom* and because of that the applicant's removal to Uganda would violate Article 3, the dissenting judges confirmed the logic adopted by the majority that legitimizes the suffering body as the ground for the recognition of the right to asylum. Rendering the suffering body, the ultimate resource to adjudicate rights and grant legal status to migrants makes their personhood fragile and the enjoyment of their rights uncertain.

The most recent case of *Khlaifia and Others v. Italy* now whose facts took place during the Arab Spring concerns three Tunisian nationals who were intercepted and transferred initially to a reception center in the island of Lambedusa and then to Palermo, before their expulsion to Tunisia by Italy based on a bilateral agreement between Italy and Tunisia. It must be clarified here that the 2016 Grand Chamber's ruling on the *Khlaifia* case follows a 2015 decision of the Second Section of the ECtHR[319] that found Italy in breach of Article 4 of Protocol 4 of the ECHR which prohibits the collective expulsion of aliens.[320] The 2015 Chamber's judgment was warmly welcomed as it favored migrant's rights amidst the massive arrivals of migrants in Europe. Nevertheless, the Grand Chamber's ruling did not follow the same approach and found

[314] Agamben, *Homo Sacer*, p. 81.
[315] Arendt, *On Revolution*, p. 99.
[316] Arendt, *On Revolution*, p. 99.
[317] *Airey v. Ireland*, App No 6289/73, Judgment of 9 October 1979, quoted in *N. v. UK*, Joint Dissenting Opinion of Judges Tolkens, Bonelo, and Spielmann, para 6; hereafter Dissenting Opinion.
[318] *N. v. UK*, Dissenting Opinion, para. 3.
[319] ECtHR, *Khlaifia and Others v. Italy*, App 16483/12, (1 September 2015).
[320] This was in fact the third time that the ECtHR was founding Italy in breach of Article 4 of Protocol 4 of the ECHR, with the first being the *Hirsi Jamaa and Others v. Italy*, App 27765/09 (23 February 2012) case, and the other the *Sharifi and Others v. Italy and Greece*, App 16643/09 (21 October 2014) case.

contrary to the Chamber's judgment no violation of Article 4 Protocol 4 on collective expulsions and no violation of Article 3 of the ECHR concerning the conditions of migrants' detention in the Lambedusa center. I will not go through an analysis of the Grand Chamber's decision here. What I want to stress is a specific part in the Court's reasons concerning the detention conditions of the applicants in Lambedusa center. More specifically, the Grand Chamber acknowledged in accordance with the Chamber that the applicants were weakened both physically and psychologically upon their arrival in Lambedusa center due to the dangerous crossing of the Mediterranean.[321] However, it held that the applicants, who "were not asylum-seekers, did not have the specific vulnerability inherent in that status."[322] In addition, the Court stressed that the applicants were young and did not suffer from any particular medical condition.[323] In that way, the Grand Chamber's ruling seems to suggest what vulnerability is not, that is being a healthy, young man, nevertheless with irregular status.[324]

Evidently, the introduction of the criterion of vulnerability[325] opens the floodgates to arbitrary decisions concerning the determination of the legal status of aliens. How is such 'vulnerability' to be measured and determined? Moreover, since in international law the legal status of refugees and asylum seekers is founded upon their vulnerable status, what does the requirement of the proof of a 'specific vulnerability' adds to the determination of an alien's status? As Petropoulou explains "the Court in *Khlaifia* case reproduces the humanitarian tendency to depict refugees as a vulnerable category and draw as a consequence a distinction with other categories of migrants who are placed outside the realm of vulnerability. But that move places the dichotomies at the intersection between a moral economy centered on compassion and an administrative rationality directed at the management of vulnerable populations"[326] A person's legal protection seems therefore to be dependent upon her determination as a suffering body.

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[321] *Khlaifia* v. Italy, para. 194.
[322] *Khlaifia v. Italy*, para. 194.
[323] *Khlaifia v. Itlay*, para 194.
[324] Denize Venturi, "The Grand Chamber's Ruling in Khlaifia and Others v. Italy: one Step Forward, one Step Back?", Strasbourg Observers, January 2017, available at: https://strasbourgobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/
[325] The vulnerability approach was adopted by the Court in the *M.S.S. v. Belgium and Greece* case. See ECtHR, *M.S.S. v. Belgium and Greece*, App. 30696/09, (21 January 2011).
[326] Athanasia Petropoulou, 2017, "On the Margins of Citizenship: The Refugee Crisis and the Transformation of Identities in Europe", *Nordicum-Mediterraneum* 12 (2).

What both the abovementioned cases reveal therefore is how the body has turned into the determinant factor for claiming rights, a practice that generates what Fassin names as "biolegitimacy," that is the legitimization of rights in the name of the suffering body.[327] The humanitarian logic prevalent in the *Khlaifia* case reflects the rise of what has been labelled as 'humanitarian government'. Fassin, defines 'humanitarian government' as a politics that governs precarious lives, such as the lives of "the unemployed and the asylum seekers, the lives of sick immigrants and people with Aids […]"[328] that deploys "moral sentiments in contemporary politics."[329] In other words, humanitarian government' can be defined as "the administration of human collectivities in the name of a higher moral principle which sees the preservation of life and the alleviation of suffering as the highest value of action".[330] The 'problem' with humanitarian governmentality lies in the fact that it does not limit itself to the 'alleviation of suffering' or to practices of care but entails a process of depoliticization that subsequently affects the modes of subjectivity produced by this mode of government. In the language of compassion that humanitarian government employs, "injustice is articulated as suffering" and "violence is expressed in terms of trauma."[331] As Athanasiou correctly points out, within the current contexts of humanitarian governmentality "discourses of 'victimhood' are favored over discourses of political claims and confrontations" and "formal recognition comes with the requirement of the recognized subject's conformity to certain standardized accounts of victimization and depoliticized modalities of injury."[332] Referring to the "troubling undercurrents of vulnerability", that is the way in which "vulnerability turns into a norm of regulating immigration and asylum", Athanasiou brings as an example the case of women migrants in Greece who are "prompted to perform an 'authentic' self-identity of enforced migration and trafficked victimhood in order to become eligible for state or NGO assistance.[333]"

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[327] Fassin, Didier. 2005, "Compassion and Repression: The Moral Economy of Immigration Policies in France", *Cultural Anthropology* 20 (3): 362-87, at p. 372.
[328] Fassin Didier, and Rachel Gomme, 2012, *Humanitarian Reason: A Moral History of the Present Times*, Berkley: University of California Press, at p. 4.
[329] Fassin Didier and Rachel Gomme, 2012, *Humanitarian Reason: A Moral History of the Present Times*, Berkley: University of California Press, at p. 6.
[330] Fassin, Didier 'Humanitarianism: A Nongovernmental Government', in Michel Feher (ed.) *Nongovernmental Politics*, New York: Zone Books (2007), pp. 149-160 at p. 151.
[331] Fassin Didier, and Rachel Gomme, 2012, *Humanitarian Reason: A Moral History of the Present Times*, Berkley: University of California Press, at p. 6
[332] Butler Judith and Athena Athanasiou, *Dispossession: The Performative in the Political: Conversations with Athena Athanasiou,* Cambridge, UK: Polity Press, 2013, at p. 91
[333] Butler and Athanasiou, *Dispossession*, p. 113.

The disastrous effects of privileging humanitarian claims over political claims were made apparent in France in 1998. More specifically, after the introduction of a humanitarian provision as an amendment to the law on the "Conditions of Entry and Residence of Foreigners" according to which residency permits would be granted to groups of non-citizens that live in France and have "life-threatening" pathologies in case they are declared unable to receive proper treatment in their home countries, undocumented migrants started to infect themselves with HIV to fulfil the 'humanitarian exception'.[334]

What the accounts of HIV self-infection, as well as the cases *N v. UK* and *Khlaifia* that have been discussed above reveal, is how injury itself has become essential to identity under the current political framework in Europe. Yet, as Butler and Athanasiou explain, "forging identities around injury is a slippery path", since "an identity politics that relies on claims of woundedness ends up reaffirming the structures of domination that have caused the injury."[335] There is therefore a fundamental difference between "calling for recognition of oppression in order to overcome oppression and calling for a recognition of identity that now becomes defined by its injury".[336] What is problematic in the latter case is that "it inscribes injury into identity and makes that into a presupposition of political self-representation" and as a result "injury cannot be recast as an oppression to be overcome."[337] Consequently, as Butler and Athanasiou point out, "the question might be whether there can be a way to answer the call of the dispossessed without further dispossessing them."[338]

The significance of Arendt's phenomenological conceptualization of personhood that has been discussed previously becomes more evident now. Whereas the function of the artificial mask of law as conceived by Arendt was to cover and thus protect the human being behind the mask,

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[334] Ayten Gudongdu, "Potentialities of Second Nature: Agamben on Human Rights", *in* Archer Crina, Laura Ephraim, and Lida Maxwell, eds. 2014, *Second Nature: Rethinking the Natural through Politics*, New York: Fordham University Press; Ticktin Miriam, 2006, "Where Ethics and Politics Meet: The Violence of Humanitarianism in France", *American Ethnologist* 33 (1): 33-49; Ticktin Miriam Iris, 2011, *Casualties of Care: Immigration and the Politics of Humanitarianism in France*, Berkeley: University of California Press.
[335] Butler and Athanasiou, *Dispossession*, p. 135.
[336] Butler and Athanasiou, *Dispossession*, p. 87.
[337] Ibid., p. 87.
[338] Ibid., p. 112.

humanitarian exceptions introduced in immigration laws are working in the exact opposite direction. That is, they require a person to be "human and nothing but human,"[339] to make their claims to human rights. However, as Arendt stressed, when people appear to others in their bare humanity, their "mere givenness,"[340] they become vulnerable to various forms of violence and arbitrariness since this is the most fragile and dangerous identity that a person could have. Deprived of their legal personality, migrants are deprived of equality.

From the examination of the above cases it entails that the way refugees are represented has indeed a negative effect on the very right of asylum itself, leading to its transformation from a guaranteed right of protection by the host country as asserted in the 1951 Geneva Convention, to "a 'charitable' obligation only dependent on the good will of each state",[341] that is subject to the arbitrariness of administrative and juridical bodies. As Arendt highlighted, the stateless are equated with the rightless since "the prolongation of their lives is due to charity and not to right, for no law exists which could force the nations to feed them".[342] In the same vein, Agamben has also highlighted the dangers of separating humanitarianism from politics and the fact that the logic of humanitarianism risks undermining migrants' personhood. That is why he argues that since humanitarian organization "can only grasp human life in the figure of bare or sacred life," they "maintain a secret solidarity with the very powers they ought to fight."[343]

The cases discussed above demonstrate also the paradoxes and perplexities that continue 'haunting' the regime of human rights despite the advances that took place at the international level since Arendt's time in ensuring human rights. The centrality of the principle of territorial sovereignty that the Court upholds entails that the power to exclude remains predominant. The cases reveal that current inscriptions of personhood in international human rights law fall short of guaranteeing refugees' rights. To put it differently, refugees' legal personality remains fragile despite the progress in the field of human rights law. To the extent that the right to political membership within the nation-state was and remains reduced to nationality, refugees lack "a

[339] Arendt, *Origins* p. 297.
[340] Arendt, *Origins*, p. 301.
[341] Fassin Didier, and Estelle d' Halluin, 2007, "Critical Evidence: The Politics of Trauma in French Asylum Policies", *Ethos* 35 (3): 300-329, at p. 302.
[342] Arendt, *Origins*, p. 296
[343] Agamben, *Homo Sacer*, p. 78.

place in the world"[344] and they thus appear as a-political beings. Within that context refuges appear as Arendt noted as the "absolutely innocent ones", arguing further that "it is precisely this absolute innocence that condemns them to a position outside, as it were, of mankind as a whole."[345] Humanitarianism comes to fulfil this gap in politics and although it presents itself as apolitical, it evolves into a new form of politics that employs practices of depoliticization. To put it differently, humanitarianism employs a logic that ends up undermining migrants' personhood by making them dependent upon their recognition as suffering bodies. The precarious legal position of today refugees is interlinked with the inherent paradoxes of the human rights regime and its innate tension between nationals and non-nationals. Within that context, it wouldn't be an exaggeration to argue that Arendt's non-national minorities of the early 20th century have been equated today with the third country nationals in EU. Despite EU's vision for the creation of a "post-nationalist sociopolitical space"[346] within Europe, the sedentary logic that separates between us-them continues undermining the process of identity formation. As Braidotti explains,

> "Fear, anxiety and nostalgia are clear examples of the negative emotions involved in the project of detaching ourselves from familiar forms of identity. Achieving a post nationalist sense of European identity requires the disidentification from established, nation bound points of reference. Such an enterprise inevitably entails a sense of loss as cherished habits of thought and representation are relinquished."[347]

The language itself, used to describe non-nationals is indicative of the sedentary logic that underpins the constitution of European identity. The expression 'sans-papiers' used extensively to describe the aliens, is but a proof of the negation of refugees' face and name discussed above. Derrida characterizes the expression 'sans-papiers' as a "terrifying" one, albeit one that has become established and legitimatized in our days. As he writes:

> "One assumes that what one calls, in a word, a 'sans-papiers,' is lacking something. He is 'without'. She is 'without'. What is he or she lacking, exactly? Lacking would be what the

[344] Arendt, *Origins*, p. 296.
[345] Hannah Arendt, "Collective Responsibility", *in* Arendt Hannah and Jerome Kohn, 2003, *Responsibility and Judgment*, 1st ed. New York: Schocken Books, at p. 150.
[346] Rosi Braidotti, "The Becoming Minoritarian of Europe", *in* Buchanan Ian and Adrian Parr, 2006, *Deleuze and the Contemporary World*, Deleuze Connections, Edinburgh: Edinburgh University Press, pp. 79-94, at p. 80.
[347] Rosi Braidotti, "The Becoming Minoritarian of Europe", *in* Buchanan Ian and Adrian Parr, 2006, *Deleuze and the Contemporary World*, Deleuze Connections, Edinburgh: Edinburgh University Press, pp. 79-94, at p. 89.

> alleged 'paper' represents. The right, the right to a right. One assumes that the 'sans-papiers' is in the end 'sans droit,' 'without right' and virtually outside the law."[348]

I will go through an analysis of this specific 'right to rights' that the 'sans-papiers' are lacking within the next section.

c) Rethinking Human Rights as 'The Right to Have Rights'

As we saw in the previous sections, for Arendt human rights fall short of providing a guarantee of human dignity for stateless persons. In the Preface to *Origins*, introducing her analysis of totalitarianism, Arendt writes that "human dignity needs a new guarantee," since the 19th century Kant's cosmopolitanism idea of a community of peaceful nations respecting natural rights had failed. "We became aware of the existence of *a right to have rights* (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community," Arendt writes, "only when millions of people emerged who had lost and could not regain these rights because of the new global political situation."[349] In other words, it was after the decline of the rights of man because of the failure of the institution of the nation-state as a model of belonging in the period after World War I, that it became clear that humanity was in need of a new guarantee. Arendt speaks about 'the right to have rights' to denote the new guarantee of human dignity. The question that Arendt poses is whether "the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself."[350] "It is by no means certain," she writes, "whether this is possible,"[351] although Arendt seems to find it necessary, or at least desirable. The new guarantee of human dignity she notes "can be found only in a new political principle, in a new law on earth, whose validity this time

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[348] Derrida Jacques, "Derelictions of the Right to Justice", *in* Derrida Jacques and Elizabeth Rottenberg, 2002, *Negotiations: Interventions and Interviews, 1971-2001*, Cultural Memory in the Present, Stanford, Calif.: Stanford University Press, pp. 133-144 at p. 135

[349] Arendt, *Origins*, p. 296-97; emphasis added. It is worth noting the use of the first-person plural at this passage in contrast to the impersonal way in which *Origins* is written. The 'we' in that passage indicates that Arendt includes herself to those that became aware of right to have rights.

[350] Arendt, *Origins*, p. 298.

[351] Arendt, *Origins*, p. 298.

must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities."[352]

As Butler correctly points out in her dialogue with Spivak in *Who Sings the Nation State,*[353] there is a tension in Arendt's chapter 9 of *Origins*. More specifically, while in the first part of the text, Arendt dismisses the discourse of human rights for being both philosophically ungrounded and politically unenforceable, in the second half of the text, she "redeclares the rights of man and tries to animate a discourse that she thinks will be politically efficacious."[354] This new political discourse consists in the declaration of the 'right to have rights.' Indeed, Arendt's skepticism towards human rights is followed by her claim that the only fundamental human right is the right to have rights, namely a right that should precede any declaration and codification of rights. But if the right to have rights is the right to belong to a political community, to have "a place in the world",[355] then how is this right enacted or how are we to conceive that right in cases where a person has been expelled from her community and consequently has been denied her right of belonging? How those excluded from a political community take political action to defy their exclusion and thus the predominant way upon which that community has been constructed?

Arendt's assertion of 'a right to have rights' should be read as part of her theory of action and consequently as part of the way Arendt conceived the nature of the political. Arendt declares the right to have rights in *Origins*, but it is in the *Human Condition* that she elaborates further on it, by analyzing the conditions that make the enactment of the right possible. The analysis of the space of appearance that has been preceded is relevant here. As elaborated previously, for political action to take place I must appear to others in a way that my opinions would be significant and my actions effective.[356] However, the space of appearance is not a static place existing independently of the people who act in it. Instead, according to Arendt "the space of appearance comes into being wherever men are together in the manner of speech and action."[357] In other words, the *polis* arises out of "acting and speaking together" and "can find its proper

[352] Arendt, *Origins*, p. ix.
[353] Butler Judith and Gayatri Chakravorty Spivak, 2007, *Who Sings the Nation-State?: Language, Politics, Belonging*. London Seagul Books.
[354] Butler and Spivak, *Who Sings the Nation-State*?, p. 47.
[355] Arendt, *Origins*, p. 296.
[356] Arendt, *Origins*, p. 296.
[357] Arendt, *Human Condition*, p. 199.

location *almost* any time and anywhere."[358] The decisive question now as posed by Butler is whether "anyone and everyone [can] act in such a way that this space is brought about?"[359] To put it differently, can anyone become part of that plurality that brings the space of appearance into being? Has anyone the right to appear in the space of appearance? Can for example a community of refugees in a camp materialize their right to have rights of their own accord?

Although Arendt understands the construction of the public realm as a performative activity, she at the same time acknowledges that "this space does not always exist, and although all men are capable of deed and word, most of them—like the slave, the foreigner, and the barbarian in antiquity, […] do not live in it.[360] It seems therefore as if Arendt presents the space of appearance as being already divided, with the lives of those who are excluded from the space of appearance "deprived of reality".[361] This conclusion is reversed however, since at a latter point Arendt argues that the 'space of appearance' that comes into being when (and as long as) speech and action is undertaken in concert by people, "predates and precedes all formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized".[362] Consequently, whenever people are acting together in the manner of speech and action, they enact their right to have rights, and in that sense, the enacting of the right to rights also predates and precedes any political institution that may be constituted to organize the enaction of the right. Thus, Arendt understands the right to have rights not as a natural right as it is proclaimed in the 1948 Declaration of Human Rights, but as an ontological and political feature of the human life as a political life.

"Arendt's assertion that even the stateless have the 'the right to have rights' is itself a kind of performative exercise," writes Butler since "Arendt is establishing through her very claim the right to have rights, and there is no ground for this claim outside of the claim itself."[363] The claim to the right to have rights is therefore a claim "enacted through bodily movement, assembly,

[358] Arendt, *Human Condition*, p. 198.
[359] Butler Judith, 2011, "Bodies in Alliance and the Politics of the Street". EIPCP, at p. 3.
[360] Arendt, *Human Condition*, p. 199.
[361] Ibid., p. 199.
[362] Ibid., p. 199.
[363] Butler, *Notes Towards a Performative Theory of Assembly*, pp. 48-49.

action and resistance."[364] Therefore, when people excluded from the public realm occupy public spaces and assert their right to assemble, they are in fact enacting their right to have rights and in that way challenge the regulation of the public realm through their exclusion. When refugees occupy public spaces (the beginning of the sans papiers movement was marked by an occupation of public places, churches and schools in Paris in 1996 by undocumented migrants),[365] without a legal right to do so, or cases where refugees in camps collectively protest their detention and ask food, shelter, access to health care, they challenge the norms of the political. The inherent contradiction in those acts as well as in all cases where people exercise their right to rights, leads according to Butler "not to impasse but to forms of insurgency."[366] In her dialogue with Spivak in *Who Sings the Nation-State?,* she analyzes exactly the event of the singing of the U.S. national anthem in Spanish by undocumented workers in 2006 as a kind of performative contradiction. In the spring of 2006 millions of people protested the suggested bill H.R. 4437 that proclaimed harsh penalties for illegal immigration and classified undocumented migrants as well as for anyone that helped them to enter the U.S. as felons. While President George W. Bush had stated that the anthem could be sung only in English, the protesters sang the U.S. anthem in Spanish ("Nuestro Himmo"), raising that the question of who has the right to sing the national anthem, or to be more specific of who has the right of belonging with the nation-state. The undocumented migrants asserted through the singing of the national anthem in Spanish in the streets of California in May 2006 their right to assemble even though they were not legally granted this right.

Highlighting the performative character of politics, Butler's description of the space of appearance as defined "neither [by] my act nor [by] yours, but [by] something that happens by virtue of the relation between us, arising from that relation", is formulated in accordance with Arendt's relational understanding of the public realm. Nevertheless, an important point that marks a difference with Arendt's theory should be mentioned here. Arguing further that

[364] Butler, *Notes Towards a Performative Theory of Assembly*, p. 49.
[365] The migrants occupied the churches to protest the administrative degrees that put them in a legal limbo. The movement of sans-papiers in France started their demonstrations at the Church of Saint-Ambroise on March 18, 1996 with the slogan "*on c'est lévé*" (we have risen). Interestingly, the date has a symbolic meaning since in March 18, 1871 was the date of Paris Commune. See further, Gündonğdu Ayten, ""Potentialities of Second Nature: Agamben on Human Rights", *in* Archer Crina, Laura Ephraim, and Lida Maxwell, eds. 2014, *Second Nature: Rethinking the Natural through Politics*, New York: Fordham University Press; Ticktin Miriam, 2006, pp. 104-126
[366] Butler and Spivak, *Who Sings the Nation-State?* p. 63.

"political claims are made by bodies as they appear and act"[367] and that "each of us is constituted politically in part by virtue of the social vulnerability of our bodies,"[368] Butler brings to the fore the bodily dimensions of human existence. The 'in-between' the space of appearance, is therefore for Butler an in-between bodies, it is "a space that constitutes the gap between my own body and another's."[369] The establishment of the space of appearance as a performative exercise happens according to Butler "*only* 'between' bodies."[370] stressing thus the corporal nature of politics. This is an important point, since by highlighting the "material urgencies of the body"[371] and rendering them "central to the demands of politics,"[372] Butler stresses human's shared condition of precarity.[373] In that way, she dismisses Arendt's division between the public and the private realm, asserting that the "space of appearance does not belong to a sphere of politics separate from a sphere of survival and of need."[374] For Butler, the private constitutes part of the very definition of the political and not merely its condition.[375]

Butler decides to read Arendt "against herself,"[376] an endeavor that allows her to bring out forms of exclusion that Arendt probably neglected. To put it differently, Butler is interested not only in what happens between an already established space of appearance but also for the power relations that distribute the right to appear in the space of appearance. These power relations, by establishing different degrees of precarity, allocate also differentially the right to appear. Butler thesis is that "none of us acts without the conditions to act, even though sometimes we must act to install and preserve those very conditions."[377] Hence, in cases where the material conditions are threatened an assembly may act exactly to demand the conditions for acting and living. Bodies are therefore for Butler themselves modalities of power, but these bodies can act only when their material needs are fulfilled. For Butler these material conditions that render action possible do not stand outside of politics, they are not pre-political, but they are instead part and

[367] Butler, "Bodies in Alliance and the Politics of the Street", p. 4.
[368] Butler, *Precarious Life*, p. 20.
[369] Butler, *Notes Towards a Performative Theory of Assembly*, p. 77.
[370] Butler, *Notes Towards a Performative Theory of Assembly*, p. 77; emphasis added.
[371] Judith Butler "Bodies in Alliance and the Politics of the Street", p. 10.
[372] Butler, *Notes Towards a Performative Theory of Assembly*, p. 96.
[373] Butler uses the term 'precariousness' to denote vulnerability as an inherent condition of human life that cannot be reversed and juxtaposes it with the notion of 'precarity' as a condition of induced inequality and destitution. See Butler and Athanasiou, *Dispossession*, p. 20.
[374] Butler, "Bodies in Alliance and the Politics of the Street", p. 5.
[375] Butler, *Notes Towards a Performative Theory of Assembly*, p. 206.
[376] Butler and Spivak, *Who Sings the Nation-State?* p. 27.
[377] Butler, *Notes Towards a Performative Theory of Assembly*, p. 16.

parcel of politics. The body's hunger, need for shelter and protection from violence are "major issues of politics."[378]As Butler notes "it is not only that we need to live in order to act, but that we have to act, and act politically, in order to secure the conditions of existence."[379] Thus, what Arendt fails to see according to Butler is that the body that appears to the public realm is a body that feel thirst and hunger and needs a material support in order to live a livable life. Butler's method enables her to show the interrelation between ethics and politics or to use her own words, between "performativity" and "precarity,"[380] where by the notion of precarity she means a condition of induced inequality as an effect of neoliberal forms of social and economic life.[381] Identifying the corporal nature of politics is an important point she makes, since it is on the shared condition of precarity that Butler structures her theory on responsibility for the *Other* that I will analyze in chapter 5 concerning our common, ethico-political responsibility towards refugees.

Finally, I want to emphasize the link that Arendt establishes between the right to have rights and the right to the freedom of movement. For Arendt freedom of movement is "historically the oldest and also the most elementary"[382] of all human liberties. "Being able to depart from where we will is the prototypical gesture of being free," writes Arendt, "as limitation of freedom of movement has from time immemorial been the precondition for enslavement."[383] Arendt further notes that freedom of movement "is also the indispensable condition for action."[384] In addition, Arendt argues that since "both action and thought occur in the form of movement," it is evident that freedom of movement "underlies both."[385] Hence, being the "indispensable condition for action," the right to have rights cannot be assured without the assurance of the freedom of movement. "To be isolated is to be deprived of the capacity to act,"[386] writes Arendt, and it is exactly isolation that refugees bear placed for indefinite periods of time in camps today.

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[378] Butler Judith, 2012, *Parting Ways: Jewishness and the Critique of Zionism*, New Directions in Critical Theory, New York: Columbia University Press, at p. 174.
[379] Butler, *Notes Towards a Performative Theory of Assembly*, p. 58.
[380] Butler, *Notes Towards a Performative Theory of Assembly*, p. 58.
[381] See Butler and Spivak, *Who Sings the Nation-State?* p. 20-21 and also Butler, *Frames of War*, p. 3 and p. 25.
[382] Arendt Hannah, 1968, *Men in Dark Times* [1 St ed.], A Harvest/Hbj Book, New York: Harcourt, Brace & Company, p. 9.
[383] Arendt, *Men in Dark Times*, p. 9.
[384] Arendt, *Men in Dark Times*, p. 9.
[385] Arendt, *Men in Dark Times*, p. 9.
[386] Arendt, *The Human Condition*, p. 188.

Deprived of their freedom of movement they are also denied the chance to enact their right to rights.

In the next chapter, I will focus on one of Arendt's contemporary readers, Giorgio Agamben and analyze his approach to the perplexities of the rights of Man. It is stated from now, that in accordance with Arendt, Agamben also sees the problem of rightlessness of refugees not as an exception, but as an indication of the limits of human rights within the institution of the nation-state. Nevertheless, arguing that the human rights declarations are based upon man's natural life, marking in that way the biopolitical foundations of modern state, Agamben's criticism goes beyond Arendt's, stating that "the concept of refugee must be resolutely separated from the concept of the 'human rights,' and the right of asylum."[387]

[387] Agamben, Giorgio. 2000. *Means Without End: Notes on Politics.* Theory Out of Bounds, V. 20. Minneapolis: University of Minnesota Press, p. 21

Chapter III*:* Agamben's Biopolitical Sovereignty and Today Anti-Immigration Politics

Writing almost fifty years after Arendt, the Italian political philosopher Giorgio Agamben is also interested in the fate of the persons who - stripped of their political status and left only with their "abstract nakedness of being human and nothing but human",[388] what Agamben names as 'bare life'[389] - end up being rightless. Bare life is therefore the term that Agamben uses to denote the state of nakedness that people suffer because of the loss of their political *persona*. However, it needs to be stressed here that bare life should not be equated with natural life, with *zoe*[390] sine it is a life produced according to Agamben as the originary act of sovereignty, it is thus a life bound with sovereign power.[391] As Agamben writes: "bare life is a product of the machine and not something that preexists it."[392] Being neither natural nor political life, bare life stands as the threshold that "enables the passage from one to the other."[393]

Drawing on Arendt's thesis on the rightlessness of stateless persons, Agamben also links the predicament of refugees with the paradox of human rights. The rather marginal figure of the refugee (from the point of view of dominant sovereign powers), is brought by Agamben to the fore of his analysis of sovereign power and constitutes a central pillar of his theory on the workings of sovereign power. For Agamben, the way refugees are treated by destination countries (in our case EU states as well as EU itself), reveals the way that modern politics works. Hence, he states that:

> "It would be more honest and, above all, more useful to investigate carefully the juridical procedures and deployments of power by which human beings could be so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime".[394]

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[388] Arendt, *Origins*, p. 297.
[389] Agamben, *Homo Sacer*.
[390] See Hussain, Nasser, and Melissa Ptacek, (2000), "Thresholds: Sovereignty and the Sacred", *Law & Society Review* 34 (2): 495-515 at p. 496.
[391] Agamben, *Homo Sacer*, p. 11.
[392] Agamben Giorgio. 2005. *State of Exception.* Ebrary. Chicago; University of Chicago Press, pp. 87-88.
[393] Whyte Jessica. 2009. "Particular Rights and Absolute Wrongs: Giorgio Agamben on Life and Politics*." Law and Critique* 20 (2): 147-61 at p. 152.
[394] Agamben, *Homo Sacer*, p. 97.

Interested in unraveling the nexus between sovereign power and human life, Agamben introduces the theoretical schema of biopolitical sovereignty as a mode of power that always produces bare life. That schema proves a useful tool in unraveling the relationship between sovereignty and subjectivity, and therefore the precarious legal and political status of today refugees. Before moving on to the analysis of the way Agamben approaches sovereignty, I will first refer to a quite recent incident involving migrants' death in the Mediterranean. This incident is important for two reasons; firstly, because the incident gave rise to the filing of a lawsuit against Italy on behalf of the 17 survivors, before the ECtHR. [395] At a second level, an evaluation of the facts of this incident will enable us to better understand the usefulness of Agamben's analysis of the way sovereign power works in producing bare life. The decisive events that took place as they have been described in the report[396] prepared by *Forensic Oceanography* are the following:

> "On 6 November 2017, the rescue NGO Sea Watch (SW) and a patrol vessel of the Libyan Coast Guard (LYCG) simultaneously directed themselves towards a migrants' boat in distress in international waters. The boat, which had departed from Tripoli a few hours earlier, carried between 130 and 150 passengers. A confrontational rescue operation ensued, and while SW was eventually able to rescue and bring to safety in Italy 59 passengers, at least 20 people died before or during these events, while 47 passengers were ultimately pulled back to Libya, where several faced grave human rights violations – including being detained, beaten, and sold to another captor who tortured them to extract ransom from their families."[397]

The collaboration between Italy and Libya is based on the Memorandum of Understanding (MoU) signed on 2 February 2017 between Italy and the Government of National Accord (GNA) of Libya[398] whose aim of which is to stem illegal migrants flows and which received "full EU

[395] The application was filed by a broad-based coalition of NGOs and scholars led by the Global Legal Action Network (GLAN).
[396] The account of the events descried in the report are based on "testimonies from survivors, the crew of Sea Watch, Italian coast guard, and Libyan coast guard. It further relies on a range of evidence provided by Sea Watch, including audio recordings of all communication that took place on SW's bridge, video footage recorded by several cameras positioned on the SW ship and its RHIBs, log books and distress signals received. We have further analyzed AIS vessel tracking data", see the report at p. 87.
[397] Charles Heller and Lorenzo Pezzani, May 2018. *Forensic Oceanography, Mare Clausum, Italy and the EU's undeclared operation to stem migration across the Mediterranean,* Goldsmiths, University of London, at p. 7. (hereinafter Forensic Oceanography Report).
[398] Memorandum of understanding on co-operation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of

Council supports" in the Malta Declaration adopted on 3 February 2017.[399] Looking at the facts of the incident, it is obvious that the case concerns extraterritorial state actions undertaken by Italy aiming to prevent migrants and asylum seekers from reaching Italian territory and ask for international protection. However, what makes this case peculiar compared to previous cases of outsourced border control,[400] is that in the present case, migrants' interception took place by LYCG itself, acting under the control and direction of Italian and EU authorities. Accordingly, the Italian authorities as well as EU exercised control over the LYCG which finally operated "*refoulement by proxy* on behalf of Italy and the EU".[401] Evidently, the purpose of this kind of pullback arrangement between Italy and Libya is to avoid any kind of physical or direct contact between refugees and the Italian authorities, to ultimately cut any jurisdictional link in order for Italy to escape its international responsibility for the violation of the principle of *non-refoulement.*[402] Italy and EU establish thus in that way what Violeta Moreno-Lax characterizes as a form of ""contactless control"[403] over the migrants' boat. Concerning the human rights violations resulting from the returns to Libya, it is suffice to mention the words of the UN High Commissioner for Human Rights after his visit on detention centers in Tripoli on 14 November 2017: "The increasing interventions of the EU and its member states have done nothing so far to

Libya and the Italian Republic, 2 February 2017. For an English translation see: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf

[399] *Forensic Oceanography Report*, p. 10.

[400] In the *Hirsi Jamaa* case, ruled by the ECtHR, the interception had taken place by Italy on the high seas. In its ruling, the Court found the practice of *direct refoulement* illegal and condemned the Italian authorities. See *Hirsi Jamaa and Others v. Italy*, No. 27765/09 (ECtHR, February 23**,** 2012).

[401] *Forenesic Oceanography Report*, p. 7.

[402] For an in-depth analysis of the different ways in which the Court could address the issues raised in the application, see Annick Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?", *European Journal of Migration and Law* 20 (2018) 396–426.
Given that the pullback operation of the migrants on board to Libya took place by the Libyan Coast Guard itself (even if it was acting under the 2017 agreement with Italy) and thus Italy's jurisdiction (contrary to *Hirsi Jamaa* case) cannot be established in the present case, the challenge is whether the Court would apply Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which does not require the establishment of Italy's jurisdiction in order to be applicable. In that scenario, Italy would bear derivative responsibility for the internationally wrongful acts committed by the LYCG. Article 16 of the ARSIWA stipulates that: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State.". International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc A/56/83, 3 August 2001.

[403] Violeta Moreno-Lax and Maragiulia Giuffré, "The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows", To appear in: S. Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming).

reduce the level of abuses suffered by migrants. Our monitoring, in fact, shows a fast deterioration in their situation in Libya."[404]

Considering now the fact that the migrants' boat was intercepted on behalf of Italy by LYCG agencies while being in international waters, that means that the border control[405] took place miles away from Europe. Since the externalization of migration control is becoming more and more widespread in a worldwide scale,[406] it is obvious that this practice challenges conventional understandings of where and what borders are. In view of this trend, Etienne Balibar has emphatically stated that "borders are no longer at the border."[407] Elaborating further on this (at a first reading) paradoxical statement Balibar notes that "borders are vacillating…they are no longer *at the border*, an institutionalized site that could be materialized on the ground and inscribed on the map, where one sovereignty *ends* and another *begins*".[408]

But if the function of the border as a security mechanism is to preserve a state's sovereignty, where sovereignty denotes the 'task of any state to preserve and protect its own territoriality",[409] that means that traditionally,[410] the limits of sovereign power were located at the geographical outer-edge of a sovereign territory. Nevertheless, in the present case, the interception and collective expulsion of migrants by the LYCG in contravention of the *non-refoulement* principle took place in international waters and the migrants in the distress boat suffered violence ~~as a~~ It therefore becomes obvious that a territorial conception of the limits of sovereign power fails to explain the violence that migrants suffered as a result of the activities of Italy and LYCG. The question is thus what the changing nature of borders reveals us about the workings of sovereign power itself.

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[404] OHCHR "UN human rights chief: Suffering of migrants in Libya outrage to conscience of humanity", 14 November 2017, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393&LangID=E

[405] Although the operation was presented as being a 'rescue operation', it is obvious from the number of the people that died and of those that have been pulled back in Libya by LYCG agencies that it constituted in fact nothing but another case where rescue activities have been used as a covering for border control operations.

[406] For an analysis of the externalization of migration controls in USA, Australia and Europe, see Bill Frelick, Ian M. Kysel, and Jennifer Podkul. 2016. "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants". *Journal on Migration and Human Security* 4 (4): 190-220.

[407] Etienne Balibar, "The Borders of Europe", pp. 217-218 *in* Cheah, Pheng, Bruce Robbins, and Social Text Collective. 1998. *Cosmopolitics: Thinking and Feeling Beyond the Nation.* Cultural Politics, 14. Minneapolis: University of Minnesota Press.

[408] Balibar Étienne. 2002. *Politics and the Other Scene*. Phronesis. London: Verso, p. 89.

[409] Butler Judith. 2004. *Precarious Life: The Powers of Mourning and Violence*, Verso p. 55

[410] By the term 'traditionally' here, I mean that the understanding of the concept of sovereignty was based on the 1648 Treaty of Westphalia that inaugurated the idea of sovereign national territories surrounded by national borders.

My thesis is that Agamben's conceptualization of biopolitical sovereignty, the notions of the state of exception, the sovereign ban and bare life that he develops (and that will be analyzed subsequently) provides us with the necessary theoretical framework to shed light on refugees' predicament today. To understand how migrants' bodies have become today the object of a power that by erecting walls and borders transforms them into 'bare lives' and condemns them to a permanent state of exception, by exposing them to deadly and humiliating conditions in detention centers and hot spots, we need to look more at this form of power.

To explain how sovereignty reduces certain individuals to bare life, Agamben examines the concept of power genealogically and goes back to the Greek separation between *zoe* and *bios*, where *zoe* indicates the simple fact of living which is common to all living beings, while *bios* means the politically qualified life. The western conception of politics, Agamben explains, has been determined by Aristotle's definition of the end of the perfect community in *The Politics*. More specifically, the *polis* is in Aristotle's definition, "born with regard to life, but exists essentially with regard to the good life" (*γινομένη μὲν τοῦ ζῆν ἕνεκεν, οὖσα δὲ τοῦ εὖ ζῆν*).[411] Aristotle makes here a distinction between the prepolitical fact of life (*zen*), mere life, on the one hand and the good life (*eu zen*) that the *polis* secures, on the other. For Agamben this understanding of politics became canonical for the political tradition of the West. The distinction, manifested in the Greek language itself,[412] between natural life (*zoe*) and good life (*bios*), to express what we mean today by the term 'life', underpins the *polis* and needs to be rethought anew today according to Agamben, since the distinction entails already an exclusion, that is the exclusion of *zoe* from *bios*. Of course, *zoe* and *bios* are interdependent concepts and there is no way to separate the one from the other.[413] Nevertheless, what Agamben highlights is

[411] Aristotle, *Politics*, 1252b 30, quoted in Agamben, *Homo Sacer*, p. 9.
[412] The fact that Greeks had not a single word to denote what we call 'life' but instead were using two different terms, namely *zoe* and *bios*, reflects for Agamben the distinction between natural and politically qualified life.
[413] Derrida, in the *Beast and the Sovereign,* sharply criticizes Agamben's analysis that takes for granted the differentiation between *zoe* and *bios*. Based on Aristotle's thesis who defines man as a *politikon zoon*, (political animal) Derrida insists that there is no clear differentiation between *zoe* and *bios* within the realm of *polis*, since *polis* is the political community that has as its purpose the *eu zen*. The Aristotelian definition of human as *politikon zoon* contradicts according to Derrida the *zoe/bios* distinction on which Agamben isists. Derrida's thesis is thus that Aristotle did not make a differentiation between *zoe/bios*. Nevertheless, Derrida agrees with Agamben that biopower is an important concept in unraveling contemporary politics; "there are incredible novelties in bio-power", he writes, and like Agamben, he also sees biopower not as a feature of modernity, but as being as old as sovereign power itself, that only takes new structures today. Politics has therefore for both Derrida and Agamben always been biopolitics,

that sovereign power, operates by making distinctions already from the classical time between natural and politically qualified life. As Verena Erlenbusch notes, "for Agamben political life does not replace or even elevate natural life; rather, sovereignty creates the idea of natural life in order to then subject it to the law."[414] It could be argued thus that natural life functions as an 'ideal type', to use Weber's term. What is decisive however for Agamben is-that the excluded bare life provides in modernity the ground on which the political sphere is articulated. According to Agamben it was Foucault who put in question the relation between politics and life and noticed the gradual process through which *zoe* (once excluded) has come to be included within state power and brought to the center of the political sphere. Foucault introduced the term biopolitics[415] to denote how man's natural life (*zoe*) became the focus of modern politics, that is the gradual inclusion of *zoe* within the realm of *polis* as the characteristic of modern societies. For Foucault the shift from politics to bio-politics signals society's "threshold of modernity,"[416] as well as a total transformation of the paradigm of classical politics, since biological existence is now reflected in the political.[417] As Foucault puts it: "For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question".[418]

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and what characterizes the contemporary era, is that this link between politics and life is made more visible than ever. Derrida's disagreement lies in the way Agamben reads the ancient texts with reference to today politics, that is in reading history in terms of "a decisive and founding event". See Derrida, Jacques, Michel Lisse, Marie-Louise Mallet, Ginette Michaud, and Geoffrey Bennington. 2009. *The Beast & the Sovereing*. [English ed.]. The Seminars of Jacques Derrida. Chicago: University of Chicago Press. at para. 420-443.

[414] Erlenbushc Verena. 2003. "The Place of Sovereignty: Mapping Power with Agamben, Butler and Foucault", *Critical Horizons*, 14:1, 44-69.

[415] Foucault Michel and Robert Hurley. 1990. *The History of Sexuality*. Vintage books. New York: Vintage Books, p. 139 and Foucault Michel, Mauro Bertani, Allesandro Fontana, and David Macey. 2003. "*Society Must Be Defended": Lectures at the Collège De France*, 1975-76. 1St Picador pbk. New York: Picador, at p. 243.

[416] Foucault, *History of Sexuality*, p. 143.

[417] Foucault, *History of Sexuality*, p. 142.

[418] Foucault, *History of Sexuality*, p. 143.

a) The concept of biopower

I will briefly explain below what Foucault means by biopower,[419] an essential concept in understanding Agamben's theory of the workings of sovereign power today, but before that, I will provide an explanation of what Foucault meant by power itself.

According to the orthodox conception of power that 'haunted' our understanding of power for many years, power was defined as "the right of the sovereign to decide on life and death".[420] The the sovereign (king), was able to exercise both 'direct' and 'indirect' power over his subjects of life and death.[421] 'Indirect' power was exercised in cases where he had to wage war against external enemies and in that way expose his subjects to the danger of death, while 'direct' power was exercised in cases that a person violated his laws as a form of punishment.[422] However, as Foucault points out "the sovereign exercised his right of life only by exercising his right to kill, or by refraining from killing".[423] Consequently, the "power of life and death", was in fact the right "to *take* life or *let* live".[424] Thus, power was understood as a form of "deduction", as a "right of seizure".[425] As long as power is defined under this model, namely as the imposition of the will of the sovereign over its powerless subjects, power is ultimately conceived as being something negative and repressive. At the same time, it is equated with the rule of law, whilst the main place where it is supposed that the main place where it operates is that of the State.[426] As Foucault notes this model of power views power as "an essentially negative power, presupposing on the one hand a sovereign whose role is to forbid and on the other a subject who must somehow effectively say yes to this prohibition".[427]

Foucault challenges this understanding of power as sovereignty. For Foucault, power is neither something that can be localized nor something that can be found only in specific aspects of our

[419] The term "biopower" was first used by Foucault in the last of his *College de France* lectures of 1975-6, "Society Must Be Defended."
[420] Foucault, *History of Sexuality*, p. 135.
[421] Foucault, *History of Sexuality,* p. 135.
[422] Foucault, *History of Sexuality* p. 135
[423] Ibid., p. 136.
[424] Foucault, *History Sexuality*, p.136. As Foucault writes in "*Society Must Be Defended"*: "The very essence of the right of life and death is actually the right to kill: it is at the moment when the sovereign can kill that he exercises his right over life". *Society Must Be Defended*, p. 240.
[425] Foucault, *History Sexuality,* p 136.
[426] Michel Foucault, and Colin Gordon, *Power/Knowledge, Selected Interviews & Other Writings* 1972-1977, p. 140.
[427] Michel Foucault, *Power/Knowledge, Selected Interviews & Other Writings* 1972-1977, p. 140.

lives and kept by only one person. He thus calls us to see not into "the domination of the King in his central position […]," but "that of his subjects in their mutual relations: not the uniform edifice of sovereignty, but the multiple forms of subjugation that have a place and function within the social organism".[428] Foucault's assertion is that in political analysis, "we need to cut off the king's head,"[429] that is to stop thinking power as concentrated around a sovereign, that is restricted within the limits of the State and in terms of law.[430]

Hence, an analysis of power should not "concern itself with the regulated and legitimate forms of power in their central locations, with the general mechanisms through which they operate, and the continual effects of these. On the contrary, it should be concerned with power at its extremities, in its ultimate destinations, with those points where it becomes capillary, that is, in its more regional and local forms and institutions."[431] Power thus needs a network of people in order to be exercised. For Foucault power is not (only) negative not (only) repressive[432] and not held by only one person. On the contrary, as Foucault writes: "Power is exercised through networks, and individuals do not simply circulate in those networks; they are in a position to both submit to and exercise this power. […] In other words, power passes through individuals. It is not applied to them."[433] Consequently, power for Foucault cannot be appropriated by only one person as a commodity, but is found in all the aspects of life, namely between parents and kids, lovers, friends etc. To put it differently, Foucault calls us to see power as productive and not (only) as deductive. As Agamben notes:

> "One of the most persistent features of Foucault's work is its decisive abandonment of the traditional approach to the problem of power, which is based on juridico-institutional models (the definition of sovereignty, the theory of the State), in favor of an unprejudiced analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life."[434]

[428] Michel Foucault, *Power/Knowledge, Selected Interviews & Other Writings* 1972-1977, p. 96.
[429] Foucault, *Power/Knowledge*, p. 121.
[430] Foucault, *Power/Knowledge*, p. 122.
[431] Michel Foucault, Power/Knowledge, Selected Interviews & Other Writings 1972-1977, p. 96.
[432] As he emphatically stresses "If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse." in Power/Knowledge, Selected Interviews & Other Writings 1972-1977, p. 119.
[433] Foucault, "*Society Must Be Defended"*, p. 29.
[434] Agamben, *Homo Sacer*, p. 10.

The way Foucault conceived power is essential in understanding the way he formulated the constitution of subjectivity.[435] More specifically, seeing power as both productive and repressive, Foucault conceived the subject as being also one of the products, the effects of power. That means that the subject "is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals."[436] On the contrary, "it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. The individual, that is, is not the *vis a-vis* of power; it is, I believe, one of its prime effects."[437] Thus, contrary to Liberal and Marxist understandings of power that conceive power as an institution that is exercised centrally within a society and consequently attribute agency to individuals, for Foucault, identity and agency are already entangled in a network of power.[438] By understanding power as productive,[439] Foucault conceived that the subject emerges through a prior submission to power.[440] As Butler writes drawing on Foucault, "if, following Foucault, we understand power as *forming* the subject as well, as providing the very condition of its existence and the trajectory of its desire, then power is not simply what we oppose but also, in a strong sense, *what we depend on for our existence* and what we harbor and preserve in the beings that we are."[441] Consequently, 'subjection' signifies "the process of becoming subordinated by power as well as the process of becoming as

[435] Interestingly, the process was the reverse for Foucault, namely, his aim was to investigate the process of subject formation and secondarily and only incidentally to analyze the phenomena of power. As he states: "[…] the goal of my work […] has not been to analyze the phenomena of power, nor to elaborate the foundations of such an analysis. My objective, instead, has been to create a history of the different modes by which, in our culture, human beings are made subjects." Michel Foucault, "The Subject and Power", *in* Foucault, Michel, and James D Faubion. (2000) *Power: Essential Works of Foucault, 1954-1984*, V. 3, New York: New Press.
[436] Foucault, *Power/Knowledge*, p. 98.
[437] Foucault, *Power/Knowledge*, p. 98.
[438] Halit Mustafa Tagma, "Biopower as a Supplement to Sovereign Power: Prison Camps, War, and the Production of Excluded Bodies", in *International Relations and States of Exception: Margins, Peripheries, and Excluded Bodies*, *Routledge*, 2010, pp.161-185, at p. 169.
[439] In Discipline and Punish, Foucault writes that "Power produces knowledge" and "power and knowledge directly imply one another", see Michel Foucault, (2012) *Discipline and Punish: The Birth of the Prison*, (transl. by Alan Sheridan), New York: Vintage, at p. 27.
[440] Likewise, Louis Althusser argues: "the individual is *interpellated as a (free) subject in order that he shall submit freely to the commandments of the Subject, i.e. in order that he shall (freely) accept his subjection,* i.e. in order that he shall make the gestures and actions of his subjection 'all by himself'. *There are no subjects except by and for their subjection*." (emphasis original) Louis Althusser, (1994), "Ideology and Ideological State Apparatuses (Notes towards an Investigation)," in Zizek , S. (ed.) *Mapping Ideology*, New York: Verso, 93-140, at p. 136.
[441] Butler, *The Psychic Life of Power*, p. 2; emphasis added.

subject."[442] Consequently, the core of Foucault's and then Butler's and Agamben's argument is that if our subjective expressions of agency are not free from discourses of power, then political agency (and consequently resistance itself) should be rethought and put in a different basis.

Having that in mind, I will now proceed with what Foucault meant by biopower. According to Foucault, the 18th century marked the deployment of a new modality of power whose purpose is to control all aspects of life and which transformed the existing mechanisms of power. Foucault calls this power that aims to administer life itself as "biopower."[443] Under this new mechanism of power, repression is "no longer the major form of power but merely one element among others".[444] This new form of power is more productive and less repressive since it is power "bent on generating forces, making them grow, and ordering them, rather one dedicating to impeding them, making them submit, or destroying them".[445] Biopower is organized in two main poles. The fist pole which was developed in the 17th century and which is known as "*anatomopolitics of the human body*"[446] was centered on the body as a machine[447] and was constructed as disciplinary form of power. The second pole, developed during the second half of the 18th century, known as "*biopolitics of the population*"[448] is non-disciplinary[449] and focuses on the control of populations. Contrary to the individualizing character of the "*anatomopolitics of the human body*", this new form of power is as Foucault explains "massifying", that is, it is directed "not to man-as-body, but to the living man", that is to "man-as-species."[450] It is thus a technology centered upon life itself, namely a regulatory technology of life, that "brings together the mass effects characteristic of a population, which tries to control the series of random events that can occur in a living mass.

As Foucault, notes, both technologies are apparently technologies of the body, however, while in the *anatomopolitics of the human body*, the body is individualized, the *biopolitics of the population*, is a technology in which bodies are replaced by general biological processes."[451]

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[442] Butler, *The Psychic Life of Power*, p. 2.
[443] Foucault, *History of Sexuality*, p. 140.
[444] Foucault, *History of Sexuality*, p. 136.
[445] Foucault, *History of Sexuality*, p. 136.
[446] Foucault, *History of Sexuality*, p. 139.
[447] Foucault, *History of Sexuality, p.* 139.
[448] Foucault, *History of Sexuality*, p. 139.
[449] Foucault, "*Society Must Be Defended",* p. 242.
[450] Foucault, "*Society Must Be Defended"*, p. 242.
[451] Foucault, "*Society Must Be Defended"*, p. 249.

Biopolitics appears therefore as "a matter of taking control of life and the biological processes of man-as-species and of ensuring that they are not disciplined, but regularized."[452] The "population" appears now as the "final end of government"[453] which means that the improvement of the living conditions, of the wealth and health of the population became predominant. Importantly, Foucault names 'governmentality' the practice of government whose purpose is the management of populations[454] (concerned thus with a macrophysics of power), which consequently allows biopower as the new modality of power to function. From that moment, governments are not concerned with subjects but with a social body as a whole "with its specific phenomena and its peculiar variables: birth and death rates, life expectancy, fertility, state of health, frequency of illness, patterns of diet and habitation".[455] Contrary to sovereignty[456] which is exercised upon a territory and the subjects who live on that territory, governmentality is exercised on "men in their relationships, bonds, and complex involvements with things like wealth, resources, means of subsistence, and, of course, the territory with its borders, qualities, climate, dryness, fertility, and so on."[457]

The result of this new power that focuses on the administration of life itself is that "for the first time in history, no doubt, biological existence was reflected in political existence".[458] In other words, "power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would be applied at the level of life itself; it was the taking charge of life, more than the threat of death, that gave power its access even to the body."[459] The politicization of life itself

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[452] Foucault, "*Society Must Be Defended"*, p. 246-247.
[453] Foucault, *Security, Territory, Population*, p. 105.
[454] Foucault Michel. 2009. *Security, Territory, Population: Lectures at the Collège De France, 1977-78.* Edited by Michel Senellart, Ewald François, and Alessandro Fontana. Translated by Graham Burchell. Michel Foucault. Basingstoke: Palgrave Macmillan, p. 108.

[455] Foucault, *History Sexuality*, p. 25.
[456] It must be noted that Foucault's account of sovereignty as a mode of power should not be equated with the state sovereignty as defined by International law theories. It should be remembered that what matters for Foucault is not 'where' power is exercised, but 'how' it is exercised, since power is not something that has a clear and pre-determined origin and direction. As Foucault writes: "the State does not have an essence. The State is not a universal nor in itself an autonomous source of power. The State is nothing else but the effect, the profile, the mobile shape of a perpetual statification (étatisation) or statifications […] In short, the state has no heart, as we well know, but not just in the sense that it has no feelings, either good or bad, but it has no heart in the sense that it has no interior. The state is nothing else but the mobile effect of a regime of multiple governmentalities". Foucault, *The Birth of Biopolitics*, p. 77.
[457] Foucault, *Security Territory Population*, p. 96.
[458] Foucault, *History of Sexuality*, p. 142.
[459] Foucault, *History of Sexuality*, p. 142-43.

therefore[460] turned humans as living beings into targets of power. The fact that power would no longer be exercised over legal subjects has far reaching implications in understanding the violence that today migrants suffer as a result of anti-immigration politics even when they are outside a state's territorial jurisdiction. To be more specific, if power is not exercised over legal subjects but over living beings, it entails that it does not operate (solely) within the territorial limits of a sovereign state, but within the framework of a living population. The criterion of power's applicability would thus not be juridical but biological. The usefulness of Foucault's notion of biopower in the examination of states' anti-immigration politics in the framework of this study becomes thus evident. To put it differently, today's anti-immigration politics can only be read through the lens of biopolitics, since power is directly applied to migrants' bodies and targets them long before they set foot on the soil of their destination countries.

It is important to note that within this new framework shaped by the emergence of biopower,[461] the old sovereign's right of death has not been abolished but is shifted to "align itself with the exigencies of a life-administering power and to define itself accordingly".[462] As Foucault writes in "*Society Must be Defended"*, sovereignty's old right -to take life or let live- was not replaced, but "it came to be complemented by a new right which does not erase the old right but which does penetrate it, permeate it. This is the right, or rather precisely the opposite right. It is the power to "make" live and "let" die.",[463] the power in other words, "to *foster* life or *disallow* it to the point of death".[464]

Thus, the power of death presents now itself as "the counterpart of a power that exerts a positive influence on life, that endeavors to administer optimize, and multiply it."[465] At the same time, the power to "*disallow* life to the point of death" became the indication of the degree to which human life as such, has come under human control. The fact that Foucault offers us a

[460] What the 20th totalitarianism did was to take to the extreme the politicization of life, by rendering millions of people to bare life, mere being by stripping them of their legal and political status.
[461] Importantly, Foucault sees biopower as an 'indispensable element in the development of capitalism', while Nikos Poulantzas adding to Foucault's analysis, notes that the political technology of the body is based on the relations of production and the social division of labor. That is in the capitalist mode of production, the state individualizes the bodies through techniques, in order to subdue the political body. See Nikos Poulantzas, *State, Power, Socialism,* 1978, London: LNB. In the same vein Agamben, "he development and triumph of capitalism would not have been possible, from this perspective, without the disciplinary control achieved by the new bio-power, which, through a series of appropriate technologies, so to speak created the "docile bodies" that it needed". Homo Sacer in p. 10.
[462] Foucault, *History of Sexuality,* p. 136.
[463] Foucault, "*Society Must Be Defended",* p. 241.
[464] Foucault, *History of Sexuality,* p. 138.
[465] Foucault, *History of Sexuality,* p. 137.

chronological understanding of the rise of sovereign and governmental power, does not mean that he conceives the two forms of power as mutually exclusive or as operating in different periods of time. On the contrary, he clearly states that "we should not see things as the replacement of a society of sovereignty by as society of discipline, and then of a society discipline by a society, say, of government. In fact, we have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism."[466]

One may ask now, why we should worry with a politics centered on improving living conditions? What is (if anything) problematic about a political rationality that takes "the administration of bodies and the calculated management of life"[467] as its subject? The answer is that to improve life, biopower may also take life away. To put it differently, to protect the well-being of a specific section of the population, certain lives may be deemed as unworthy of living and effectively left to die. That is why Foucault characterizes genocide where "power is situated and exercised at the level of life", as the "dream of modern powers".[468] In the same vein, Agamben argues since modern politics is saturated by biopower, "it becomes possible both to protect life and to authorize a holocaust".[469] As Foucault explains, biopower is followed by biopolitical racism as its necessary component. Racism, Foucault writes, introduces a 'break' within the domain of life and that break consists in deciding "what must live and what must die."[470] In other words, racism according to Foucault makes a distinction within the biological and consequently within the social realm between lives 'worthy' and 'non-worthy' of living. At the same time, racism establishes a relation between the lives deemed 'worthy' and those considered as 'non-worthy' of living that can be summed up as following: "the fact that the other dies does not mean simply that I live in the sense that his death guarantees my safety; the death of the other, the death of the bad race, of the inferior race (or the degenerate, or the abnormal) is something that will make life in general healthier: healthier and purer."[471] It must be added here that death does not mean "simply murder as such", but also "every form of indirect murder: the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply,

[466] Foucault, *Security, Territory, Population*, p. 107-108.
[467] Foucault, *History of Sexuality*, p. 140.
[468] Foucault, *History of Sexuality*, p. 137.
[469] Agamben, *Homo Sacer*, p. 10.
[470] Foucault, "*Society Must Be Defended"*, p. 254.
[471] Foucault, "*Society Must Be Defended*", p. 255.

political death, expulsion, rejection, and so on."[472] Today anti-immigration politics that exclude migrants' bodies from the body politic, 'leaving them to die' either in the sea or in detention centers and hot spots can be read as a constituent element of racism of our biopolitical societies.

b) The Refugee as Exception

As stated above, Foucault provides us with a chronological sequence of sovereign and governmental power (without of course suggesting that the one replaced the other) and conceives the concept of biopower in a positive way, as governments' ability to control populations[473] as such by optimizing the productivity of their lives through a series of technologies of power, such as the improvement of their health and welfare. In that way, he tries to understand biopower within its sociological features, rather than as a phenomenon of legal repression. Agamben now, while being in a large extent inspired and affected by Foucault's theory of power, makes a central part of his critique of Foucault, the relation between the juridico-institutional and the biopolitical model of power and asserts that there is no separation between the two models arguing instead that "the inclusion of bare life in the political realm constitutes the original – if concealed – nucleus of sovereign power."[474] For Agamben, *"the production of a biopolitical body is the original activity of sovereign power,"*[475] and this activity is the "originary inclusion of the living in the sphere of law,"[476] which derives from the sovereign's decision on the exception.[477] From this assertion it arises firstly a difference concerning the historical depth that each of them places on the concept of biopolitics as the original activity of any sovereign power. More specifically, while Foucault focuses on the analysis of the biopolitical model of power from the 17th century onwards, for Agamben, biopolitics has always been fundamental and constitutive to the emergence of any form of power. However, a more important difference between the two approaches lies in the essence of biopolitics itself, since Agamben links biopolitics with the state of exception.

[472] Foucault, "*Society Must Be Defended*", p. 256.
[473] Foucault, "Society Must Be Defended", p. 247.
[474] Agamben, *Homo Sacer*, p. 11.
[475] Agamben, *Homo Sacer*, p. 11.
[476] Agamben, *Homo Sacer*, p. 22.
[477] Agamben, *Homo Sacer*, p. 22.

To define the decision on the exception, Agamben draws on Carl Schmitt's definition of sovereignty: "[The] sovereign is he who decides on the exception".[478] The sovereign, writes Agamben quoting Schmitt, "stands outside the juridical order and, nevertheless, belongs to it, since it is up to him to decide if the constitution is to be suspended *in toto*."[479] The sovereign stands therefore both outside and inside the legal order. To put it differently, while the sovereign is at the one hand within the limits of a territory, appearing as a body that contains all the other bodies (the image at the cover of the first edition of Hobbe's *Leviathan* is characteristic), he is at the same time outside those limits, as the only who can decide about the suspension of the legal order and in that way decide about the lives of all the others. Agamben elaborates further on sovereignty's paradoxical character and he adds another maxim to Schmitt's definition: "I, the sovereign, who am outside the law, declare that there is nothing outside the law [*che non ce unfiiori legge*]."[480] In that way, Agamben reveals us the structure of law, highlighting that the force of law lies exactly in its possibility of being suspended. He calls law's ability in being in force without applying as "force-of-Law": "In this sense, the state of exception is the opening of a space in which application and norm reveal their separation and a pure force-of- law realizes (that is, applies by ceasing to apply [*dis applicando*]) a norm whose application has been suspended."[481] In other words, the state of exception defines a case where what takes place and is decisive is the separation of "force of law" from the law, it designates thus a "state of the law" where while the norm is in force, it is not applied (it has no "force" [forza]).[482] Agamben detects a tautology inherent in the law, since the real content of law as a relation, lies in its force. Hence, the law exists to assure the force of law. At the same time, sovereignty is found in an inverse relation to the rule of law, since sovereignty is exercised when (or to the extent) that the law is suspended,[483] that is when the 'force of law' applies. For Agamben the sovereign relation of exception derives from the paradox of sovereignty, namely the fact that the sovereign always

[478] Carl Schmitt, 2005. *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago: University of Chicago Press, at p. 5.
[479] Agamben, *Homo Sacer* p. 17.
[480] Agamben, *Homo Sacer*, p. 17.
[481] Agamben, *State of Exception*, p. 40.
[482] Agamben, *State of Exception*, p. 38.
[483] Butler, *Precarious Life*, p. 61.

stands in a threshold of the legal order in order to determine the power of the juridical order. The key term therefore to understand Agamben's conception of sovereignty is the word 'threshold'. However, contrary to writers who saw the exceptional event as an 'objective' necessity that justifies the declaration of a state of exception, for Agamben there is no such as thing as an 'objective necessity', or to put it differently, what is called as an 'objective necessity' is nothing but the result of a 'subjective judgment'. Hence, Agamben explains that "far from occurring as an objective given, necessity clearly entails a subjective judgement, and […] obviously the only circumstances that are necessary and objective are those that are declared to be so."[484] The fact that the declaration of a state of exception is legally provided as a possibility, does not turn the exceptional event into an 'objective necessity', since at the end of the day, the sovereign decision on the exceptional character of the event in question is by no one checked. The schema is thus circular: power recognizes only power. Sovereign's response to an exceptional event is justified by what the sovereign power itself declared as exceptional. Agamben calls this 'objective condition' of necessity a "fictitious lacuna" and argues that:

> "Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation."[485]

Hence, if there is no such a thing as an 'objective condition' of necessity that gives rise to the state of exception through a sovereign declaration, since what is called as 'objective necessity' is always the product of a 'subjective decision', it entails that sovereignty cannot be grounded in legal norms and as such it needs an 'exteriority' to ground itself. The interrelation between sovereignty and that 'exteriority', entails that sovereignty is structured upon a relation between the norm and the exception, between law and 'the force of law', which ensures that it applies from the beginning both to the norm and to the exception. The 'exteriority' upon which sovereignty is structured is life itself. Without (human) life, the law has no existence, Agamben argues,[486] it is thus dead, and it is thus dependent upon life.

To shed more light on the relation between sovereign law and life and to clarify the structure of sovereignty, Agamben turns to the etymology of the word 'exception', which comes from ex-

[484] Agamben, *State of Exception*, p. 30.
[485] Agamben, *State of Exception*, p. 31.
[486] Agamben, *Homo Sacer*, p. 22.

capere, that is to take outside. Agamben shows that sovereign's decision on the exception entails that something is taken outside and not simply excluded from the legal order. The term *relation of exception* that Agamben introduces, denotes thus "the extreme form of relation by which something is included solely through its exclusion."[487] In other words, the exception is not a mere exclusion, but what Agamben names as an "inclusive/exclusion."

To elucidate further on this scheme of 'inclusive exclusion' that characterizes modernity, Agamben draws on Jean-Luc Nancy's notion of the *ban*[488] and argues that the relation of exception is a relation of ban,[489] namely a spatial relation. The person that has been banned from a political community, remains in a relation with that community in terms of her exclusion. Agamben uses the term 'ban' to describe exactly the case where life although excluded from the political community, is captured within the realm of sovereign power. Sovereign power shows therefore its power through the withdrawal of the law from certain lives which entails their abandonment to a state of violence where they can be killed without this act to count as a murder. Consequently, as Agamben writes:

> "He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable. It is literally not possible to say whether the one who has been banned is outside or inside the juridical order."[490]

Accordingly, the person that has been banned, namely excluded from a *polis* and reduced to what Agamben names 'bare life', is not totally excluded, but stands at a threshold between inclusion and exclusion. Contrary thus to Arendt who conceive the exclude outside political power, the excluded from polity is for Agamben caught in the relation of the ban. According to Agamben, the realm of bare life once found at the margins of the political order, is brought at the center of the political realm in a way that "exclusion and inclusion, outside and inside, *bios* and *zoe*, right and fat, enter into a zone of irreducible indistinction."[491] This phrase summarizes in the best way the substance of Agamben's argument on the production of bare life. Because of its 'inclusive/exclusion', bare life comes into a more fundamental political relation with the power that excluded it. Consequently, Agamben argues that the bandit:

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[487] Agamben, *Homo Sacer*, p. 18.
[488] Nancy, Jean-Luc, 1993, *The Birth to Presence*, Meridian, Stanford, Calif: Stanford University Press at pp. 36-47.
[489] Agamben, *Homo Sacer*, p. 23.
[490] Agamben, *Homo Sacer* p. 23.
[491] Agamben, *Homo Sacer*, p. 12.

> "is in a continuous relationship with the power that banished him precisely insofar as he is at every instant exposed to an unconditioned threat of death. He is pure *zoe,* but his *zoe* is as such caught in the sovereign ban and must reckon with it at every moment… In this sense, no life, as exiles and bandits know well, is more "political" than his."[492]

Agamben revokes the figure of *homo sacer* - meaning sacred man[493]- as the personification of the bandit, that is a figure found in ancient Roman law whom anyone could kill without committing a murder in legal terms but also who could not be sacrificed (in religious ceremonies), since he exists outside both the human and divine laws, living therefore in a zone of indistinction. Like the sovereign, *homo sacer* is therefore also found in a threshold outside and inside the legal order and because of that he may be killed without legal consequences. Thus, while the fact of being in a threshold between law and anomie, allows the sovereign to determine juridical order's validity, in the case of *homo sacer*, being in that threshold is the fact that renders him a person that can be killed without that act to count as a murder. *Homo sacer* constitutes thus a reflection of the sovereign and his life is included in the legal order through its own exclusion. The withdrawal of the law from the excluded lives and their exposure to the threat of death, defines the sovereign exception. Hence:

> "*The sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life-that is, life that may be killed but not sacrificed-is the life that has been captured in this sphere*."[494]

Bare life is the life that has been caught in a relation of exception through the suspension, the 'ban' of the law. It is thus the exception according to Agamben that brings together the realm of law and life. Further developing Schmitt's definition of the exception, Agamben shows that:

> "if the law employs the exception-that is the suspension of law itself-as it is original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law".[495]

Therefore, for Agamben sovereignty constitutes a mode of power that suspends the law and produces bare life. Nevertheless, if sovereign power is defined by its ability to declare an exception and thus suspend the law, that means that sovereignty's essence lies in its ability to

[492] Agamben, *Homo Sacer*, p. 103.
[493] Agamben's 'sacredness' with reference to homo sacer should not be associated with any notion of holiness. On the contrary, the sacred life means here the life that can be killed but not sacrificed.
[494] Agamben, *Homo Sacer*, p. 53.
[495] Agamben, *State of Exception*, p. 1.

decide whether a life is valuable or not valuable, whether a person is recognized as a political entitled to legal rights or not. Accordingly, Agamben reformulates Schmitt's definition of the sovereign as the one who decides on the exception as following:

> "in modern biopolitics, sovereign is he who decides on the value or the nonvalue of life as such. Life-which, with the declaration of rights, had as such been invested with the principle of sovereignty- now itself becomes the place of a sovereign decision".[496]

But if the sovereign is defined as the one who decides on the value or non-value of life, then the concept that defines contemporary politics is that of bare life; namely the life that has been stripped of any rights and such is found at a threshold of law standing outside and inside the legal order. Agamben claims that the two figures that are to be found at this threshold that constitutes the exception, are both the sovereign and bare life. That means that the concept of the political is defined according to Agamben through this threshold where both the sovereign and bare life are found. The very fact that the sovereign has the power to strip a subject of her rights and reduce it to depoliticizing form of being whose death does not count as murder, renders therefore the notion of bare life the prime political form that defines the political realm. The paradox of power as conceived by Agamben lies thus in the fact that the very same act of depoliticization, constitutes at the same time the realm of the political. That is why Agamben argues that bare life through its inclusive/exclusion constitutes the hidden foundation of sovereignty.[497] In other words, bare life, that is a depoliticizing form of life, becomes the source of the political.

Revealing us the logic of sovereignty Agamben enables us to understand how the refugee while being excluded from the domain of law are still subjected to it. The permanent state of exception where refugees are found, with their rights being suspended is a sphere where there is 'a force of law without law.'[498] The state of exception, Agamben argues separates "the norm from its application in order to make its application possible,"[499] and thus although the application of law is suspended, the law remains in force. Consequently, the refugee instead of being a subject of law, is on the contrary subjected to it.

[496] Agamben, *Homo Sacer*, p. 83.
[497] Agamben, *Homo Sacer*, p. 12.
[498] Agamben, *State of Exception*, p. 39.
[499] Agamben, *State of Exception*, p. 36.

c) The Refugee as Homo Sacer

In accordance with Arendt, Agamben sees refugees' precarious as an indication of the paradoxes of human rights within the political organization of the nation-state. Interestingly, although Agamben's concept of 'bare life' denotes a state equivalent to what Arendt described as "the abstract nakedness of being human and nothing but human",[500] -namely the state of a person who has lost her political agency and legal recognition and is thus exposed to violence occurring in what is considered as the state of exception-, Agamben argues in *Homo Sacer* that "a biopolitical perspective is altogether lacking" from Arendt's *Origins of Totalitarianism*.[501] Interestingly, it is Agamben who highlighted the aspect of biopolitics in Arendt's work and brought together (for the first time) Foucault's notion of biopolitics with Arendt's analysis on totalitarianism. As he writes in *Homo Sacer*, Arendt had analyzed almost twenty years before Foucault's *History of Sexuality*, "the process that brings *homo laborans,*[502] -and, with it, biological life as such- gradually to occupy the very center of the political scene of modernity."[503] Indeed, although Arendt did not use the term biopolitics, she had nevertheless explicitly referred to the primacy of life within modern societies, the decline in politics and the reduction of humans to mere living beings within totalitarianism.[504] As she puts it in *The Promise of Politics*: "[…] the fact that contemporary politics is concerned with the naked existence of us all is itself the clearest sign of the disastrous state in which the world finds itself -a disaster that, along with all the rest, threatens to rid the world of politics."[505] In addition, Arendt discussed extensively in *Origins* the "preparation of living corpses"[506] in the concentration camps, the destruction of man's "individuality" and "uniqueness"[507]and the reduction of people to mere living beings in the 20th totalitarianism.

[500] Arendt, *Origins,* p. 297.
[501] Agamben, *Homo Sacer*, p. 10.
[502] "The human condition of labor is life itself", Arendt writes in *Human Condition*, p. 7.
[503] Agamben, *Homo Sacer*, p. 10.
[504] For a reading of Arendt as a theorist of biopolitics, see Kathrin Braum, 2007 "Biopolitics and Temporality in Arendt and Foucault", *Time & Society* 16 (1): 5-23.
[505] Arendt, *The Promise of Politics,* p. 145.
[506] Arendt, *Origins*, p. 447.
[507] Arendt, *Origins,* p. 454.

Hussain and Ptacek note that what Agamben seems to object is that for Arendt this state of natural or naked life is "resolutely rejected as a political condition", while Agamben's bare life is on the contrary the "result of an unavoidable political power that blurs the distinction between political and natural"[508] and that is why it should not be equated with natural life. I think that what Agamben wants to criticize here is Arendt's insistence on a separation between *bios* and *zoe*, public and private, while one of the features of biopolitics is the blurring of the distinction between these terms "to the point of entering today into a real zone of indistinction."[509] Perhaps Arendt's insistence on such division between the realm of public and private on the model of the Greek *polis* is proposed as a kind of solution, an alternative to a non-biopolitical conception of politics. In addition, the way Arendt conceived politics, that is as an activity that always takes place somewhere and therefore as an activity that cannot be conceived beyond a spatial order, disallows her from recognizing political subjectivity to stateless, since what stateless lack is exactly "a place in the world",[510] where they can be recognized as equals. This does not mean of course that the way Arendt reflects on statelessness is not a political one. On the contrary, she does treat the subject solely in political terms and the 'solution' she proposes to the problem of statelessness, that is the 'right to have rights,'[511] means exactly a right to membership in a political community.

It needs to be mentioned at this point that the term 'bare life'[512] has caused ambiguities, in the sense of whether life as such can ever be considered as 'bare'. Butler in her dialogue with Spivak in the essay *Who Sings the Nation-State,*[513] argues that although stateless are without legal

[508] Hussain, Nasser, and Melissa Ptacek, 2000. "Thresholds: Sovereignty and the Sacred" *Law & Society Review* 34 (2): 495-515, pp. 507-508.
[509] Agamben, *Homo Sacer*, p. 10.
[510] Arendt, *Origins,* p. 296.
[511] Arendt, *Origins,* p. 296.
[512] It is worth noting that Agamben borrows the term of bare life from Benjamin who in the Critique of Violence makes reference to 'mere life'. See Walter Benjamin, *Critique of Violence*, at p. 299.
[513] Butler and Spivak in their essay *Who Sings the Nation-State? Language, Politics Belonging*, which constitutes in fact a dialogue between them on the issue of stateless and the right to belong, reject Agamben's notion of 'bare life' as a useful concept in understanding the political state of today stateless, migrants, asylum seekers. Drawing on Derrida, Butler and Spivak argue that the conjugate between the political and the animal (*politikon zoon)* that constitute the human being is non- deconstructable. Butler has a point in arguing that Agamben's thought might lead to a reproduction of the discourse of sovereign power obscuring thus any possibility to escape from it. "We must describe destitution" she writes, "and, indeed, we ought to, but if the language by which we describe that destitution presumes, time and again, that the key terms are sovereignty and bare life, we deprive ourselves of the lexicon we need to understand the other networks of power to which it belongs, or hew power is recast in that place or even saturated in that place". *Who Sings the Nation-State* p. 42-43. In the *Notes Towards a Performative Theory of Assembly*, Butler writes that "if we claim that the destitute are outside of the sphere of politics-reduced to depoliticized forms of being-then we implicitly accept that the dominant ways of establishing the political are

protection they are still placed under the control of state power and thus they are "in no way relegated to a 'bare life': this is as life steeped in power."[514] On my reading, Agamben does not equate bare life with a life outside politics. Indeed, as Agamben has stated: "from the point of view of sovereignty *only bare life is authentically political,"*[515] he therefore does not conceive bare life as being outside power relations but on the contrary, he treats it as a life steeped in power like Butler. "Bare life is a product of the [biopolitical] machine", he writes in the *State of Exception,* and "not something that preexists it."[516] My thesis is that we can talk about 'bare life', to denote the state of the person who stripped of her legal and political status stands 'naked' before death and any other form of violence. There is a state of 'nakedness' that emerges in the case of refugees since what becomes decisive is whether they will have food, water and eventually if they will die or not.

Returning now to Agamben's conception of the refugee, Agamben argues that the refugee represents a "disquieting element in the order of the modern nation-state,"[517] precisely because "by breaking the continuity between man and citizen, *nativity* and *nationality*,"[518] the refugee puts "the originary fiction of modern sovereignty in crisis".[519] The 'man' of the human rights declarations is for Agamben the "immediately vanishing ground (who must never come to light as such) of the citizen."[520] Agamben brings to our attention the etymology of the concept of 'nation', which comes from the verb *nascere*, namely to be born. Turning to the text of the *French Declaration of the Rights of Man,* Agamben shows that the State justifies itself through its ability to protect the biological life of its citizens. To show how within the institution of the nation-state, the refugee, instead of being the personification of the 'Man' of the Declaration, is equated on the contrary with a rightless person, Agamben reads in conjunction the first three articles of the 1789 *Déclaration* of human rights.[521] A simple reading makes apparent the tension

right.", NTPTA, p. 78 At the same time, however by introducing in her own work the notion of 'precarity', as a condition of induced inequality and a threshold upon which sovereign power determines each time the value or non-value of life, Butler might end up reproducing the critique she makes to Agamben's notion of bare life.

[514] Butler and Spivak, *Who Sings the Nation-State*?, pp. 8-9.

[515] Agamben, *Homo Sacer,* p. 64.

[516] Agamben, *State of Exception,* p. 87-88.

[517] Agamben, *Means Without End,* p. 20.

[518] Agamben, *Means Without End,* p, 20.

[519] Agamben, *Homo Sacer,* p. 77.

[520] Agamben, *Homo Sacer,* p. 76.

[521] Article 1 of the 1789 Declaration of the Rights of the Man and Citizen states that: "Men are born and remain free and equal in rights. Social distinctions can be based only on public utility" Article 2 states that: "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty,

that exists since human rights are identified with nationality, which entails the loss of human rights for those declared non-citizens. More specifically, by asserting that sovereignty resides in the nation, the Declaration, "inscribed the element of birth in the very heart of the political community."[522] Within the institution of the nation-state, Man is included in the order of the state by being born in its territory, which automatically entails the exclusion of those declared as non-nationals. The crucial point here is that while biological life is included within the realm of politics, as the life that needs to be protected, at the same time, the biological life of those declared as non-citizens is cast out of politics as bare life. Hence, Agamben's assertion that it is the excluded life that constitutes the source of sovereignty in modernity is verified. Importantly, by seeing the link between bare life and the institution of the nation-state as a structural one, Agamben understands the equation of refugees with rightless not as an aberrant phenomenon, but on the contrary, as the "hidden paradigm of the political space of modernity."[523]
Consequently, if rights become effective only under sovereignty, the refugee by not being a subject of sovereign power, is subject to a permanent state of exception. In other words, if rights are a product of sovereign power, that means that they can not be opposed in a dualistic manner to it. Thus, although both the 1789 French as well as the 1948 UDHR, proclaimed subjects as 'sovereign', and 'free', they in fact subjected them into a more fundamental relation with sovereign power. Accordingly, what lies in the "passage from subject to citizen", Agamben argues, is not "man as free and conscious political subject but, above all, man's bare life."[524] To further support his argument that bare life turns to be included within political calculations and thus constitute the (secret) foundation of modern democracy, Agamben turns to the writ of *habeas corpus* of 1679, which proclaimed the right against detention without trial.[525] Agamben argues that with the introduction of *habeas corpus*, modern democracy makes *corpus*, that is bare life as such, the new political subject.[526] This is because the aim of *habeas corpus* was to assure the presence of the accused in the trial, that is to assure the presence of the body of the accused, rather than to impede a person's detention without a prior legal judgment. As such, "*corpus*",

property, security, and resistance to oppression", while Article 3 states that: "The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation".
[522] Agamben, *Homo Sacer*, p. 76.
[523] Agamben, *Homo Sacer*, p. 73.
[524] Agamben, *Homo Sacer*, p. 76.
[525] The today prisoners held at Guantánamo, as 'terrorists-suspects' are denied the right of *habeas corpus.*
[526] Agamben, *Homo Sacer*, p. 73.

Agamben writes is "*a two-faced being, the bearer both of subjection to sovereign power and of individual liberties.*"[527] Rights can not therefore be perceived in a binary opposition to sovereign power to the degree that it is a product of sovereign power itself. Agamben's thought echoes here Foucault's thought on the constitution of subjectivity and his problematization of the sovereign subject as both free and made subject to sovereign power. Consequently, both Foucault and Agamben recognize the productive role of power in the constitution of the subject and they understand identity as being saturated in a network of power from the beginning.

Based on the above, I will now return to today anti-immigration politics taking as a case-study the 2017 incident concerning migrants' interception by LYCG that I described at the beginning of this chapter. The aim is not to 'apply' Agamben's theory to that incident, but to rethink the relation between biopolitical sovereignty and the state of exception as a zone of indistinction between outside and inside, exclusion and inclusion that he introduces.

As stated at the beginning of the chapter, the migrants in the 2017 incident suffered violence by the LYCG acting on behalf of the state of Italy and EU, while they were in international waters, namely outside the territorial jurisdiction of both Italy and Libya. As a result, they were denied their right to asylum and were illegally intercepted by the LYCG.

According to Agamben, the ordering of the space, what Schmitt called as sovereign *nomos*, is not only the taking of land and as such the determination of a juridical and territorial ordering, but mainly, "a 'taking of the outside', an exception."[528] But as discussed above, the way sovereign power captures the outside, the exception, does not take the form of a simple interdiction in Agamben's theory. The exception as the defining feature of sovereignty, is on the contrary a bit more complex than an interdiction, since in the state of exception:

> "what is outside is included not simply by means of an interdiction or an internment, but rather by means of the suspension of the juridical order's validity – by letting the juridical order, that is, withdraw from the exception and abandon it. The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule. The particular "force" of law consists in this capacity of law to maintain itself in relation to an exteriority." [529]

[527] Agamben, *Homo Sacer*, p. 73.
[528] Agamben, *Homo Sacer*, p. 19.
[529] Agamben, *Homo Sacer*, p. 18.

Agamben further argues that what is at issue in the sovereign exception is not simply to control an excess, but "the creation and definition of the very space in which the juridico-political order can have validity."[530] The refugee and the migrant alike constitute from the point of view of the destination countries where they seek asylum an excess, an 'exteriority', since despite the human rights treaties, including the 1951 Refugee Convention, they are not included within destination countries' responsibilities unless they are found under their jurisdiction.[531] The case is that today and as long as the practice of borders' extraterritorialization tends to become the rule, the way states capture the 'outside' is through a decision based on the value or non-value of life as such, that is a decision whose rationality is biopolitical. Consequently, states borders could be seen today as spaces of exceptions themselves. In other words, instead of seeing borders as a static and clearly demarcated line localizable in specific spaces, whose function is to separate the 'inside' from the 'outside' demarcating in that way the geographical limits of sovereign power, they should rather be understood as exceptional spaces, which are performatively produced[532] via a sovereign decision on the value or the nonvalue of life. That is why Agamben argues that the state of exception is the "fundamental localization", that does not distinguish the outside from the inside but places a threshold between them, based on which the outside and the inside become indistinguishable.[533]

Considering Agamben's theoretical insights in the context of contemporary anti-immigration politics adopted by EU and its member states, enables us thus to reconceptualize or at least to rethink the concept of state borders. As Agamben has stated, to really understand what is at stake in politics, we must to learn to see the opposition between the exception and the rule, "not as 'di-chotomies' but as 'di-polarities', not substantial but tensional." He further adds: "I mean that we need as logic of the field, as in physics, where it is impossible to draw a line clearly and separate two different substances. The polarity is present and acts at each point of the field. Then you may

[530] Agamben, *Homo Sacer*, pp. 18-19.

[531] An exception to this rule constitutes Article 33 of the 1951 Refugee Convention which establishes the *non-refoulment* principle and as argued in the chapter on legal norms, it applies equally to persons who are not physically present within the territory of a State.

[532] Indicative is here the response of the Australian government, when in 2001, after an official denial to land immigrants that were arriving by sea, retroactively declared several small islands (such as the Christmas Island, Papua New Guinea) as no longer being part of the Australian state for the purposes of migration law. Based on this modification of law, the intercepted immigrants were transferred to these islands and detained there, without the possibility of making a claim for asylum in Australia. With the islands no longer considered part of its territory, Australia could evade its responsibility for violating international law.

[533] Agamben, *Homo Sacer*, p. 19.

suddenly have zones of indecidability or indifference. The state of exception is one of those zones."[534]

Moreover, "If sovereign power is founded on the ability to decide on the state of exception," Agamben writes, then "the camp is the structure in which the state of exception is permanently realized."[535] Although in the past, the state of exception was localized in the camp, it is now spread in every aspect of our life in a way that: "the camp, which is now securely lodged within the city's interior, is the new biopolitical *nomos* of the planet."[536] The Mediterranean Sea which has turned into a graveyard the last years for a great number of anonymous migrants, could therefore be seen as the materialization of a state of exception, as a camp, where the "normal order is de facto suspended and in which whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign."[537] Refugees are reduced to bare life not because of their actions, but by the exceptional nature of the place where they are found, that is in our case the Mediterranean Sea. When a state of exception is declared, the political system, writes Agamben "no longer orders forms of life and juridical rules in a determinate space, but instead contains at its very center a *dislocating localization* that exceeds it and into which every form of life and every rule can be virtually taken."[538] The camp as the place where this dislocating localization is materialized constitutes thus a "complex topological figure" that opens up "a topological zone of indistinction."[539] For Agamben it is precisely this zone of indistinction that was hidden from the eyes of justice and thus that "we must try to fix under our gaze."[540] It is important to pay attention here to the fact that for Agamben this topological zone of indistinction embodies the state of nature.[541] Consequently, the state of exception as the product of the sovereign's decision, is not the chaos that precedes the legal order, "but rather the situation that results from its suspension."[542] Hence Agamben rereads Hobbes' conceptualization of the state of nature as an exteriority that precedes the constitution of the State, and places it on the internal of the city as something that becomes

[534] Raulff Ulrich, "An Interview with Giorgio Agamben", *German Law Journal* 5 (5): 609-14, at p. 612.
[535] Agamben, *Means Without End*, p. 40.
[536] Agamben, *Homo Sacer*, p. 99.
[537] Agamben, *Homo Sacer*, p. 99.
[538] Agamben, *Homo Sacer*, p. 99.
[539] Agamben, *Homo Sacer*, p. 28.
[540] Agamben, *Homo Sacer*, p. 28.
[541] Agamben, *Homo Sacer*, p. 28.
[542] Agamben, *Homo Sacer*, p. 18.

manifest when the state of exception is declared and therefore "the State is considered 'as if it were dissolved.'"[543] By making the analogy between state of nature and state of exception, Agamben brings to our attention the fact that life is always under the sovereign's right of life and death, in other words that life continues to be subjected to the threat of death because of its dependence on the sovereign's decision.

It is obvious from the above, that contemporary border practices target and impact directly the bodies of refugees that are trying to cross them, confirming Agamben's thesis on the politicization of man's bare life in today politics. As exceptional spaces, borders constitute "a threshold between the inside and the outside."[544]

The theoretical schema of 'inclusive/exclusion' that Agamben suggests defining the relation of exception, permits us to move forward the binary logic between inclusion and exclusion. "The camp as space of exception" writes Agamben, "is a piece of territory that is placed outside the normal juridical order; for all that, however, it is not simply an external space."[545] Equally, the refugee is equated with the bandit (since what the ban as a space of exception holds together is precisely bare life and sovereign power[546]) and is reduced to bare life, as a result of as sovereign decision. Nevertheless although 'banned' from the political community that excluded them, refugees remain in a relation with that community through their exclusion, just like the 'outlaw' is always 'in the law'. The concept of the ban involves therefore both a spatial dimension in the sense that it involves real spaces that are to be each time geographically determined, and an ontological dimension,[547] in the sense that people who are hold under the sovereign ban, suffer alongside the loss of their legal and political status, an ontological loss as well, namely their recognition as less than human.

Finally, it seems that borders are indeed vacillating as Balibar suggested and that since border politics target today the migrants' bodies themselves, it is obvious that power is no more exercised over legal subjects, but over living beings. Highly indebted to Foucault, Agamben

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[543] Agamben, *Homo Sacer*, p. 27.

[544] Vaughan-Williams, Nick. 2009. *Border Politics: The Limits of Sovereign Power*. Edinburgh: Edinburgh University Press, p. 79.

[545] Agamben, *Means Without End*, p. 40.

[546] Agamben, *Homo Sacer*, p. 65.

[547] Vaughan-Williams refers to the ban as "a spatial-ontological" device. See Nick Vaughan-Williams, "The Generalized Biopolitical Border? Re-conceptualizing the Limits of Sovereign Power", *Review of International Studies*, Vol. 35, No. 4 (October 2009), pp. 729-749, at p. 734.

formulates his theory on the workings of sovereign power in contemporary politics through the lens of biopolitics, since his belief is that it is only in the terrain of biopolitics that the "enigmas" of our century will be solved.[548] My thesis is that Agamben's theoretical insights can prove extremely helpful in conceptualizing the changing nature of borders and the state of exception that has now become permanent as a result of states' anti-immigration politics. As Vaughan-Williams argues, Agamben's concept of 'biopolitical abandonment' offers a unique insight in unraveling European border politics. Without such diagnostic accounts he explains, "some of the worst examples of thanatopolitics may otherwise appear merely as tragic accidents, where the 'reality' of EU border security has simply failed to live up to the neo-liberal humanitarian rhetoric, rather than as a more intrinsic feature of biopolitics."[549]

Therefore, although FRONTEX (*frontières extérieures)*, the EU's established external border agency, proclaims as its stated purpose the "coordination of intelligence driven operational co-operation at EU level to strengthen security at the external borders,"[550] it simultaneously engages in European border performances hundreds of miles away from Europe,[551] a reality that disallows us from determining where both EU's external and individually member states' borders are exactly located. The case is that the more EU's and individual member states' borders become blurred and extended beyond their territories, the more migrants' rights are undermined.

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[548] Homo Sacer, p. 10. It should be noted here that Agamben does not only declare the importance of the concept of biopolitics in a theoretical level, but he is in fact interested in unraveling the practical implications of the generalization of the sovereign state of exception and the subsequent reduction of subjects to 'bare lives' and how these events opened up the way (and continue doing that) for great human rights violations. The way Agamben reads Holocaust is indicative: "The truth", he writes, "that we must have the courage not to cover with sacrificial veils-is that the Jews were exterminated not in a mad and giant holocaust but exactly as Hitler had announced, 'as lice', which is to say, as bare life. The dimension in which the extermination took place is neither religion nor law, but biopolitics", while in another point in Homo Sacer he writes that: "Only because politics in our age had been entirely transformed into bio-politics was it possible for politics to be constituted as totalitarian politics to a degree hitherto unknown.", See Homo Sacer at p. 68 and 71 respectively.

[549] Nick Vaughan-Williams, *Europe's Border Crisis: Biopolitical Security and Beyond*, 2015, Oxford, United Kingdom: Oxford University Press, at p. 47.

[550] FRONTEX 'Mission Statement'. Available at: «http://www.FRONTEX.europa.eu/more_about_ FRONTEX/».

[551] Frontex's operations know as HERA I and HERA II (HERA's II expressed aim was to prevent "migrants from leaving the shores") for example were taking place in Canary Islands and Africa and thus migrants were subject to a "pre-border surveillance" on their movement to Europe, Williams, Nick 2008, "Borderwork Beyond Inside/Outside? Frontex, the Citizen-Detective and the War on Terror", *Space and Polity* 12 (1): 63-79, at p. 67-68.

At that point, I want to note that drawing on Agamben but adopting a slightly different account of power, Judith Butler offers us a distinct yet equally powerful interpretation of today exceptional politics. Although Butler focuses on the detention and treatment of the detainees held in Guantánamo by US, her understanding of sovereignty is also useful in reading EU's anti-immigration politics. More specifically, Butler emphasizes the practices that produce the state of exception and following Foucault, argues that our historical situation is marked by governmentality as a mode of government whose end is the management of populations. What is important here, is her assertion that under these conditions of governmentality, sovereignty is transformed. That is, the rise of governmentality entailed the loss to a certain degree a loss of sovereignty within contemporary era.[552] However, this loss of sovereignty is "compensated" she argues through the "resurgence of sovereignty within the field of governmentality."[553] This 'resurgence' of sovereignty is made possible through law's suspension as a tactic of governmentality.

Law, Butler explains, "withdraws from the usual domain of its jurisdiction; this domain thus becomes opened to both governmentality (understood as an extra-legal field of policy, discourse, that may make law into a tactic) and sovereignty (understood as an extra-legal authority that may well institute and enforce law of its own making)."[554] Thus, sovereignty for Butler is "produced at the moment of this withdrawal, [consequently we must] consider the act of suspending the law as a performative one which brings a contemporary configuration of sovereignty into being, or more precisely, reanimates a spectral sovereignty within the field of governmentality."[555]

Hence, while Agamben, as already stated, conceptualized sovereignty as a relation of power that takes the form of law's suspension and where sovereignty is the cause of the suspension of law, Butler sees sovereignty not as the cause, but as the result of law's suspension, adopting thus a performative understanding of sovereignty. In other words, while in Agamben's understanding of sovereignty, the sovereign pre-exists the declaration of a state of exception, for Butler it is the

[552] Butler, *Precarious Life*, p. 56.
[553] Butler, *Precarious Life*, p. 56.
[554] Butler, *Precarious Life*, p. 60.
[555] Butler, *Precarious Life*, p. 61.

act of declaring the exception that determines also the sovereign.[556] These "petty sovereigns",[557] Butler explains being "part of the apparatus of governmentality," they have been endowed with the sovereign power to "deem" someone dangerous.[558] Butler names this form of contemporary sovereignty as a "spectral sovereignty,"[559] and asserts that it becomes the instrument of power by which law is either used tactically or suspended and populations are detained and regulated.[560] Sovereign governmentality is thus for Butler the contemporary modality of power that selectively produces certain lives as disposable, as non-worthy of living.

It could be argued that Butler's performative understanding of sovereignty echoes Foucault's call to think of forms of power from a point of view that surpasses the institution of the State

As Foucault argued, contrary to sovereignty's circular logic where its' end is the submission of subjects to law, one of the features of governmentality is the employment of tactics or even the employment of laws as tactics that enable this modality of power to be exercised[561]. To put it differently, from the point of view of the governmentalization of the state, law goes beyond its negative effect as a rule of constraint and is more an instrument of normalization.

Consequently, the "petty sovereigns" are endowed with the power to decide on the exception and thus reduce certain people to 'bare life'. The members of LYCG in our case study who illegally intercepted and pulled back the migrants in Libya, could be seen as 'petty sovereigns' in Butler's terms, who a part of the apparatus of governmentality, made possible a "ghostly and forceful resurgence of sovereignty in the midst of governmentality."[562]

Finally, it must be stated that both Agamben and Butler see sovereignty and governmentality as contemporary forms of power. Despite their nuanced difference, Agamben's theory on the state of exception and Butler's version of sovereignty's performativity provide a solid theoretical

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[556] As Loizidou notes, Agamben's proposition "implies that the sovereign pre-exists the utterance. And it may imply that Agamben himself knows who the sovereign is (e.g. the President of the United States, the Roman Emperor, etc.). For Butler on the other hand, it is precisely the utterance of the state of emergency, or extraordinary conditions, that forms this sovereign governmentality. In other words, there is no sovereign before the declaration. *The declaration brings about the sovereign power*.", Loizidou finds Butler's understanding of sovereignty more powerful compared to Agamben's in the sense that Butler's reading refuses any naturalization and any foundationalist account of power in the sense that there would be "an originary holder of such power". See Loizidou Elena, "Butler and Life: Law, Sovereignty, Power", *in* Carver, Terrell and Samuel Allen Chambers, 2008, *Judith Butler's Precarious Politics: Critical Encounters*, London: Routledge, pp. 145-156, at p. 148.

[557] Butler, *Precarious Life*, p. 56.

[558] Butler, *Precarious Life*, 59.

[559] Butler, *Precarious Life*, p. 61.

[560] Butler, *Precarious Life*, p. 97.

[561] Foucault, *Security, Territory, Population*, p. 99.

[562] Butler, *Precarious Life*, p. 59.

insight into contemporary anti-immigration politics, the changing nature of borders and the perpetual precarity of refugees.

Before closing this chapter, it must be noted that the link between sovereign power and bare life that Agamben brings to our attention constitutes one of the most important contributions of his analysis of the workings of sovereign power. When refugees are not drowned in the Mediterranean in their endeavor to reach European soil, they are kept in humiliating conditions in detention centers and hot spots, turned thus into bare lives. The thousands of people kept in the Greek islands are treated and seen as disposable bodies, bodies without a name and identity. Found in a threshold between and outside the legal order and exactly because they are found in this threshold, the death of those people does not count a murder but is seen as being a mere statistical event. As I stated above, the notion of "the threshold" which for Agamben is constituted as the exception, is a key term in his theory. For Agamben, the paradox of sovereignty lies in the fact that the sovereign is found always in a threshold between and outside the legal order in order to determine the validity of that order. At the same time, the figure of the homo sacer being also in a threshold outside and inside the legal order reflects that of the sovereign. Thus, both the sovereign and *homo sacer* stand on a threshold while at the same time the one defines the *modus operandi* of the other as a necessary condition of power relations. As Vaughan-Williams notes, "sovereign power depends upon creating and exploiting zones of indistinction in which subjects' resource to conventional legal and political protection is curtailed."[563] The practical consequence of this, is that the production of disposable bodies, of *homines sacri* in our days, although it appears as an exception, an 'anomaly', constitutes in fact the rule that governs power relations. To put it differently, what Agamben help up to see is that the refugees' disposable bodies are the norm of western societies and not the exception. Finally, I would like now to turn to the title of this subjection, "the refugee as homo sacer." As already stated, *homo sacer* is a figure from Roman law, a person who may be killed by everyone but not sacrificed, standing thus outside both human and divine law. For the refugee to be equated thus with *homo sacer*, it must be also a person that can be killed but not sacrificed. The thousands of refugees that have already died in search for asylum as well as those that die in the

[563] Vaughan-Williams, Nick. 2009. "The Generalized Bio-Political Border? Re-Conceptualizing the Limits of Sovereign Power". *Review of International Studies* 35 (4): 729-49 at p. 738.

various hot spots and detention centers entails without any ambiguity that today refugees are indeed killed with impunity. But what about the non-sacrificial character of refugees' deaths? Refugees are not sacrificed because their *corpus* is the bearer of individual liberties and human rights. To put it differently, today refugees are not sacrificed because they are human, but they are killed because they are refugees. Although states are bound and internationally responsible through human rights treaties, rights as Arendt and Agamben pointed out are attributed to the man and not to the citizen. The refugee, as the subject who by definition is a non-citizen, is found in a permanent state of exception, in a zone of indecidability or indifference where abandoned by law is at the mercy of sovereign violence. As Agamben points out: "what has been banned is delivered over to its own separateness and, at the same time, consigned to the mercy of the one who abandons it- at once excluded and included, removed and at the same time captured."[564]

~~Despite the progress in the field of international law since Arendt's time, that is despite the adoption of a series of human rights conventions, refugees are 'left to die', being in that way, the 21st century *homines sacri*.~~

[564] Agamben, *Homo Sacer*, p. 65.

Chapter IV: Unraveling our Political Obligations to Refugees or The Counterpart to the 'Right to Have Rights'

At the end of chapter 2 concerning the legal norms, I mentioned that in *Hirsi* case, the ECtHR referred to Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe (PACE) and inter alia stated that states have not only a legal but also a moral obligation to save persons in distress at sea without the slightest delay. In the present chapter I am interested in unraveling the theoretical grounds for establishing that ethical obligation for 'others', namely those considered as non-members within established political communities and in that way rethinking our ethical (or to be more precise ethico-political) obligations to refugees. In other words, what are states responsible for towards refugees, what is the counterpart to Arendt's idea of "the right to have rights" that they have? To make my argument, I draw on the work of Emmanuel Levinas and Judith Butler.

Before moving on the examination of the ethical obligation for the Other, I want to take some space and look into refugees' precarity itself, whereby by precarity I mean their differential exposure to violence, injury and death. According to Butler and Athanasiou the notion of 'precarity', describes exactly the lives of those people whose "proper place is non-being," [565] that is a situation related to "socially assigned disposability."[566] As Butler writes, "precarity designates that politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death."[567] Following Butler, I argue that refugees' precarious legal, political and human situation has to do with the fact that refugees are not recognized as subjects of rights by destination countries where they seek asylum. Thus, the suspension or the non-application of universal human rights norms in the case of refugees seeking asylum in the so-called Western states, does not constitute a mere discrepancy between formal rights and their application, but it is related to refugees' non-recognition as subjects of rights. To understand the politics of recognition I turn to the work of Butler and Athanasiou on dispossession and recognition.

[565] Butler, Judtih and Athena Athanasiou. 2013. *Dispossession: The Performative in the Political: Conversations with Athena Athanasiou*. Cambridge, UK: Polity Press, p. 19.
[566] Butler and Athanasiou, *Dispossession*, p. 19.
[567] Butler, *Frames of War*, p. 25.

Resolving the notion of 'precarity' and understanding its link with the issue of recognition will enable us to better understand the establishment of an ethical responsibility for the Other that follows.

Dispossession is a key term that runs through Judith Butler's and Athena Athanasiou's book *Dispossession: The Performative in the Political.* Acknowledging dispossession as a "troubling concept",[568] Butler and Athanasiou identify two different significations of the term. More specifically, in an ontological sense, dispossession means that subjects are not self-sufficient but instead relational and interdependent beings.[569] In its second sense now, or to be more accurate in its socio-economic and political sense, dispossession is what happens when persons lose their land and community, citizenship, rights and become thus exposed to violence. But if people can be deprived of these things, it entails that they are dependent on the powers that alternately sustain or deprive them and, in that way, hold a certain power over their survival.[570] In that way, this second sense of dispossession reflects or reveals the first one that is the ontological signification of dispossession according to which humans are interdependent and relational beings. As Butler notes: "Even when we have our rights, we are dependent on a mode of governance and a legal regime that confers and sustains those rights. And so we are already outside of ourselves before any possibility of being dispossessed of our rights, land, and modes of belonging."[571] Thus "we can only be dispossessed because we are already dispossessed. Our interdependency establishes our vulnerability to social forms of deprivation."[572] In both senses, dispossession means a subject's relation to norms,[573] it means in other words that a person has to qualify to certain norms in order to be recognized as a subject. However, as Butler and Athanasiou note, power relations condition in advance who will count or matter as a recognizable human subject and who will not. In that way, eligibility for recognition and human subjectivity become equated.[574] That means that in order for a person to count as a human being, she is dependent upon recognition. But recognition signifies a state where one is "dependent upon terms that one never chose in order to emerge as an intelligible being."[575] The act of

[568] Butler and Athanasiou, *Dispossession*, p. 1.
[569] Butler and Athanasiou, *Dispossession*, p. 3.
[570] Butler Athanasiou, *Dispossession*, p. 4.
[571] Butler and Athanasiou, *Dispossession*, p. 4.
[572] Ibid., p, 5.
[573] Ibid., p. 2.
[574] Butler and Athanasiou, *Dispossession*, p. 78.
[575] Ibid., p. 79.

apprehension, Butler explain, "can imply making, registering, acknowledging without full cognition."[576] That means that for Butler a human being may be apprehended as living without being recognized as a life that qualifies for recognition. On the other hand, in order for a human being to be recognized, it must conform to "general terms, conventions, and norms" that "prepare or shape a subject for recognition."[577] Consequently, for Butler "recognizability precedes recognition"[578] and is thus more important than recognition per se. As she points out:

> "Recognizability, "is *not* a quality or potential of individual humans. […] If we claim that recognizability is a universal potential and that it belongs to all persons, then, in a way, the problem before us is already solved. We have decided that some particular notion of 'personhood' will determine the scope and meaning of recognizability. Thus, we install a normative ideal as a preexisting condition of our analysis; we have, in effect, already 'recognized' everything we need to know about recognition. […] The point, however, will be to ask how such norms operate to produce certain subjects as 'recognizable' persons and to make others decidedly more difficult to recognize. The problem is not merely how to include more people within existing norms, but to consider how existing norms allocate recognition differentially."[579]

Thus, recognition takes place based on norms of recognizability which are shaped and produced through schemas of intelligibility,[580] whereas "*intelligibility"*, denotes the "general historical schema or schemas that establish domains of the knowable."[581] As Athanasiou explains, in our time it is neoliberal capitalist governmentality that "makes live,"[582] that is it recognizes some lives as worth of living, while renders others disposable. In other words, recognition is "an apparatus that discursively produces subjects as human (or inhuman, subhuman, less than human) by normative and disciplinary terms such as those of gender, sexuality, race, and class."[583] Dispossession is thus a way through which subjects are deinstituted, desubjectivated and ultimately dehumanized.[584] Accordingly, it could be argued that within the current framework of globalized capitalist society, refugees are turned into disposable bodies and consequently are dehumanized to the extent that they are deemed as unqualified to be integrated

[576] Butler, *Frames of War*, p. 5.
[577] Butler, *Frames of War*, p. 5.
[578] Ibid, p. 5.
[579] Butler, Frames of War, pp. 5-6.
[580] Butler, *Frames of War*, p. 7.
[581] Ibid., p. 6.
[582] Butler and Athanasiou, *Dispossession*, p. 29 and p. 31.
[583] Ibid., p. 90.
[584] Ibid., p. 28-29.

within the system of capitalist production. To put it differently refugees are turned into commodities and they are classified exactly like commodities depending on their usefulness for the improvement of the economy destination states. Dispossession in the second sense discussed above, is therefore the result of a failure in terms of recognition.

As Butler writes, "a life has to be intelligible *as a life,* has to conform to certain conceptions of what life is, in order to become recognizable."[585] Thus, the question that emerges is what happens with those lives that fail to be recognized, what are the consequences of the failure of recognition upon such lives? Butler's account of the notion of 'precarity' and its juxtaposition to the notion of 'precariousness' are key here in understanding dispossession as a condition "painfully imposed by the normative and normalizing violence that determines the terms of subjectivity, survival and livability."[586] To be more specific, while 'precariousness' is a common feature of all human beings, denoting a common human vulnerability that emerges with life itself,[587] 'precarity' designates the differential distribution of precariousness depending on power relations which has the consequence that "certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence and death."[588] In other words, while precariousness is a universal condition of human life, precarity on the other hand is a politically induced condition. As Butler points out: "the more or less existential conception of 'precariousness' is thus linked with a more specifically political notion of 'precarity'."[589] When a life fails to be recognized as properly human, it is exposed to precarity and is thus becomes vulnerable to violence and injury compared to another one not exposed to the same degree of precarity. For Butler: "this differential distribution of precarity is at once a material and a perceptual issue, since those whose lives are not 'regarded' as potentially grievable, and hence valuable, are made to bear the burden of starvation, underemployment, legal disenfranchisement, and differential exposure to violence and death."[590] Hence, a link exists between "the epistemological problem of apprehending life" and "the ethical problem of what it is to acknowledge or, indeed, to guard against injury and violence."[591] Precarity is thus

[585] Butler, *Frames of War*, 7.
[586] Butler and Athanasiou, *Dispossession*, p. 2.
[587] Butler, *Precarious Life*, p. 31.
[588] Butler, *Frames of War*, p. 25.
[589] Butler, *Frames of War*, p. 3.
[590] Butler, *Frames of War*, p. 25.
[591] Butler, *Frames of War*, p. 3.

linked with non-recognition.[592] Because of that, a vicious circle takes place here since the failure to recognize a life as properly human entails a failure to recognize the violence impinged on that life and at the same time a failure to recognize that violence leads to a non-recognition as properly human of the subject that had suffered that violence. The conceptualization of the notion of precariousness as a general condition of humans and of precarity as the differential distribution of precariousness (or dispossession in its second sense) have implications for the establishment of Butler's theory on responsibility for the Other that will be examined below. For Butler understanding our common precariousness questions the ontology of individualism and "implies, although does not directly entail, certain normative consequences."[593]

Questioning the ontology of individualism is central to establishing our ethical obligations for the others or the ethical demand that the Other places upon us. In fact, it is the only way to respond to the question of what is owed to refugees. Emmanuel Levinas dealt directly with questions like these. Disputing individualism, Levinas tried to establish our responsibility for the other beyond any contract and beyond any kind of common social or political identities. To understand however Levinas' concept of responsibility towards others it is essential to consider first how he conceived the formation of the self. For Levinas, the formation of the self takes places "outside of being"[594] As Butler writes, the sphere in which Levinas' subject is said to emerge "is 'preontological' in the sense that the phenomenal world of persons and things becomes available only after a self has been formed as an effect of a primary impingement."[595] The other is thus constitutive of the subject - and the notion of responsibility for Levinas goes so far as to constitute the definition of subjectivity itself. Our very subjectivity is according to Levinas a relationship of responsibility to and for the Other. "Responsibility," writes Levinas is "the essential, primary and fundamental structure of subjectivity."[596]

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[592] Butler and Athanasiou, *Dispossession*, pp. 78-79. In her book *Frames of War: When is Life Grievable?* that precedes *Dispossession*, Butler linked also precarity with non-recognition.
[593] Butler, *Frames of War*, p. 33.
[594] Levinas Emmanuel, 1991, *Otherwise Than Being or Beyond Essence.* Martinus Nijhoff Philosophy Texts, 3. Dordrecht: Springer Netherlands, p. 110.
[595] Butler Judith. 2005. *Giving an Account of Oneself* (version 1st ed.) 1st ed. New York: Fordham University Press, p. 85-6.
[596] Lévinas Emmanuel, and Philippe Nemo. 1985. *Ethics and Infinity*, 1st ed. Pittsburgh: Duquesne University Press, p. 95.

That means that "the Other individuates me in my responsibility for him."[597] The subject is for Levinas from the beginning "a hostage."[598] The presence of the other entails for Levinas a "putting into question of the self…a responsibility for the other […]that is not assumed as a power but responsibility to which I am exposed from the start, like a hostage;".[599] The subject does not become in other words responsible through her actions but by virtue of the self's relation to the Other that is established at the level of self's primary and irreversible susceptibility.[600] As Butler writes, for Levinas, the ethical relation "is not a virtue that I have or exercise; it is prior to any individual sense of self."[601]

My relation with the Other constitutes what Levinas paradoxically names as "a relation without relation."[602] Therefore, my relation with the Other constitutes a relation within which each subject preserves its absolute alterity and cannot be reduced to one another. Responsibility thus according to Levinas emerges "as a consequence of being subject to the unwilled address of the Other."[603] Consequently, my responsibility is not something that I can choose or not but the existence of the Other renders me responsible. As Geoffrey Bennington puts it commenting on the Lévinasian understanding of the relation with the other, "I do not exist first, and then encounter the other: rather the (always singular) other calls me into being as always already responsible for him."[604]

A key term in Levinas' ethical responsibility is the notion of the face of the Other, that Levinas uses to refer to the infinity of the Other. In other words, what does he mean by the 'face of the Other' is not Other's natural appearance, but exactly the infinite alterity of the Other. As he points out:

> "The epiphany of the absolutely other is a face, in which the other calls on me and signifies an order to me through his nudity, his denuding. His presence is a summons to answer. The

[597] Derrida Jacque, 1999. *Adieu to Emmanuel Levinas*. Meridian Crossing Aesthetics. Stanford, Calif,: Stanford University Press, p. 7.
[598] Levinas Emmanuel, 1991, *Otherwise Than Being or Beyond Essence*, Martinus Nijhoff Philosophy Texts, 3. Dorderecht: Springer Netherlands, at p. 112.
[599] Lévinas Emmanuel, and Hand Seán. 1989. *The Levinas Reader*. New York, NY: B. Blackwell, p. 243.
[600] Butler, *Giving an Account of Oneself*, p. 88.
[601] Butler, *Notes Towards a Performative Theory of Assembly*, p. 109.
[602] Lévinas Emmanuel. 2007. *Totality and Infinity: An Essay on Exteriority*. Duquesne Studies, Philosophical Series, Pittsburgh: Duquesne University Press, p. 80.
[603] Butler, *Giving an Account of Oneself*, p. 85.
[604] Geoffrey Bennington, "Deconstruction and Ethics", *in* Royle, Nicholas. 2000. *Deconstructions: A User's Guide*. Hampshire England: Palgrave, at p. 69.

> I does not only become aware of this necessity to answer, as though it were an obligation or a duty about which it would have to come to a decision; it is in its very position wholly a responsibility […] To be an I means then not to be able to escape responsibility, as though the whole edifice of creation rested on my shoulders."[605]

What is important and must be stressed here is that the Other as face, signifies an alterity beyond cultural and social contexts. Contrary to the ordinary perception, the face is not a specific individual, but on the contrary the very essence of the other human. For Levinas "the face is signification, and signification without context",[606] it is "a bareness without any cultural adornment."[607] That point is crucial and must be stressed here since for Levinas, the Other as face, signifies an alterity beyond cultural and social contexts. "The nudity of a face is a bareness without any cultural ornament, an absolution, a detachment from tis form in the midst of the production of its form."[608] My relation with the Other constitutes what Levinas paradoxically names as "a relation without relation."[609] Therefore, my relation with the Other constitutes a relation within which each subject preserves its absolute alterity and cannot be reduced to one another

Another important point that should be stressed here is that for Levinas, the responsibility for the Other is independent of any sense of reciprocity. In Philippe Nemo's question as to whether "the Other [is] also responsible in my regard?", Levinas responds as follows: "Perhaps, but that is *his* affair. One of the fundamental themes of Levinas's *Totality and Infinity* […] is that the intersubjective relation is a non-symmetrical relation. In this sense I am responsible for the Other without waiting for reciprocity, were I to die for it. Reciprocity is *his* affair."[610] To put it differently, ethical relations are for Levinas asymmetrical, beyond any reciprocity of giving and

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[605] Lévinas Emmanuel, "Meaning and Sense", *in* Lévinas Emmanuel, *Collected Philosophical Papers*. Phaenomenologica, 100. Dordrecht, The Netherlands: Nijhoff, p. 97.
[606] Lévinas Emmanuel, and Philippe Nemo. 1985. *Ethics and Infinity*. 1st ed. Pittsburgh: Duquesne University Press 86.
[607] Lévinas Emmanuel, Adriaan Theodoor Peperzak, Simon Critchley, and Robert Bernasconi. 1996. *Emmanuel Levians: Basic Philosophical Writings*. Studies in Continental Thought. Bloomington: Indiana University Press, p. 53.
[608] Lévinas Emmanuel. 1987. *Collected Philosophical Papers*. Phaenomenologica, 100. Dordrecht, The Netherlands: Nijhoff., p. 96.
[609] Lévinas Emmanuel. 2007. *Totality and Infinity: An Essay on Exteriority*. Duquesne Studies, Philosophical Series, Pittsburgh: Duquesne University Press, p. 80.
[610] Lévinas Emmanuel, and Philippe Nemo. 1985. *Ethics and Infinity*. 1st ed. Pittsburgh: Duquesne University Press at p. 98.

taking. That is why he calls the ethical demand that the Other places upon us "persecution",[611] arguing that "the recurrence of the self in responsibility for others, a persecuting obsession, goes against intentionality, such that responsibility for others could never mean altruistic will, instinct of 'natural benevolence,' or love."[612] Hence, the presence of the Other before the door of my house or the borders of my country renders me immediately responsible for her. The terms of my relation with the Other are thus characterized by an inherent asymmetry and inequality and it is exactly that asymmetry that renders me responsible. In other words, the Other being different from me cannot be understood in terms of equality:

> "The face in its nakedness as a face presents to me the destitution of the poor one and the stranger; but this poverty and exile which appeal to my powers, address me, do not deliver themselves over to these powers as givens, remain the expression of the face."[613]

It should be noted that what makes my relation with the Other symmetrical is for Levinas what he calls"the third",[614] [*le tiers*] namely the humanity, the society in which prevails justice. For Levinas the third is the one who assures that the ethical relation always takes place within a political framework. In his dialogue with Cohen Richard, Levinas points out that:
"[…] If there were only two people in the world, there would be no need for law courts because I would always be responsible for and before, the other. As soon as there are three, the ethical relationship with the other becomes political and enters into the totalizing discourse of ontology."[615] Consequently, justice constitutes paradoxically the limit of my responsibility. It is the moment when I am no longer infinitely responsible for the Other, and consequently the Other does not stand in an asymmetrical and unequal relation to me.[616] As Levinas points out:

> "Justice remains justice only, in a society where there is no distinction between those close and those far off, but in which there also remains the impossibility of passing by the closest. The equality of all is borne by my inequality, the surplus of my duties over my rights."[617]

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[611] Levinas, *Otherwise Than Being*, p. 121.
[612] Lévinas, Emmanuel. 1991. *Otherwise Than Being or Beyond Essene*. Martinus Nijhoff Philosophy Texts, 3. Dordrecth: Springer Netherlands, at p. 111-112.
[613] Levinas, *Totality and Infinity*, p. 213.
[614] Levinas, *Otherwise Than Being*, 150.
[615] Emmanuel Levinas and Richard Kearney, "Dialogue with Emmanuel Levinas", *in* Cohen, Richard A. 1986. *Face to Face with Levinas*. Suny Series in Philosophy. Albany, N.Y.: State University of New York Press, pp. 21-22.
[616] Gerasimos Kakoliris, 2017. *The Ethics of Hospitality. Jacques Derrida on Unconditional and Conditional Hospitality* – in Greek, Plethron, at p. 195.
[617] Levinas, *Otherwise Than Being*, p. 159.

Butler draws on Levinas to establish a notion of an ethical responsibility for the Other, but in her engagement with his theory, the bodily dimensions of human existence come to the fore. In accordance with Levinas, Butler finds also essential "the refutation of the primacy of self-preservation for ethical thinking."[618] As for Levinas, for Butler as well, there is a relation between the self and the Other that precedes individuation,[619] where the self is from the start bound to the Other. The self emerges thus as divided or ungrounded from the beginning.[620] "The life of the other" she writes, "the life that is not our own, is also our life, since whatever sense 'our' life has is derived precisely from this sociality."[621] Consequently, "the 'I' is always to some extent dispossessed by the social conditions of its emergence."[622] Drawing on Laplanchian psychoanalysis, Butler argues that our self is from the beginning "decentered", that is it lacks a specific center, and this decentering is the result of the way in which others, "from the outset, transmit certain messages to us, instilling their thoughts on our own, producing an indistinguishability between the other and myself at the heart of who I am."[623] Butler turns to grief[624] to show human interdependency and an understanding of the self as non-sovereign, since it is exactly in moments of mourning that a person becomes "inscrutable" to herself, and wonders "who 'am' I, without you?"[625] It is therefore in the moments of mourning that one realizes that "one is beside oneself, not at one with oneself,"[626] namely that the Other determines who I am. Therefore, conceiving the 'I' as being implicated in the 'we', Butler understands ethics as being always a question of an ethical relation, namely "the question of what binds me to another" instead of a question of personal morality.[627] The subject is thus for Butler defined by 'otherness', by relationality. As Butler explains:

> "For if I am confounded by you, then you are already of me, and I am nowhere without you. I cannot muster the 'we' except by finding the way in which I am tied to 'you', by trying to translate but finding that my own language must break up and yield if I am to know you. You are what I gain through this disorientation and loss. This is how the human comes into being, again and again, as that which we have yet to know."[628]

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[618] Butler, *Notes Towards a Performative Theory of Assembly*, p. 108.
[619] Butler, *Notes*, pp. 109-110.
[620] Butler, *Giving an Account of Oneself*, p. 19.
[621] Butler, *Notes Towards a Performative Theory of Assembly*, p. 108.
[622] Butler, *Giving and Account of Oneself*, p. 8.
[623] Butler, *Giving and Account of Oneself*, p. 75.
[624] She refers specifically to it in chapter 3 of *Precarious Life*, entitled "Violence, Mourning, Politics".
[625] Butler, *Precarious Life*, p. 22.
[626] Butler, *Precarious Life*, p. 28.
[627] Butler and Athanasiou, *Dispossession*, p. 107. See also Butler, *Parting Ways*, p. 9.
[628] Butler, *Precarious Life*, p. 49.

At the same time, the bodily dimensions of human existence render humans as non-sovereign beings. More specifically, Butler stresses that because we are bodily beings, namely because we live an embodied life, "we are, from the start […] already given over, beyond ourselves, implicated in lives that are not our own."[629] In other words, it is by virtue of our bodily requirements that we are from the beginning even prior to individuation itself, "given over to some set of primary others."[630] Consequently, Butler bases her theory of responsibility for the Other, on humans' shared condition of precariousness, that is to a common human vulnerability that is inherent to life itself.[631] Vulnerability and precarity[632] result thus from humans' ontological situation of precariousness which establishes ~~us~~ human beings as interdependent beings. Butler insists that we cannot recover the source of this vulnerability since "it precedes the formation of 'I'."[633] This form of vulnerability is "a condition of being laid bare from the start and with which we cannot argue. "[634] As she points out, "the condition of primary vulnerability, of being given over to the touch of the other, even if there is no other there, and no support for our lives, signifies a primary helplessness and need, one to which any society must attend."[635] Ethics is therefore for Butler the effect of our dispossession, of the fact that human beings are not autonomous and self-sufficient but interdependent. Understanding our common precariousness is fundamental since according to Butler, "the precarity of life imposes an obligation upon us." [636] Nevertheless, Butler further argues that "it does not suffice to say that since life is precarious, therefore it must be preserved."[637] Instead, understanding our common precariousness "implies, although does not directly entail, certain normative consequences."[638] More specifically, understanding precariousness as "a condition of being laid bare from the start" and thus a condition "with which we cannot argue",[639] has as a consequence that it "introduces strong

[629] Butler, *Precarious Life*, p. 28.
[630] Butler, *Precarious Life*, p. 31. See also Butler and Athanasiou, *Dispossession*, p. 107.
[631] See Butler and Athanasiou, *Dispossession*, p. 20.
[632] Understood as an assigned disposability as a result of power relations that targets specific groups of the population. See Butler and Athanasiou, *Dispossession*, p. 2.
[633] Butler, *Precarious Life*, p. 31.
[634] Butler, *Precarious Life*, p. 31.
[635] Butler, Precarious Life, pp. 31-32.
[636] Butler, *Frames of War*, p. 2.
[637] Butler, *Frames of War*, p. 33.
[638] Butler, *Frames of War*, p. 33.
[639] Butler, *Precarious Life*, p. 31.

normative commitments of equality and invites a more robust universalizing of rights that seeks to address basic human needs for food, shelter, and other conditions for persisting and flourishing."[640] Our obligations are according to Butler, "not to 'life itself", but "to the conditions that make life possible."[641] Consequently, an understanding of precariousness questions the ontology of individualism and therefore the neoliberal conception of the ethics of responsibility. As Butler aptly points out "neoliberal rationality demands self-sufficiency as a moral ideal at the same time that neoliberal forms of power work to destroy that very possibility at an economic level, establishing every member of the population as potentially or actually precarious."[642]

Butler's conception of our ethical obligation for the Other is supported by an ethics of cohabitation that she constructs drawing on Arendt. Butler acknowledges that "both Levinas and Arendt take issue with the classically liberal conception of individualism, that is, the idea that individuals knowingly enter into certain contracts, and their obligation follows from having deliberately and volitionally entered into agreements with one another."[643] Turning to Arendt's claim that Eichmann's crime was that he supported a policy of not wanting to share the earth with certain people (Jews, Roma, homosexuals etc.), a policy that that reveals that Eichmann and his superiors acted as if they had the "right to determine who should and who should not inhabit the world."[644] From that point Butler, following Arendt argues that "unwilled cohabitation is a condition of our political lives."[645] Thus, although we can choose how, where and with whom to live, we nevertheless can not choose with whom to cohabit the Earth unless we commit genocide.[646] Therefore for Butler, "we are all, […] the unchosen, but we are nevertheless unchosen together."[647] Consequently, since cohabitation is not a choice but a condition of our political life it entails that:

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[640] Butler, *Frames of War*, p. 28-29.
[641] Butler, *Frames of War*, p. 23.
[642] Butler, *Notes Towards a Performative Theory of Assembly*, p. 14.
[643] Ibid., p. 111.
[644] Arendt, Hannah, 2006. *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Classics. New York, N.Y. : Penguin Books, p. 279.
[645] Butler, Judith. 2012. *Parting Ways: Jewishness and the Critique of Zionism.* New Directions in Critical Theory. New York: Columbia University Press, at p. 43-44 and 23.
[646] Butler, *Notes Towards a Performative Theory of Assembly*, p. 111. See also Butler and Athanasiou, *Dispossession*, p. 123.
[647] Butler, Notes *Towards a Performative Theory of Assembly*, p. 116.

> "We are bound to one another prior to contract and prior to any volitional act. The liberal framework according to which each of us enters into a contract knowingly and voluntarily does not take into account that we are already living on the earth with those we never chose."[648]

From the unchosen character of Earth's cohabitation, Butler makes thus a call for an ethico-political obligation to "preserve the lives of others whether or not we have contractually agreed to preserve their lives."[649] But since the life that has to be preserved has bodily form, it entails that "the life of the body-its hunger, its need for shelter and protection from violence-would become major issues of politics."[650] Therefore according to Butler "we cannot understand cohabitation without understanding that a generalized precarity obligates us to oppose genocide and to sustain life on egalitarian terms."[651] It is worth noting here the bringing together of Arendt and Levinas that Butler makes, that is of a theorist engaged with politics and ethics respectively. While Levinas understood precarity in the sense of the bareness of the face, he did not relate it with a body politics. On the other hand, while Arendt talked about the body who appears in the public realm, she at the same time put the material needs of that body in the sphere of the private life. Bringing them together, Butler establishes an ethico-political relation for the preservation of the lives of others. Moreover, based on an understanding of our common vulnerability and thus humans' interdependence, Butler makes a call for "a new body politics",[652] or what in other points formulates as "a new bodily ontology",[653] that will begin with an understanding of humans' dependency and interdependency. As she points out "a different social ontology would have to start from this shared condition of precarity in order to refute those normative operations,

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[648] Butler, *Parting Ways*, p. 23.
[649] Butler and Athanasiou, *Dispossession*, pp. 122-23; Butler, *Notes Towards a Performative Theory of Assembly*, pp. 112-13. Butler acknowledges that Arendt would definitely dismiss her ethical view of cohabitation as the basis for particular forms of politics. Butler's certainty derives from the fact that for Arendt ethics and politics are two domains that should remain separate from one another. As Arendt writes "*mores* and morality […] are so important for the life of society and so irrelevant for the body politic", Arendt, On Revolution, p. 107.
[650] Butler, *Parting Ways*, p. 174.
[651] Butler, *Notes Towards a Performative Theory of Assembly*, p. 119.
[652] Butler, *Notes Towards a Performative Theory of Assembly*, p. 206.
[653] Butler, *Frames of War*, p. 2. Butler clarifies that when she uses the term 'ontology' in this phrase she means a social ontology. As she points out: "To refer to 'ontology' in this regard is not to lay claim to a description of fundamental structures of being that are distinct from any and all social and political organization. […] The 'being' of the body to which this ontology refers is one that is always given over to others, to norms, to social and political organizations that have developed historically in order to maximize precariousness for some and minimize precariousness for others.", Butler, *Frames of War*, pp. 2-3.

pervasively racist, that decide in advance who counts as human and who does not."[654] What is decisive however is not to include those excluded within existing norms,[655] but rather "to challenge the normative terms by which the human is established through producing disavowed losses and avowed excesses."[656]

Finally, both Levinas and Butler, conceiving the Other as constitutive of the subject, argue that our ethical obligations for the others are, -to use Butler's words- "*precontractual*"[657] and "nonconsensual".[658] Nevertheless, there is an important difference between them. More specifically, while Butler draws an ethical responsibility from the ontological situation of human interdependency, its vulnerability and precarity,[659] for Levinas ethics is unfounded and anarchical. In other words, for Levinas we do not become responsible to one each other because of the inherent vulnerability and interdependence of human life, that is our responsibility does not arise from a common ontological feature that we share with other human beings, but it is constituted instead beyond ontology. However, for both Levinas and Butler my responsibility towards the Other is always passive in the sense that I cannot choose or not that responsibility. To the extent that the 'I' is always dependent from the "we', it entails that welcoming the Other does not constitute a kind of morality but a recognition of my primary responsibility, namely of the fact that my own life is dependent upon the life of the Other. The vulnerability of the refugee is therefore a matter that concerns not only herself, but all of us.

[654] Butler, *Parting Ways*, p. 174.
[655] Butler, *Frames of War*, p. 6.
[656] Butler and Athanasiou, *Dispossession*, p. 33. See also, Butler, *Precarious Life*, p. 35.
[657] Butler, *Notes Towards a Performative Theory of Assembly*, p. 107.
[658] Butler, Notes, p. 103.
[659] As Butler writes "My point is not to rehabilitate humanism but, rather, to struggle for a conception of ethical obligation that is grounded in precarity". Butler, *Notes Towards a Performative Theory of Assembly*, p. 119. See also Butler, *Parting Ways*, p. 174.

Conclusion

> "Then fair-haired Menelaus greeted the two and said: "Take of the food, and be glad, and then when you have supped, we will ask you who among men you are; for in you two the breed of your sires is not lost, but ye are of the breed of men that are sceptred kings, fostered of Zeus; for base churls could not beget such sons as you"." (Hom. Od. 4.20)

As the last pages of this study were written, the Italian parliament approved on August 8, a law that imposes stricter penalties on NGO migrant rescue boats in the Mediterranean criminalizing in that way the rescue of people in distress at sea. To the escalating number of deaths in the Mediterranean, states respond by adopting measures incompatible with refugee and human rights law that could be judged as criminal. At the same time, a humanitarian rhetoric has been developed by states to justify their political acts. The proliferation of borders, detention centers and hot spots that we witness today, the encampment of people in inhuman conditions in refugee camps, the closure of ports, the criminalization of rescue operations, the normalization of deportation to unsafe third countries are not cases where human rights norms failed to be implemented. These cases are not the exceptional but revealing of the perplexities of the contemporary human rights regime, structured upon the principle of territorial sovereignty and nationality. The refugee, not fitting within the old trinity of 'state-nation-territory', comes as a disruption to the fictional unity between the 'Man' and the 'Citizen' established by the institution of the nation state. The so-called 'refugee crisis' is thus in fact a crisis of human rights.

As stated in the last chapter, the unchosen character of earth's cohabitation entails that we can not choose with whom we cohabite the earth, while at the same time imposes us an obligation to protect that plurality. Balibar's call for a restructuring of international law towards a recognition of a right of hospitality is in fact a recognition of our common obligation to preserve the lives of others with whom we cohabit the Earth. Obviously, the recognition of this right is more urgent than ever.

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