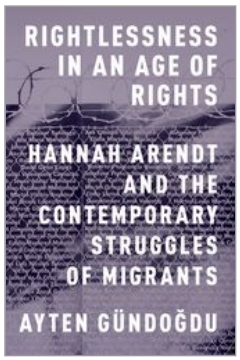

Rightlessness in an Age of Rights
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Borders of Personhood

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Abstract and Keywords

This chapter examines the contemporary manifestations of rightlessness by discussing the precarious legal personhood of asylum seekers and undocumented immigrants. The human rights framework represents a shift from citizenship to personhood as the basis of entitlement to rights. To assess the significance and limits of this shift, the chapter turns to Arendt's unique understanding of personhood as *persona*, which denotes an artificial mask that enables public appearance and allows one's voice to sound through. Although personhood can no longer be officially taken away, it can be significantly undermined as a result of border control practices justified on the basis of territorial sovereignty. To make this point, the chapter analyzes two cases from the European Court of Human Rights: *N. v. UK* (2008) and *Saadi v. UK* (2008). These cases highlight that "the human person" at the heart of human rights law is subjected to various forms of stratification in the context of deportation and immigration detention. However, this argument does not lead to the conclusion that personhood is a legal mechanism that necessarily engenders violent exclusion—a point made by

several critical legal scholars. From an Arendtian perspective, human beings can become equals only through artificial conventions such as personhood.

Keywords: personhood, rightlessness, detention, deportation, territorial sovereignty, asylum seekers, undocumented immigrants, N. v. UK, Saadi v. UK

> They live in camps surrounded by razor barbed wire. They tie plastic garbage bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under military escort. The Haitian detainees have been subjected to predawn military sweeps as they sleep by as many as 400 soldiers dressed in full riot gear. They are confined like prisoners and are subject to detention in the brig without a hearing for camp rule infractions.[1]

THESE were the words used by the US District Court Judge Sterling Johnson Jr. to describe the living conditions of migrants in Guantánamo Bay in his 1993 ruling declaring their detention in camps unconstitutional—a ruling vacated by the Supreme Court's later review of the case. Long before Guantánamo made the headlines with the US government's indefinite detention of "enemy combatants," it was used as a "safe haven" or "shelter" for migrants from Haiti and Cuba. The US Coast Guard would capture these migrants on the high seas before they could reach the United States and send them to the US Naval Base in Guantánamo Bay to determine whether they had a credible fear of persecution and qualified for asylum.[2] Those who had a credible fear and tested negative for HIV would be sent as refugees to the United States. Those who qualified for refugee status but were HIV-positive were kept on the island as a threat to public health, isolated from others in a detention center called "Camp Bulkeley."[3] And those who could not establish a credible claim were forcefully returned to their countries of origin. Camp X-Ray, which became one of the most infamous symbols of the War on Terror following the publication of photos of detainees in orange jumpsuits, was first established in 1994 for Cuban refugees who "posed serious and documented threats"; these refugees were "held indefinitely in open air cages in order to 'avoid a breakdown or disruption of law, order and discipline in the camps.'"[4]

(p.91) The story of the migrants held in Guantánamo Bay highlights how the legal standing of certain subjects can be unmade to the effect of putting them "outside the pale of the law," to use Arendt's terms:[5] Whereas the asylum seekers processed in the United States did have a right to independent review of their primary refugee determination, the asylum seekers held in Guantánamo Bay enjoyed no such right. In addition, the asylum seekers processed in the United States had a right to a lawyer present during their interviews; it was much more difficult for asylum seekers in Guantánamo Bay to enjoy this right to legal representation, as their lawyers were at times denied entry to the naval base.[6] When a group of human rights lawyers and law students brought a case challenging the legality of the US policy of interdicting migrants on the high seas and detaining them in Guantánamo without access to legal counsel, the US government responded in ways that foreshadowed the arguments it presented later in defense of the indefinite detention of "enemy combatants." The Justice Department argued that, since the naval base was not within the territorial jurisdiction of the United States, the due process clause did not apply to the plaintiffs.[7]

The Guantánamo example is by no means exceptional. In fact, Judge Johnson's description of the conditions of detention at this US naval base provides an accurate representation of many sites where asylum seekers and undocumented immigrants can be confined with very limited, if any, access to law.[8] We can think of, for example, the detention centers on thousands of Pacific islands excised from Australian sovereignty for the purposes of "offshore processing" of asylum claims,[9] "waiting zones" and administrative retention centers established in France to evade the rights and protections under the rule of law,[10] or various detention centers located in North Africa to hold the migrants intercepted in international waters by European countries such as Spain and Italy.[11]

Multiplication of these sites within the context of contemporary immigration controls reveals the challenging problems that various categories of migrants encounter as they claim and exercise human rights. In this chapter and the next one, I analyze these problems by turning to one of the key arguments in Hannah Arendt's reflections on statelessness in the first half of the twentieth century: The stateless found themselves in a "fundamental situation of rightlessness,"

Arendt claims, as they lost not only their citizenship rights but also their human rights.[12] In the absence of a political community that could recognize and guarantee their rights, the stateless were deprived of legal personhood as well as a right to action, opinion, and speech.

(p.92) In an age characterized by unprecedented developments in the field of human rights, the term "rightlessness" is likely to strike us as an anachronism. As discussed in the Introduction to this book, one of the most crucial transformations since the time Arendt wrote her analysis of statelessness has been the shift from citizenship to legal personhood as the basis of an entitlement to rights. This shift is manifest, for example, in the Preamble of the International Covenant on Civil and Political Rights (ICCPR), which announces that human rights "derive from the inherent dignity of the human person." Many scholars have interpreted this development as a dissociation of legal personhood from the status of citizenship and argued that it has allowed migrants to stand before the law and demand education, health care, family unification, and even political participation as fundamental human rights.[13]

This chapter aims to offer a critical assessment of this historic development by rethinking Arendt's arguments about the rightlessness of the stateless. It suggests that the gap between "man" and "citizen," which was characteristic of the eighteenth-century idea of rights, has not been overcome by moving to the more universalistic concept of "human person." International human rights law reinscribes that gap in many respects and often leaves migrants without effective guarantees against the violent practices of border control. Although this critique insists on the need to examine how the existing inscriptions of personhood in human rights law can give rise to new divisions and stratifications within humanity, it diverges from some of the entirely negative assessments of personhood or legal standing as a mechanism that necessarily engenders violent exclusion.[14] From an Arendtian perspective, personhood, or the artificial mask provided by law, is important, as it allows public appearance without the pervasive fear of arbitrary violence and enables rights claims to be articulated. Without this mask, one is relegated to a certain form of civil and social death.

But given that legal personhood is an artifact and not an inherent essence, it is also necessary to attend to how it can be effectively unmade or undermined in certain conditions. And because legal personhood is seen as "more fundamental, natural, essential, less of a construct, less subject to manipulation," and hence taken to be much more secure than citizenship as the basis of rights, there is the danger of overlooking how it can be "subject to various forms of qualification and evasion."[15] Such possibilities of qualifying and evading personhood are nowhere more visible than in the cases of asylum and immigration, due to the centrality of the **(p.93)** principle of territorial sovereignty to the ordering of the international system. Given these possibilities, "rightlessness" must be reconsidered as a critical concept that can alert us to various practices that undermine the legal personhood of migrants.

Once we attend to the nuances in Arendt's account of statelessness and rethink her arguments by taking into consideration the more recent changes in the field of human rights, we come to understand "rightlessness" not as the absolute loss of rights but instead as a fundamental condition denoting the *precarious* legal, political, and human standing of migrants. The term "precarious," with its Latin etymology, denotes "lives that are not guaranteed but bestowed in answer to prayer," as Didier Fassin notes, and I use it to highlight the vulnerability of lives that are dependent on the favors, privileges, or discretions of compassionate others.[16] I focus on the legal dimensions of this predicament in this chapter and address issues related to political and human standing in the next, though these different aspects, as the discussion will reveal, are closely interrelated.

Human rights law can be seen as an attempt to address the problem of precarious legal standing, as it endows every individual with personhood and attaches to this status a set of universal, inalienable rights. These rights are not privileges granted to a "passive beneficiary" at the discretion of others; they are instead "entitlements" that authorize the rights-holder to press claims in cases where these rights are denied, and these claims should normally prevail over political and moral considerations such as utility, social welfare, national security, or public order.[17] But as I highlight in this chapter, human rights law leaves various categories of migrants with quite insecure legal standing because it affirms the principle

of territorial sovereignty. Border controls, justified as legitimate acts of sovereign statehood, end up creating divisions within humanity itself, thereby rendering the rights of migrants (asylum seekers and undocumented immigrants in particular) vulnerable to discretionary decisions and uncertain sentiments such as compassion.

Following a reconsideration of Arendt's arguments about the rightlessness of the stateless, this chapter turns to her phenomenological reflections on personhood to grasp why she attributes such a crucial importance to equal standing before the law. This section aims to contribute to the growing literature on Arendt's understanding of law by rethinking her conception of personhood and situating it in relation to some of the arguments in the critical legal scholarship on this topic. I then offer a close analysis of the limits and exclusions of the existing inscriptions of **(p.94)** personhood in human rights law by examining two recent cases concerning immigration detention and deportation at the European Court of Human Rights (ECtHR or "the Court"). These cases underscore how rightlessness, understood as a precarious legal standing, persists despite the significant legal and normative changes in our conceptions of human rights. My choice of the ECtHR is intentional. Enforcement is often taken to be the greatest weakness of the existing human rights system, but as a supranational court with the capacity to issue judgments that are binding for the members of the Council of Europe, the ECtHR is often taken to be one of the most promising institutions for detaching personhood from citizenship status.[18] By examining the problems with regard to the personhood of migrants within the European context, I hope to make a stronger case for the argument that the perplexities of the Rights of Man, examined by Arendt, have not been fully resolved by moving to a universal discourse of human rights.

Statelessness and the Condition of Rightlessness

Arendt's account of statelessness repetitively invokes the term "rightless" to describe how the loss of citizenship was accompanied by the loss of human rights, but what she means by this term is far from obvious.[19] In Arendt's rendering, the term aims to capture not specific violations of rights but rather a condition that can render void even the rights that one formally has. The stateless might be granted certain rights such as the rights to life, freedom of opinion or movement, she argues, but they are in a fundamental condition of rightlessness to the extent that they are dependent on the charity or goodwill of others who grant these rights.[20] On the other hand, not every denial of rights amounts to rightlessness: Citizens can be deprived of certain rights, including the right to life (e.g., soldiers during a war), but they are not rightless as long as they have legal and political standing.[21] Arendt explains this seemingly paradoxical situation by defining rightlessness as a condition arising from the "loss of polity," which entails not only "the loss of government protection" and legal personhood but also the loss of home, or "a distinct place in the world" where one is judged by one's actions and opinions.[22]

Arendt's understanding of rightlessness as a *condition* challenges conventional understandings of the plight of migrants in terms of the loss of specific rights. When we attempt to address the problem in these **(p.95)** terms, we identify a specific violation for which we can hold an identifiable entity accountable, and the right that is violated can be restored even if the person who is denied this right continues to remain in the condition that systematically gives rise to such violations in the first place. Those advocating the rights of migrants often adopt this approach because it would be practically impossible to redress violations of rights if the plight of migrants were to be understood as a fundamental condition arising from their de jure or de facto statelessness. As scholars working on human rights advocacy underscore, in order to be effective, human rights campaigns are compelled to present problems in "intentionalist frames" that assign causes to "the deliberate (intentional) actions of identifiable individuals."[23] Such framing is much more feasible if there is an identifiable rights violation and more difficult when it comes to structural problems such as poverty or patriarchy, which cannot be easily recounted in "a short and clear causal

chain (or story) assigning responsibility."[24] This difficulty does not necessarily force activists to give up campaigning on these structural problems; in fact, they often try to reframe them in a more intentionalist, causal way, focusing on specific rights violations. For example, instead of tackling patriarchy as a structural problem, activists for women's rights focus on violence against women and highlight bodily harm in order to be able to assign responsibility for identifiable violations. In the case of migrants, this conventional frame centers on problems such as the violation of a right to be free from indefinite and arbitrary detention, and as I discuss below, to make that argument, it can end up reasserting the legitimacy of the structure (i.e., territorial sovereignty) that systematically produces the problems faced by migrants. Arendt's notion of "rightlessness," highlighting a fundamental condition that can undermine the very possibility of claiming and exercising even the rights that one formally has, draws attention to what gets lost in this conventional frame and renders statelessness more comparable to structural problems such as poverty, racial inequality, and patriarchy.

Arendt's account of statelessness draws attention to the multiple, interrelated dimensions of rightlessness. Legally speaking, the term denotes the loss of legal personhood that guarantees equal standing before the law. Politically, it captures the loss of an organized community where one's actions, opinions, and speech are taken into account. In addition, the term also indicates the precarious human standing of the stateless, highlighting their expulsion from the human world established and **(p.96)** maintained through the activities of labor, work, and action.[25] Protracted confinement in refugee camps, examined at length in the next chapter, is a concrete manifestation of this expulsion.

Arendt's analysis of the legal dimension of rightlessness draws attention to the tight connection that the nation-state established between citizenship and legal personhood; within this institutional framework, those who were rendered stateless found themselves without any formal recognition of their rights and legal standing: "Their plight is not that they are not equal before the law, but that no law exists for them."[26] Incapable of being incorporated into the legal community of the receiving nation-states and deprived of

rights in international law, the stateless were subjected to “a form of lawlessness, organized by the police.”[27]

To explain what the loss of personhood entails, Arendt draws a very striking comparison between the stateless person and the criminal: Whereas the criminal has a legal standing in a political community, the stateless person is deprived of any recognition in the legal domain. The crime committed by the criminal will be punished according to “the normal juridical procedure in which a definite crime entails a predictable penalty.”[28] Loss of personhood, Arendt argues, subjects the stateless to an arbitrary rule that imposes utterly unpredictable penalties in the absence of any definite crime; under these conditions, what the stateless endure has no relation to “what they do, did, or may do.”[29] The punishment of the criminal results from “a deliberate act,” whereas the actions of the stateless have no impact on what they will endure.[30] Without a right to residence or a right to work, the stateless constantly face the threat of internment or deportation for their mere presence or for attempting to make a living for themselves, and they have no right to appeal and challenge their internment or deportation.[31] In the absence of these rights, they become completely dependent on compassion to merely meet their basic needs such as habitation or food, whereas the criminal has “jail and food . . . not out of charity but out of right.”[32] In a quite interesting move, Arendt argues that committing a crime becomes the only way for the stateless person to acquire a legal standing:

> Only as an offender against the law can he gain protection from it. As long as his trial and his sentence last, he will be safe from that arbitrary police rule against which there are no lawyers and no appeals. . . . He is no longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried. He has become a respectable person.[33]

(p.97) By drawing a stark contrast between the criminal and the stateless person—a contrast that at times risks overlooking the formidable challenges that the accused can encounter in claiming and exercising their rights[34]—Arendt aims to capture the distinctive predicaments characterizing statelessness. Both the criminal and the stateless are cast as exceptions to the norm in the juridical structure; but as different from the

stateless, who is an “anomaly for whom there is no appropriate niche in the framework of the general law,” the criminal is a recognized exception, or an exception “provided for by law.”[35] In some ways, Arendt’s comparison follows Hegel’s argument that punishment contains within itself a recognition of the criminal as a person capable of acting freely and entitled to rights, with the proviso that the punishment is proportionate to the crime: “[B]y being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act.”[36] In the case of the stateless, there is no such recognition; their confinement in an internment camp, for example, is not a punishment that is derived from and proportionate to their own acts. In addition, because they lack personhood, they cannot appear before the court, have legal representation, and demand to be heard; their actions and speech are rendered irrelevant. Instead, we have a situation comparable to civil and social death to the extent that the actions of the stateless are not taken into account by either the legal system or the political community and that their fate is entirely dependent on the workings of an arbitrary form of power.[37]

The plight of the stateless in Arendt’s account is not unlike that of the inhabitants in “Nowheresville,” the fictitious world that Joel Feinberg depicts to explain what it means to lack recognition as a rights-bearing person. Nowheresville is characterized by a larger degree of benevolent, compassionate acts as well as conscientious duties compared to the actual world. It is also a place where inhabitants can be rewarded with gratuity if their actions are perceived as pleasing. There is even a legal order in which individuals fulfill certain obligations as duties owed to a sovereign power. Although this imaginary world might have more room for acts of goodwill, as Feinberg notes, it lacks the idea that each person has a “recognizable capacity to assert claims.”[38] In other words, the inhabitants of Nowheresville, as different from the criminal in Arendt’s account, live in a condition of rightlessness because they are denied this capacity. Feinberg’s fictitious world illuminates Arendt’s argument, as it highlights that even if the stateless were to be surrounded by well-intentioned, compassionate **(p.98)** individuals to offer them hospitality, conscientiously take care of their needs to fulfill duties of charity, and generously reward them with all sorts of gifts and

favors, they would continue to remain in this condition as subjects who are not in a position to “look others in the eye” and demand to be treated equally as persons entitled to rights.[39]

Arendt’s comparison between the stateless person and the criminal is worthy of attention not only because it sheds light on the distinctive aspects of the plight of the stateless but also because it reveals the crucial importance she attributes to the formal recognition of rights such as equality before the law, the right to trial, and the right to appeal. Even when the law fails to provide sufficient guarantees for rights and leaves one dependent on compassion, she argues in an article written for *Aufbau* in June 1944, one should not forgo the idea of equalization in and through the law in favor of an inherent human equality resting on the immediacy of compassion: “For as much as the eternal insufficiency of law relegates man to the compassion of his fellow man, all the less can one demand of him that he replace the law with compassion.”[40] To understand why Arendt does not turn away from law in the face of its insufficiency and insists on personhood, it is necessary to rethink her arguments about statelessness by engaging with her phenomenological reflections on *persona* in her several works.

Persona, or the Artificial Mask of Law

Toward the end of her discussion of statelessness in *The Origins of Totalitarianism*, Arendt invokes the notion of “legal personality” in a quite peculiar way:

> 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.[41]

The statement is striking not simply because it highlights rightlessness as a multifaceted condition denoting a precarious legal, political, and human standing but also because it proposes a puzzling explanation of **(p.99)** what a legal person is. Taking us beyond the juridical meaning of the term as a right-and-duty-bearing subject, Arendt suggests that legal personhood endows one’s actions with a meaning that

they would otherwise lack and gives some kind of unity to different aspects of one's life story. It is not immediately clear why recognition as a person before the law has such existential consequences, and it is also difficult to understand why the lack of such recognition leaves one with "unqualified, mere existence." To make sense of these perplexing claims, we need to reconsider Arendt's reflections on the legal predicament of the stateless in *The Origins of Totalitarianism* in light of her phenomenological reflections on personhood in different contexts.

Personhood, as Arendt reminds us in *On Revolution* and several other works, derives from the Latin term *persona*, which denotes "the mask ancient actors used to wear in a play."[42] *Oxford English Dictionary* links this etymological origin with several interconnected meanings, including a character in a dramatic role, a part played by a person in life, a character or individual personality, a juridical person, and a human being in general. Arendt captures these multiple meanings by describing *persona* as a mask "designed and determined by the play," one that changes according to the role that the actor will assume in that particular play.[43] She also notes that it was the Romans who first used *persona* in a metaphorical sense to draw a distinction between private individuals and citizens. They took personhood as a legal artifact, and not as an inherent quality of human beings in their natural condition: "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.'"[44]

In some respects, Arendt's discussion of the etymology and history of "person" is quite similar to the one provided by many legal scholars, who point to the Latin origins of the term to highlight the parallels between theatrical masks and the legal fiction of personhood, actors in a play and persons before the law, and theater stage and courtroom.[45] But Arendt's analysis brings out certain elements that are left out of many legal discussions, especially when she suggests that this mask is characterized by "a broad opening at the place of the mouth through which the individual, undisguised voice of the actor could sound."[46] Arendt highlights this particular characteristic by breaking down *persona* into *per-sonare*, which means to "sound through." This dissection of personhood, though etymologically suspect, is crucial for understanding the two

functions Arendt attributes to the artificial mask of *persona*: "it had to hide, or rather to **(p.100)** replace the actor's own face and countenance, but in a way that would make it possible for the voice to sound through."[47]

Arendt's discussion of personhood is key to understanding her arguments about statelessness and human rights in at least three respects. First, Arendt's account of personhood, focusing on the theatrical origins and the Roman appropriation of the term, draws attention to how rights (and subjects of rights) are created by law. In this regard, her account differs from a metaphysical approach that looks for a real or essential person antecedent to legal relations. Searching for "an inhering essence," metaphysics of the person, as John Dewey noted in 1926, works with the assumption that "there *must* be a subject to which these legal relations belong or in which they inhere or to which, at all events, they are imputed."[48] Such a metaphysical approach grounds rights in the inherent properties of this essential person (e.g., reason, sanctity, dignity, autonomy).[49] Especially with the rise of a human rights discourse, the idea that rights are attached to human beings by virtue of their nature has become widely accepted. This idea can be traced back to the religious notion of sanctity, which emphasizes the sacredness and inviolability of human life, though it has now found more secular formulations in the notion of human dignity.[50] What we see here is a metaphysical understanding of personhood, suggesting that there is some intrinsic quality that makes human beings essentially fit to be entitled to a set of inherent and inalienable rights. This metaphysics, as Ngaire Naffine underscores, "[maps] legal rights onto an antecedent human subject."[51]

Arendt's highly selective interpretation of the origins of personhood, tracing its lineage back to theatrical masks and the Roman law, conspicuously leaves out how this metaphysics originates in the theological debates on the question of Trinity. In fact, to a great extent, it was these debates that gave rise to the notion of "person" as "an individual, intransmissible (incommunicable), rational essence which is self-existent,"[52] and it is this meaning that seems to be at work even in the more secular formulations of the metaphysical idea of person. Although Arendt does not mention the religious lineage of personhood, she targets the metaphysical idea that it gives rise to, as she argues that it is the artificial mask that makes a human being a person entitled to rights. In the absence of this

mask, one appears to others as a “natural man” stripped of all political and legal rights and duties: “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, as for instance a slave—but certainly a politically irrelevant being.”[53] **(p.101)** Deprived of the artificial mask provided by legal personhood, the stateless fall “outside the pale of the law” and appear to others in their naked humanness or as “unqualified, mere existence.”[54]

Arendt’s theatrical understanding of personhood as an artificial mask created by law and her distrust of the quest for a real essence hiding behind the mask are very much in accord with her phenomenological approach to politics, which calls into question the metaphysical tradition that privileges “being” and is suspect of “appearances.” This peculiar understanding of personhood also has much to share with “the Renaissance and eighteenth-century tradition of *theatrum mundi*,” as highlighted by Dana Villa, to the extent that it represents the world as a stage on which actors appear with their public masks.[55] Arendt’s theatrical conception of personhood revitalizes this tradition, which comes under attack with the rise of Romanticism and its expressivist model of the self. This Romanticist notion of the self, best represented by Rousseau, looks for a true inner self from which our words and deeds spring and is distrustful of a politics centered on “the ideas of playacting, maskwearing, and a distinct public self.”[56]

In her account of the French Revolution, Arendt highlights the lethal dangers of this metaphysical quest for a real, true, and essential being that is hidden behind the mask, that precedes it, and that is entitled to rights by virtue of its nature. She is especially critical of the revolutionaries who equated masks with hypocrisy and ended up “[tearing] away the mask of the *persona* as well” with their “passion for unmasking society.” These revolutionaries, Arendt insists, had “no respect” for the idea that we become equals through artificial inventions such as *persona*, or the idea 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.”[57]

Arendt highlights this danger again in her analysis of statelessness, as she underscores how those who are stripped of legal personhood are exposed to arbitrary forms of violence

under police rule. The plight of the stateless epitomizes the collapse of a metaphysical vision that locates the ultimate source of rights in the sanctity of the being that comes prior to, and is hidden behind, the mask:

> The conception of human rights, 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 **(p. 102)** specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[58]

Confronted with this problem, Arendt rejects the assumption that those who appear to others in their "mere givenness" or bare humanity, stripped of all political and social qualifications, will be recognized as equals. The plight of the stateless reveals that equality is not a given or natural condition but instead the result of legal and political efforts to achieve equalization among a community of actors: "We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights."[59]

If equality is not inherently given, it cannot be taken for granted and it needs to be established by, and continuously reinforced with, relatively stable institutional guarantees. Legal personhood is perhaps the most important of such guarantees to the extent that it allows equalization without obliterating the distinctiveness of each individual. The artificial mask of legal personhood is important, for Arendt, because it covers one's face (or one's "mere givenness," understood as bare humanness) not to erase the differences among human beings but instead to make sure that they do not become justifications for naturalized stratifications and inequalities within a political community.[60] According to this perspective, "man," invoked as the subject of rights, does not precede these rights but instead arises out of them: "*Man*, as philosophy and theology know him, exists—or is realized—in politics only in the equal rights that those who are most different guarantee for each other."[61]

Arendt's peculiar etymology, stressing the Roman origins of legal personhood, deserves attention not simply because of its critique of the metaphysical ideas that attach rights to a pre-existing subject ("man") and ground them in the sanctity of human life. It is also important for drawing attention to the practices that go into the making and unmaking of personhood, and this brings me to my second point about the relevance of Arendt's discussion of *persona* as mask to her analysis of the problem of statelessness. If personhood is an artifact, and not an inherently given essence—if there is no intrinsic overlap between humanness and personhood, in other words—then it is quite possible that not every human being is automatically recognized as a person. And even when one has the formal recognition, it is conceivable that personhood can be taken away, and if not completely taken away, it can be undermined so much so that some human beings might be effectively rendered semi-persons or non-persons.

(p.103) Roman law is helpful for understanding this second point. Although Arendt does not make explicit reference to it, her discussion of statelessness in terms of the loss of legal standing evokes the Roman practice of depersonalization, or *capitis diminutio*.[62] There were three elements of *caput*, or legal standing, in Roman law: freedom, Roman citizenship, and membership in a Roman family. Correspondingly, there were three degrees of depersonalization. In its minimal form (*capitis diminutio minima)*, the practice involved the loss of family rights; this occurred, for example, when a father gave his son up for adoption. In a certain sense, the stateless in Arendt's account face this form of depersonalization as they leave behind or lose family members.[63] A more comprehensive form of depersonalization (*capitis diminutio media*) involved the loss of citizenship. In the case of criminals facing banishment for life (*deportatio*), this loss entailed a life in isolation on an island near the Italian shore or an oasis in the Libyan desert.[64] In either case, the criminal was banned from the possibility of sharing a common life with fellow citizens; if he were to return without permission, he was stripped of legal protection, and as an outlaw, he could be killed by anybody with impunity.[65] This kind of civil death is at the heart of Arendt's analysis of statelessness, which highlights the loss of membership in a political community. Finally, the most comprehensive form of depersonalization (*capitis diminutio maxima*) indicated a change from a condition of freedom to that of slavery and

entailed the loss of liberty, citizenship, and family rights. Arendt's comparison of statelessness to slavery, which I discuss in the next chapter, suggests that rightlessness involves this most comprehensive form of depersonalization in a certain sense; both the slaves and the stateless, she argues, are denied even "the possibility of fighting for freedom."[66]

In light of *capitis diminutio*, Arendt's Roman understanding of personhood exposes the fragility of this legal artifact. Refusing to treat personhood as an inherent attribute that cannot be stripped away, her analysis highlights the need to inquire into how legal standing can be unmade.[67] It is quite tempting to think of the history of personhood as one of gradual expansion and to treat depersonalization as an archaic practice of a bygone era. But the history of personhood is also "one of persistent and shameful stereotyping and exclusions in which . . . the legal community of actors extended only grudgingly," as Ngaire Naffine puts it.[68] That history underscores the need to attend to the ways in which personhood can be curtailed even today; if personhood can no longer be officially taken away, as Linda Bosniak highlights, it may **(p.104)** still be "diminished in its effect, evaded, effaced, diluted, displaced."[69] That danger is especially palpable in the case of asylum seekers and undocumented immigrants facing detention and deportation, as I discuss below.[70]

This attentiveness to the fragility of personhood brings Arendt closer to some critical scholars who maintain that formal recognition of equality before the law can disguise, perpetuate, and justify various forms of inequality. However, Arendt's phenomenological account sets her apart from many other critics of law, and this brings me to my third and final point about the implications of her analysis of personhood for rethinking the problems of rightlessness today. Arendt's unique position is encapsulated in her peculiar dissection of *persona* as *per-sonare*, or as a mask allowing the voice to sound through, and her insistence on this highly improbable etymology is quite noteworthy. For Arendt, personhood is an artificial mask that not only disguises the countenance of its wearer but also allows the possibility of speaking and being heard. Those who are stripped of the protections of this mask appear to others in their "mere givenness" and become much more vulnerable to arbitrary forms of violence. In addition, they lack the means to make their speech "sound through"; without the mask equalizing them with other actors, their

speech either does not count or is rendered inaudible and unintelligible. By insisting on this peculiar etymology, tracing personhood to *per-sonare*, 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; understood in these terms, personhood has significant implications for one's political and human standing.

This phenomenological analysis of personhood, highlighting how legal fictions can enable public appearance, is quite different from critical accounts that see the law's artifacts mainly in negative terms as mechanisms disguising, suppressing, and dividing humanity. Legal scholar and jurist John T. Noonan Jr. presents such a view when he describes masks as legal devices "classifying individual human beings so that their humanity is hidden and disavowed."[71] For Noonan, masks are dangerous "monsters," showing how the "fiction-making capacity [of law] can run amok," as they conceal real persons, or "ontological realities," and displace them from the legal process.[72] For Arendt, on the other hand, there is no person without the mask, and masks are the only ways in which persons can appear as equals before the law.

(p.105) More recently, Giorgio Agamben has offered a scathing critique of human rights as biopolitical mechanisms that render human life vulnerable to sovereign violence, as I discussed in chapter 1. In his analysis of habeas corpus, for example, Agamben casts this writ, which is often taken as one of the most fundamental legal safeguards against arbitrary state action, as another reinscription of sovereign power on the human body. He highlights how modern democracy turns *corpus*, or the body, into the subject of rights with this writ: Compelling the physical presence of a human body before a court of law not only endows the political subject with rights but also renders it vulnerable to the violence of sovereign decision.[73]

An Arendtian account of personhood also suggests that existing norms of human rights cannot be understood simply as protections against sovereign violence; in fact, as I discuss below, to the extent that these norms cast some forms of sovereign violence as legitimate, they can partake in the reproduction of rightlessness. However, in Agamben's biopolitical account, personhood, as inscribed in legal

inventions such as habeas corpus, is inextricably intertwined with the logic of sovereignty. Arendt's phenomenological account, on the other hand, underscores that personhood is not merely a juridical tie between an individual and a state. More importantly, it is an artificial convention that institutes relationships among different individuals—in ways similar to the mask that establishes relationships between different actors on stage—and is a necessary, though by no means sufficient, condition for their equalization as distinct individuals. Underlying Arendt's insistence on the importance of personhood is her Roman conception of law as *lex*, which takes legislation as a political activity that establishes relationships, connections, and ties between different entities.[74]

As this discussion highlights, personhood is not simply a juridical matter for Arendt; it has significant consequences for one's political and human standing; it is that "which makes his [a human being's] actions and part of his destiny a consistent whole," to revisit the quote at the beginning of this section.[75] What Arendt offers is nothing less than "a hermeneutic phenomenology of the person," to use Paul Ricoeur's terms, tying together how the person appears in language, action, narrative, and ethical life.[76] The artificial mask of personhood is crucial for human beings to appear as speaking subjects and be recognized as such by their interlocutors, to become actors capable of designating themselves as the agents of their own actions, to establish themselves as the narrators of **(p.106)** their own life stories that endow their identities with some cohesion throughout time, and finally, to situate themselves as participants in institutional frameworks enabling and guaranteeing reciprocity, equality, and justice.[77]

This phenomenological attention to the multiple dimensions of personhood refuses to sign on to a critique that sees legal artifacts simply as cunning devices producing injustice, oppression, and violence, although this is not to say that Arendt's account has no critical insight to offer. In fact, her distinctive understanding of personhood as a mask that covers the face but also allows the individual voice to "sound through" and be perceived as intelligible speech can be mobilized as a critical framework in examining the existing institutional frameworks guaranteeing personhood: To what extent do the current formulations of personhood in international human rights law, for example, provide the

asylum seekers and undocumented immigrants with artificial masks that can allow them to appear in public without the pervasive fear of being subjected to arbitrary violence? To what extent do these legal mechanisms cover their “face” and ward off the threat of being perceived as bare lives exposed in their “mere givenness”? And finally, to what extent do these artificial conventions allow these migrants to appear as equals before the law and let their rights claims “sound through”?

These questions are crucial starting points for understanding how rightlessness continues to haunt our present. Given the significant transformations in international human rights and humanitarian law, it has become very difficult to imagine how one can be deprived of legal standing. Arendt’s analysis of statelessness and her phenomenological understanding of personhood, however, raise caveats against the hasty conclusion that rightlessness becomes extinct in an era in which every human being is recognized as a person before the law. From an Arendtian perspective, a careful examination into the diverse and unpredictable effects of this recent institutionalization of human rights is needed to assess the extent to which this development enables the equalization of human beings regardless of citizenship status.

In the following section, I undertake such a critical inquiry as I examine different ways of diminishing personhood in the context of deportation and detention. This analysis rests on a slightly revised definition of “rightlessness.” At the time Arendt wrote her analysis, the term denoted the absence of any international legal recognition, especially for those who were de facto stateless. In my reformulation, which draws on Arendt’s **(p.107)** emphasis on the fragility of the artificial mask provided by personhood, I take into account the post–World War II international legal developments and suggest that “rightlessness” denotes the fragility of these formal guarantees, which can be unmade in ways dispossessing various categories of migrants of their legal standing. Within this new context, the term alerts us to the *precarious* legal, political, and human standing of those who are juridically or effectively deprived of the protections of citizenship status. It draws attention to contemporary practices and processes that give rise to divisions, stratifications, and thresholds within the concept of universal personhood and render the rights of

various categories of migrants dependent on quite unreliable sentiments and highly arbitrary decisions.

Rightlessness and Deportation

Only citizens have the unconditional right to enter and remain in the territory of a state, and those who are not citizens (including permanent residents) can be deported.[78] Deportation, or the physical expulsion of an alien, has always been one of the mechanisms used by nation-states to exclude those deemed undesirable from the political community. It has been recognized as a practice in accordance with the sovereign state's right to control entry to and residence in its territory, and conventionally its legitimacy has been judged within a legal framework centered on the international obligations that states have to each other.[79] As Arendt reminds us, "sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion,'" but the formal and informal agreements between states established some guarantees against mass denationalizations and deportations for most of modern history.[80] Normalization of mass denationalizations and collective expulsions with the rise of totalitarianism revealed the fragility of these guarantees.

This state-centric picture has changed to some extent with the rise of human rights norms after World War II, and the discretionary power of sovereign states in making deportation decisions has been curtailed in certain respects. Collective or mass expulsion of aliens, for example, is now prohibited, and there are procedural safeguards in place to protect migrants from arbitrary deportations and to ensure their right to individual assessment of their cases.[81] There are also several norms, including those upholding the rights to life, bodily integrity, and freedom from **(p.108)** cruel, inhuman, or degrading treatment, which can be invoked to challenge the conditions under which a deportation order is executed.[82] In addition, the principle of *non-refoulement*, which prohibits refugees from being returned to places where their lives and freedoms could be threatened, has become one of the strongest norms in place to constrain the sovereign right of states to control their borders.[83] It has even been suggested that this norm has achieved the status of *jus cogens*—i.e., it has become a peremptory norm of international law from which no derogation is permissible.[84] The institutionalization of these norms in international human rights law marks an important development in establishing the legal personhood of

migrants, as it enables them to challenge the legitimacy of deportation decisions that were once deemed to be beyond the reach of the rule of law.

Yet, it is also important to understand the various ways in which these norms continue to reinstate the precarious legal standing of various categories of migrants, especially in the context of deportation. Even the principle of *non-refoulement* affirms sovereign power of states to control their borders, as it allows for exceptions on very ambiguous grounds that leave room for arbitrariness: According to the Refugee Convention, *non-refoulement* may not be applicable when there are "reasonable grounds" that the refugee in question constitutes "a danger to the security of the country" or "a danger to the community of that country."[85] These exceptions urge us to understand human rights norms not simply as instruments constraining the sovereign power of states but also as mechanisms legitimating that power in many respects. They also underscore that the perplexities of the Rights of Man analyzed by Arendt are not resolved but instead reconfigured in international human rights and humanitarian law. Especially important in this regard are the ways in which a desire to reassert "the old trinity of state-people-territory," to remember Arendt's characterization of the nation-state framework, pervades existing international norms, as highlighted by their exception clauses.[86] This trinity, which Arendt concluded to be untenable in the face of the crisis of statelessness in the twentieth century, continues to have a strong hold on the universalistic political and moral frameworks that attribute rights to the human person.

From an Arendtian perspective, there is a need to attend to the specific conditions that can enable or undermine the political possibilities of navigating the perplexities of human rights for the purposes of guaranteeing equalization regardless of nationality. Accordingly, it is important to take note **(p.109)** of some of the worrisome developments that make it more and more difficult to invoke human rights norms to contest deportation decisions. Notable among these is the normalization of deportation within a new security discourse that depicts asylum and immigration in terms of a permanent crisis or state of emergency.[87] Within this new context, deportation has come to be used as a symbolic tactic to produce an effect of sovereign power at a time when the authority of states seems to be undermined by various global

processes and structures.[88] The exception clause of *non-refoulement*, which was reserved for states of emergency (e.g., wartime) in the past, has been increasingly invoked by states to deport those deemed to be posing a threat to national security or public order. As a result, "a palpable sense of deportability," to use Nicholas De Genova's terms, has rendered the personhood of an ever-growing number of migrants increasingly precarious.[89]

In what follows, I turn to a 2008 case from the European Court of Human Rights (ECtHR or "the Court"), *N. v. UK*, to discuss how the existing inscriptions of personhood in international human rights law fail to provide effective guarantees against this condition of rightlessness, especially in the case of migrants without a regular status, including rejected asylum seekers and undocumented immigrants.[90] My reading highlights the need to understand this condition in relation to the deeply embedded tensions between the principles of equal personhood and territorial sovereignty in human rights law. It also points to how these tensions can be navigated in different ways, some leaving migrants with a more precarious personhood, and some others giving rise to possibilities of equalization regardless of citizenship status. By analyzing this case closely, I hope to underscore that human rights law has both "jurisgenerative" and "jurispathic" dimensions, to use Robert Cover's terms.[91] We become aware of the "jurisgenerative" dimension of law when existing rights are "reposited, resignified, and reappropriated by new and excluded groups," as Seyla Benhabib notes.[92] But it is equally important to look at how human rights law gives rise to "jurispathic" processes when its norms are invoked to affirm the sovereign right to detain or deport rejected asylum seekers and undocumented immigrants. At those moments, as Cover notes, we realize that legal interpretation is different from other fields of interpretation; it "takes place in a field of pain and death," providing "justifications for violence which has already occurred or which is about to occur."[93]

N. v. UK deserves attention as a case that underscores the equivocal effects of human rights law, which extends personhood to migrants with **(p.110)** its universal scope but also holds on to the principle of territorial sovereignty that can give rise to practices of unmaking that personhood. N., an asylum seeker from Uganda, applied for asylum in the UK in March 1998, claiming that her life was in danger if she

returned to Uganda; because of her association with the Lord's Resistance Army, she had been persecuted and raped by the government soldiers. N. was seriously ill when she arrived in the UK, and later she was diagnosed as HIV-positive. After treatment with antiretroviral drugs, her condition significantly improved, and in March 2001 a consultant physician prepared an expert report in support of her asylum application, suggesting that her life expectancy would be less than one year if the treatment were discontinued. Despite the report, the UK Secretary of State refused N.'s asylum application and decided that her deportation would not amount to "inhuman or degrading treatment," according to Article 3 of the European Convention of Human Rights (ECHR). The government justified its position by arguing that the applicant could access AIDS treatment in Uganda. After exhausting all domestic remedies, N. submitted an application to the ECtHR to challenge the deportation decision on the grounds that her return to Uganda would amount to a violation of not only Article 3 but also Article 8, which guarantees a right to private life. In May 2008, the Grand Chamber of the ECtHR ruled that there would be no violation of Articles 3 and 8 in case of N.'s return to Uganda.

N. v. UK reveals the continuing relevance of Arendt's argument about the perplexities of human rights: N. has "a right to seek and enjoy asylum," according to the Universal Declaration of Human Rights (UDHR), but she does not have a "right to be granted asylum," as I mentioned in the Introduction. As a result, she is vulnerable to the highly unpredictable, even arbitrary, consequences of an asylum adjudication process. This vulnerability is further reinforced by the relatively subjective nature of decisions as to what constitutes a "well-founded fear" or what can be characterized as "persecution."[94] In addition, the claims made by asylum seekers have come to be seen as increasingly dubious in a climate that has criminalized asylum and immigration by representing them as security threats. Their asylum applications can now be easily rejected for minor flaws or incoherence in the narrative of persecution, even though such problems are common in post-traumatic situations.[95] Unlike the stateless of the Arendtian world, today's asylum seekers do have formal recognition of their legal standing; but their **(p. 111)** personhood is unlike that of any other subject standing before the law, as they are considered to be "guilty until

proven innocent” and the whole process centers on the question of whether they are really the person they say they are.[96]

As narratives of persecution have become suspect, the human body has become a crucial site for claiming rights, giving rise to what Didier Fassin aptly calls “biolegitimacy.”[97] States, courts, and refugee advocates have increasingly turned to the suffering bodies of asylum seekers and other migrants to locate more irrefutable truths. This contemporary context is important for understanding why the appeal in *N. v. UK* is based not on N.’s political biography as a member of a resistance group but on her biological condition as an HIV-positive patient. The case exemplifies the recent trend to turn to Article 3 of ECHR, which places an absolute prohibition on inhuman or degrading treatment, in an attempt to overcome the limits of asylum and *non-refoulement*.[98] Read along with the principle of *non-refoulement*, this non-derogable right has been invoked to stop states from returning asylum seekers and refugees to places where they can be subjected to the kind of treatment prohibited by the ECHR. More recently, this argument has been extended to cases in which the person in question has a medical condition that cannot be treated in the country she or he is returned to. In a landmark case, *D. v. UK* (1997), ECtHR ruled that the deportation of a drug courier dying of AIDS to St. Kitts would violate Article 3, as having no family support and adequate medical treatment would hasten his death.

In some respects, these recent interpretations of human rights law are “jurisgenerative” processes, broadening the scope of the prohibition on inhuman and degrading treatment, resignifying the meaning of *non-refoulement,* and augmenting the personhood of migrants. But a closer analysis of *N. v. UK* reveals that these interpretations also end up exposing migrants to “jurispathic” processes that render their personhood extremely precarious. It shows that the turn to the prohibition on inhuman and degrading treatment as the basis of asylum claims does not put an end to the interpretive controversies arising from the perplexities of human rights but instead gives rise to new ones that demand decisions over life and death. The case also poses challenging questions in light of Arendt’s account of personhood, as it alerts us to the

vulnerability of those who are forced to assume the guise of a bare humanity to make rights claims.

(p.112) The Court's judgment in *N. v. UK* highlights how the turn to the suffering body gives rise to highly volatile decisions about life and death, subjecting migrants to a new form of arbitrary rule. The majority of the judges agreed with the government's position that the probability of significantly reduced life expectancy could not be invoked to challenge an expulsion order.[99] The humanitarian exception could not be granted in this case, the Court argued, since the applicant was not critically or terminally ill. In addition, she had family in Uganda, even though N. insisted that they would not be willing or able to take care of her. Finally, the antiretroviral medication was available in Uganda, the Court pointed out, ignoring the fact that only half of those who needed this medication could access it.[100] In a very problematic move, the majority of the judges characterized the ECHR as a convention that is "essentially directed at the protection of civil and political rights," agreeing in effect with the UK government's claim that extending Article 3 in this case would amount to provision of social and economic rights that should be seen as aspirational. More strikingly, they represented their judgment as an attempt to balance individual rights with "the demands of the general interest of the community," risking with this move to relativize the absolute prohibition against inhuman and degrading treatment in Article 3.[101] They went so far as to portray the UK government as a generous but overburdened host that "provided the applicant with medical and social assistance at public expense." But this generosity, they concluded, should not be seen as "entail[ing] a duty on the part of the respondent State to continue to provide for her."[102]

To understand how this ruling risks eroding the personhood of migrants, it is important to attend to the arbitrary distinctions it sets up in an attempt to adjudicate rights claims based on suffering bodies. Take, for example, the distinction between "ensuring a dignified death" and "prolonging life," introduced by the UK government and affirmed by the majority of judges. Whereas the former was seen as the irrefutable basis of an absolute prohibition against deportation, the latter was cast as an unwarranted demand putting strains on the socioeconomic resources of a government. But the distinction was not clear-cut; even the descriptions used by those invoking this distinction reveal the arbitrariness of the line drawn. During

the examination of N.'s appeal at the House of Lords, Lord Nicholls of Birkenhead compared N.'s situation in the case of a deportation to "having a life-support machine turned off."[103] The judges at the ECtHR took note of this characterization in **(p.113)** addition to the overwhelming evidence that if N. were to be deported to Uganda, she would have difficulty accessing medical treatment and "her condition would rapidly deteriorate and she would suffer ill health, discomfort, pain and death within a few years."[104] Yet, despite all this evidence, N.'s case was not seen as one that is so extreme as to warrant a humanitarian exception to the sovereign right to control borders. Though her case was seen as worthy of "one's sympathy on pressing grounds," its "humanitarian appeal" was not "so powerful that it could not in reason be resisted by the authorities of a civilised State."[105]

N. v. UK points to a new form of arbitrary rule faced by migrants. Unlike the "form of lawlessness, organized by the police,"[106] which is at the heart of Arendt's analysis, this new arbitrariness is highly regulated by laws. Nevertheless, we can still describe it as arbitrary to the extent that it renders migrants' rights vulnerable to the quite erratic decisions based on ambiguous terms and distinctions. This new arbitrary rule is directly related to the compassionate humanitarianism discussed in the last chapter. As states, courts, and rights advocates turn to compassion to make decisions about suffering, they risk unmaking the equal personhood of migrants, rendering their rights dependent on a capricious moral sentiment. As a result, we are not too far away from Arendt's argument that the stateless find themselves in a fundamental condition of rightlessness because of their dependence on the goodwill or generosity of others: "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."[107] In fact, the Court's ruling suggested that there was no violation of N.'s rights under Articles 3 and 8 precisely because what she was demanding was "prolongation of her life"; it was the generosity of the British government that prolonged her life so far "at public expense," but that in itself could not be taken as the basis of rights imposing positive duties on the UK.

The perplexities at the heart of the eighteenth-century discourse of rights, especially those arising from the simultaneous invocation of “man” and “citizen” as the subject entitled to rights, have not been resolved with the move to the inclusive notion of humanity. As the ECtHR ruling in *N. v. UK* demonstrates, these perplexities are reinscribed in human rights norms; what cannot be denied as a fundamental right to citizens can be seen as dependent on the compassion of the “host” states in the case of migrants, which diminishes their personhood.

These perplexities can be navigated in different ways, however, and some of these can be more promising than others to establish migrants as **(p.114)** equal persons before the law, as can be seen in the dissenting opinion of Judges Tulkens, Bonello, and Spielmann in *N. v. UK*. Criticizing the problematic hierarchy drawn between civil rights and socioeconomic rights, the dissenting judges argued instead that “there is no water-tight division separating that sphere [of social and economic rights] from the field covered by the Convention.”[108] They were equally concerned about the utilitarian calculus that the Court set to weigh rights against their costs, warning that this reasoning makes the enjoyment of even non-derogable rights dependent on policy considerations.[109] The dissenting opinion also questioned the Court’s quick dismissal of N.’s complaint under Article 8, which guarantees a right to respect for private and family life and has been interpreted to indicate “a person’s right to physical and social integrity.” Given that N. was being “sent to certain death,” the dissenting judges insisted, the Court’s refusal to examine the complaint under Article 8 was simply unjustifiable.[110]

Despite all these important points, the dissenting opinion could not break away from the logic of humanitarian exception altogether. In fact, as the dissenting judges defended that N. should have a right to stay in the UK, they were affirming, not questioning, the logic that undermines the personhood of migrants by rendering their rights dependent on quite arbitrary decisions about suffering bodies. If the majority decided that N.’s case was significantly different from D.’s case as one concerning prolonging life, and not death with dignity, the dissenting judges insisted on the similarities of these two cases: Just like D., N. was a “very exceptional” case, they argued, given that she would not be able to survive more

than a year or two if she were to be returned to Uganda.[111] It is possible to see this attempt to depict N.'s case as a very exceptional one deserving protections under Article 3 as a strategic move—one that is easier to justify, for example, than a broader interpretation that could have described deprivation from adequate access to health care as "inhuman or degrading treatment."[112] Such an interpretation would have involved representative practices that could have established connections between things seen as unrelated (to recall the "political" approach to human rights discussed in chapter 2) and would have reframed what was perceived to be a social issue—health care—as a political problem that is inextricably linked to N.'s equal personhood. By challenging the deportation order on the grounds of a humanitarian exception reserved for those who are critically ill, the dissenting judges tried to avoid the controversies entailed by such an interpretation that would have effectively dismantled the distinction **(p.115)** between civil-political rights and socioeconomic rights; instead, they turned to the seemingly self-evident truth of a suffering body. But with that move, placing their dissent at the intersection of a moral economy centered on compassion and an administrative rationality directed at the management of vulnerable populations, they ended up subjecting the rights of asylum seekers to highly arbitrary decisions about the conditions under which a human life can be deemed to be worthy of special protections.

The rise of a humanitarian logic centered on the suffering body, as illustrated by the case of *N. v. UK*, poses significant challenges to establishing migrants as equal persons before the law. Arendt's phenomenological account of personhood sheds critical light on these challenges. For Arendt, we become rights-and-duty-bearing subjects with the artificial mask of *persona*. As highlighted earlier, one of the crucial functions of this mask is that it covers the countenance of the human being so as to shield her "mere givenness" from an arbitrary violence to which she would otherwise be more likely to be exposed. The logic of humanitarian exception, on the other hand, risks unmaking the personhood of migrants precisely by forcing them to stand bare naked before the court, to become nothing but human, so as to make claims to human rights. But as Arendt reminds us, the stateless become most vulnerable to arbitrary forms of rule and violence when they appear to others in their bare humanity, especially

because their fate becomes dependent on the unpredictable sentiments of others.[113] In very exceptional circumstances, that exposure can invoke a response extending them a set of rights; but in the majority of cases, it leads to the commonplace reaction that their plight is worthy of compassion but does not entitle them to the rights enjoyed by citizens. Compassion turns out to be a quite tenuous basis for human rights, as it does not imply any positive duties—even the officials in the UK government admitted that N.'s case demanded "sympathy," without recognizing any obligations arising from her plight.[114]

In addition, compassion, as the analysis in chapter 2 highlighted, is also a quite unreliable feeling, as it can end up sacrificing those who are cast as the most misfortunate in the name of the cause it glorifies. In fact, among the cases that both the UK and the ECtHR cited to support their position, we see a long list of such sacrificed lives for the purposes of upholding a humanitarian morality that makes exceptions only for those in extreme situations.[115] If "death and pain are at the center of legal interpretation," as Robert Cover argues, they are even more prominent in decisions related to humanitarian exception.[116] To qualify for this exception, **(p.116)** migrants must meet the "high threshold" set by the ECtHR in the interpretation of Article 3, but as the differing opinions in N.'s case reveal, it is not always clear where that "threshold" is, and it must be located in each case by making a new decision in response to challenging questions about life and death.[117] These decisions "concerning the *threshold* beyond which life ceases to be politically relevant," to use Giorgio Agamben's terms, have quite troubling effects:[118] When the majority of the judges represented N.'s suffering as a problem related to social and economic rights, and not civil and political rights, her life "cease[d] to be politically relevant" in their eyes. Such discretionary decisions over life and death effectively turn migrants with physical and mental illness into *homines sacri*, to use Agamben's terms again, as subjects who could be subjected to sovereign violence (e.g., deportation) and left to die.[119]

Approaching human rights on the basis of a humanitarian framework centered on suffering bodies is problematic not simply because it renders the personhood of migrants very precarious but also because it reinscribes their rightlessness as speechless subjects—a problem that I discuss at length in

the next chapter. If the artificial mask of *persona* has an opening to allow the voice of the individual to "sound through," as in Arendt's characterization, an exclusive focus on suffering bodies in the adjudication of rights claims ends up depriving migrants of such a mask, as it ends up drowning their voices amidst the more authoritative statements made by medical, humanitarian, and legal experts. In an international environment that makes their narratives highly suspect, the bodies of migrants become material sites bearing witness to truths that seem to be beyond any dispute. As a result of this shift, it is no longer the migrants' accounts of their suffering that count; it is experts who are "called on to speak the truth in their place."[120] From an Arendtian perspective, which urges us to ask the extent to which existing inscriptions of personhood in international human rights law allow migrants to speak and be heard, the shift from migrants' narratives to expert testimony is troubling, as it ends up rendering migrants' speech irrelevant.

Rightlessness and Immigration Detention

Similar to deportation, detention was mainly used as an exceptional measure in times of emergency (e.g., war), especially to confine those who were categorized as "terrorists" or "enemy aliens." Since the 1990s, however, detention has been normalized as a legitimate tool used by states in **(p.117)** immigration control, especially due to the increasing securitization and criminalization of asylum and immigration—a process that has intensified in the wake of 9/11.[121] It has now become a routine administrative procedure to detain asylum seekers whose claims are being processed, unaccompanied minors who are waiting for their status to be regularized, undocumented immigrants and rejected asylum seekers, and non-citizens who have completed their criminal sentences and are awaiting deportation.

A brief look at the numbers in Europe confirms this troubling normalization of detention in the immigration context: From 2000 to 2012, the number of "camps" used for immigration detention in Europe and in the Mediterranean countries has increased from 324 to 473, according to the estimates of *Migreurop*, a European network of non-governmental foundations working on immigration detention. This estimate is quite conservative because it includes only permanent structures that can hold five or more people and excludes a plethora of other sites that can be temporarily utilized for immigration detention (e.g., waiting zones in airports).[122] In France, for example, in addition to the 24 *centres de rétention administrative* (administrative detention centers) where detainees can be held up to 45 days in cases where immediate deportation is not possible, there are 150 *locaux de rétention administrative* (administrative detention facilities) where detention is limited to 48 hours and 85 *zones d'attentes* (waiting zones) that are located at various ports of entry and can be used to detain individuals up to 20 days by a court order. The number of people detained by the French government in these sites rose from 28,220 in 2003 to 35,008 in 2007.[123]

In many respects, we are confronted with a situation that is quite similar to the one that Arendt described in her account of statelessness, as what was once exceptional has been normalized as "the routine solution" and internment camp, in its several guises, has become "the only practical substitute for a nonexistent homeland."[124] Those who can be

characterized as de facto stateless, including asylum seekers and undocumented immigrants, are now again “liable to jail sentences without ever committing a crime,” and confined to these sites, they can rarely access the protections guaranteed to other detainees under the rule of law.[125]

Many of these detention sites bear an eerie resemblance to the structure of internment camps used to contain the stateless in a space of lawlessness, always subject to an arbitrary rule of discretionary decrees. Although these sites serve administrative purposes and are supposed to be non-penitentiary, they are regulated by a very disciplinary regime **(p.118)** reminiscent of ordinary prisons. There are fixed eating times, designated hours for recreation, and mandatory curfews. If detainees violate the rules that regulate their daily routine, they can be subject to various forms of punishment, including solitary confinement.[126] In addition to the formal rules in place, detainees’ lives are regulated by a set of informal rules that create an environment of arbitrariness, uncertainty, and vulnerability.[127] The arbitrariness of the system has become even more worrisome with the more recent move to privatize immigration detention in many countries. As states are increasingly transferring responsibility to private prison management companies, it has become more difficult to ensure accountability in cases of human rights violations.[128]

Despite the important similarities, the picture is also different from the one Arendt painted in certain respects as a result of developments in the field of international human rights and humanitarian law. Article 31 of the Refugee Convention forbids states from imposing any penalties on asylum seekers and refugees on account of their unauthorized entry or presence, “provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence,” and it limits restrictions on their freedom of movement to only “those which are necessary.” The United Nations High Commissioner for Refugees (UNHCR) stipulates that asylum seekers and refugees should not be detained unless there are exceptional grounds such as verifying identity, conducting a preliminary assessment of asylum claim, dealing with cases involving fraudulent documents, and protecting national security and public order.[129] In addition, Article 9 of International Covenant on Civil and Political Rights (ICCPR) guarantees “the right to liberty and security of

person," regardless of citizenship status, and forbids arbitrary arrest and detention; it demands states to inform those who are arrested of the reasons for their arrest. It also prohibits mandatory and indefinite detention and guarantees access to courts for those who are detained to determine the lawfulness of their detention.

In what ways do these human rights norms protect migrants against the lawlessness that Arendt criticized and allow migrants to make claims to rights as equal persons before the law? To what extent do these norms ensure the personhood of migrants in the context of detention and provide them with an artificial mask that can protect them against arbitrary forms of rule and violence? In what respects do these human rights norms reconfigure the perplexities that Arendt pointed to in her account of statelessness? And how do different actors, including states, migrants, lawyers, and rights advocacy groups, navigate these perplexities when it comes to **(p.119)** detention? *Saadi v. UK*, a 2008 case from the ECtHR in which an asylum seeker challenged his detention, offers crucial insights into these questions.[130]

Shayan Baram Saadi fled the Kurdish Autonomous Region of Iraq in December 2000; as a hospital doctor, he treated three fellow members of the Iraqi Workers' Communist Party who had been injured in an attack and then facilitated their escape. Upon his arrival at Heathrow Airport on December 30, 2000, Saadi immediately claimed asylum and was given "temporary admission." Although he reported to the airport as required in the next three days, he was arrested on January 2, 2001, and transferred to Oakington Reception Center for detention. On January 8, Saadi's asylum claim was rejected, but the next day he was released from Oakington and granted temporary admission pending the determination of his appeal. On January 14, 2003, Saadi's appeal was allowed and he was granted asylum. Saadi and his lawyers challenged his detention at the ECtHR. They claimed that his detention was in violation of Article 5 (1) of ECHR, which guarantees "the right to liberty and security of person" and prohibits the deprivation from liberty except in cases of arrest or detention on permissible grounds.

Saadi v. UK was a landmark case because it was the first time the ECtHR was called upon to make a decision on the permissibility of detention in cases of unauthorized entry.[131]

The UK government argued that the detention of Saadi was lawful, as it aimed at the prevention of unauthorized entry in accordance with the Article 5 (1) of the ECtHR.[132] It also challenged the claim that the detention was arbitrary by highlighting that Saadi was detained in order to enable the speedy examination of his asylum claim and that he was held in a "relaxed regime" with access to legal advice and other facilities for only seven days.[133] Saadi's lawyers contested the lawfulness of the detention by underscoring that there was no unauthorized entry since his temporary admission would make his presence in the UK lawful. In addition, in the absence of any risk of absconding, they argued, Saadi was detained purely for the purposes of administrative convenience and expediency.[134] The Court found no violation of Article 5 (1) and endorsed the short-term detention of asylum seekers for the purposes of processing their claims speedily.

The reasoning adopted by the majority of judges in *Saadi v. UK* highlights that "personhood operates . . . in the shadow of the border" in the context of asylum and immigration and "has often found itself stunted as a result."[135] Precarious personhood of migrants in international human **(p.120)** rights law can be seen in the Court's argument that states enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory." On the basis of this strong endorsement of the principle of territorial sovereignty, the majority of judges declared any entry not explicitly authorized by the state in question to be "unauthorized," even in cases where the individual claims asylum upon arrival.[136] They argued that Saadi's detention was not arbitrary, since it was carried out in good faith to quickly assess his asylum application and he was detained for only seven days under conditions that were specifically adapted to the needs of asylum seekers.[137] In a move justifying detention undertaken simply for administrative expediency, the Court concluded that Saadi's detention was not in violation of the right to liberty given the "administrative problems" faced by the UK in the face of "increasingly high numbers of asylum-seekers."[138] The Court found only a violation of Article 5 (2), which requires the authorities to promptly inform those who are detained of the reasons for their arrest and charges against them.

Saadi v. UK provides a justification for detention as a routine administrative procedure to be used against those who have entered states without prior authorization. In addition, the judgment risks endowing detention with a humanitarian aura when it presents it as a legitimate measure benefiting the interests of the asylum seekers.[139] It also confers this aura on detention centers such as Oakington. Highlighting how this center meets the specific needs of asylum seekers, including "recreation, religious observance, medical care and, importantly, legal assistance," the judgment ends up obscuring the surveillance functions of facilities such as Oakington:[140] Oakington is located in the former army barracks, and just like the refugee camps located on Guantánamo mentioned at the beginning of this chapter, it is a highly securitized space used for the confinement of those who are cast as undesirables: "It has high perimeter fences, locked gates and twenty-four hour security guards." Detainees have no privacy and they need to comply with strict rules: "Detainees must open their correspondence in front of the security guards and produce identification if requested, comply with roll-calls and other orders." There are rules stipulating fixed times for eating and returning to rooms.[141] In many respects, Oakington resembles the internment camps in Arendt's analysis, revealing the precarious legal, political, and human standing of its inhabitants as subjects who can be interned without committing a crime and become dependent on the benevolence of their captors. Sites such as Oakington, where even the most basic human activities (e.g., eating, walking, sleeping) are always undertaken in **(p.121)** the shadow of a perpetual threat of punishment, confirm Arendt's argument that a fundamental condition of rightlessness can persist even when there is no explicit violation of specific human rights.

Normalization of detention in the context of asylum and immigration demonstrates that the perplexities of human rights have not been fully resolved with their codification in law. To the extent that international human rights law affirms not only equal personhood but also territorial sovereignty, it reinscribes these perplexities in new ways. I have already mentioned the peculiar formulation of the right to asylum as "a right to seek and enjoy asylum," as opposed to "a right to be granted asylum," to highlight this point. In addition, the exception clauses of various human rights norms, including the right to liberty and security of person, render the

personhood of migrants precarious, as they allow for detention to prevent unauthorized entry. Finally, although there are human rights norms regulating the conditions of detention and prohibiting arbitrary and indefinite detention, there is still an ongoing legal debate on the maximum duration of detention and what constitutes arbitrariness in the context of immigration-related detention. As highlighted in the *Saadi* judgment, the ECtHR has not "formulated a global definition as to what types of conduct on the part of the authorities might constitute 'arbitrariness,'" and the UN Human Rights Treaty monitoring bodies have yet to establish clearly articulated, globally recognized guidelines.[142] In the absence of such guidelines, an EU Directive adopted in 2008 has stipulated that the initial detention period can be as long as six months, and that period can be extended further up to 12 months.[143] Saadi's detention was much shorter, but his case is important for understanding the indeterminate nature of the line that is drawn in decisions related to arbitrary detention: The Court ruled that the seven-day period "cannot be said to have exceeded that reasonably required for the purpose pursued,"[144] but there are no explicitly stated and generally recognized rules defining what would be a "reasonably required" detention period for the purposes of assessing the validity of an asylum claim.

Saadi v. UK was a very controversial case, and several international and non-governmental actors have taken issue with the judgment. The criticisms raised by the dissenting judges in particular deserve attention, as they highlight how the perplexities of human rights could have been navigated differently to ensure more robust guarantees for the personhood of asylum seekers. The partly dissenting opinion called into question the Court's characterization of the detention regime in Oakington as a **(p.122)** humanitarian one when it instead highlighted the administrative functions of the site (i.e., "speedy resolution" of asylum claims), and took issue with the dangerous claim that "detention is in the interests of the person concerned."[145] This instrumentalist logic, the dissenting judges argued, amounted to a blanket justification of detention as a legitimate means toward the humanitarian end of asylum—a small price to be paid for the rights to be gained.[146] In addition, they were particularly worried that justification of detention on the grounds of administrative

expediency would subject asylum seekers to an arbitrary rule and undermine their personhood:

> [S]uch a situation creates great *legal uncertainty* for asylum seekers, stemming from the fact that they could be detained at any time during examination of their application without their being able to take the necessary action to avoid detention. Hence, the asylum seeker becomes an object rather than a subject of law.[147]

This possibility of being relegated to an "object" of law explains why the legal personhood of various categories of migrants remains precarious despite significant transformations in the field of human rights since the time Arendt completed her analysis of statelessness. Asylum seekers still find themselves in a fundamental condition of rightlessness to the extent that they can be subjected to detention given the monopoly that states continue to have on the legitimate means of movement.[148] As different from the case in Arendt's time, they can challenge their detention conditions if there are specific human rights violations. But as the *Saadi* ruling suggests, in the absence of any such violation, they cannot contest the detention itself, or take action to avoid detention during their asylum determination process. Without the possibility of such action, however, it is difficult to speak of equal personhood of migrants before the law. To recall Arendt's words, "[p]rivileges in some cases, injustices in most, blessings and doom are meted out to them according to accident and without any relation whatsoever to what they do, did, or may do."[149]

If the *Saadi* judgment highlights the continuing relevance of Arendt's argument about the rightlessness of the stateless, the dissenting opinion points to the promising possibilities of interpreting human rights in ways that question rightlessness. These possibilities become manifest, for example, in the concluding remarks of the dissenting judges who questioned the privileges attached to citizenship as they refused to accept the idea that asylum seekers have a necessarily diminished personhood given their status as foreigners:

> **(p.123)** Ultimately, are we now also to accept that Article 5 of the Convention, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and

> immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so.[150]

Although the dissenting opinion was important for contesting the condition of rightlessness created by the *Saadi* judgment to a certain extent, it had some crucial limits. In fact, the criticisms raised by both the dissenting judges and the third-party interveners also reveal the normative, institutional, and discursive constraints that can hinder or undermine the possibilities of interpreting human rights in ways ensuring equal personhood for everyone regardless of citizenship status. These criticisms failed to fully attend to the underlying conditions perpetuating contemporary forms of rightlessness faced by migrants, and in certain instances, they risked reproducing these conditions by reinforcing problematic categories and creating hierarchies within "personhood."

As they articulated their criticisms of the *Saadi v. UK* decision, the dissenting judges, the UNHCR, and several human rights organizations refrained from taking issue with detention as a legitimate practice of territorial sovereignty in migration control. They attacked the decision mainly for blurring the distinctions between asylum seekers and other migrants:

> [T]he judgment does not hesitate to treat completely without distinction all categories of non-nationals in all situations—illegal immigrants, persons liable to be deported and those who have committed offences—including them without qualification under the general heading of immigration control, which falls within the scope of States' *unlimited sovereignty*.[151]

This position fails to confront how these distinctions themselves are at the root of the problem, as they allow the states to legitimize detention as a necessary and effective measure taken to determine which migrants are entitled to asylum and which ones are not. By insisting on distinguishing asylum seekers from other migrants, the dissenting opinion ends up justifying the problematic categories that cast some as undeserving intruders who can be treated differently in accordance with the "unlimited sovereignty" of states in the field of immigration control. Appeals to human **(p.124)** rights on the basis of such categorical distinctions risk turning asylum into a "filtering process" that "keeps migration

exclusion morally defensible while protecting the global gatekeeping operation as a whole," as Jacqueline Bhabha highlights.[152] These distinctions turn personhood into a stratified category, as they draw hierarchical divisions within humanity. They end up relegating the majority of migrants to a fundamental condition of rightlessness as subjects who can be rendered vulnerable to various forms of violence that can be justified as legitimate in accordance with the state's sovereign prerogative to control its borders. The predicament of these migrants, who find themselves stranded in "the indefinite space that opens like a kind [of] a trap door below the person," to use Roberto Esposito's terms, brings to light the haunting presence of semi-persons, and even non-persons, in an age of rights.[153]

The universal discourse of human rights introduces personhood as the basis of entitlement to equal rights. With this move, it aims to "fill in the chasm between man and citizen left gaping since 1789."[154] It is quite tempting to think that the shift from citizenship to personhood resolves the fundamental problem of rightlessness that Arendt examined in her discussion of statelessness. After all, one of the defining features of this condition, according to Arendt's account, was the loss of legal personhood. In a nation-state framework tying legal standing to citizenship, those who were rendered stateless effectively became non-persons relegated to lawlessness. That problem can no longer exist, one might conclude, once personhood is ascribed to every human being regardless of citizenship status.

What arises out of this chapter is an equivocal picture of this novel development, highlighting not only its political and normative significance but also its limits and problems. The rise of a universal discourse of human rights, centered on legal personhood, is a welcome development to the extent that it allows migrants to have a standing before the law and make claims to rights. As Arendt's phenomenological account of personhood highlights, such formal recognition is not simply a juridical matter. As an artificial mask that enables equalization of different actors, legal personhood is inextricably tied to one's political and human standing. However, Arendt's account also brings to light the fragility of personhood and urges us to look into the various practices and conditions that can end up undermining and diminishing it. As the discussion of deportation and immigration detention underscores, human

rights norms do not provide robust guarantees against this troubling possibility. To the extent **(p.125)** that they affirm not only the principle of equal personhood but also that of territorial sovereignty, these norms are not completely free from “the perplexities of the Rights of Man” analyzed by Arendt.

“Rightlessness” becomes a crucial critical concept in examining the contemporary practices and conditions that can render the legal standing of migrants precarious. This precarity cannot be understood as a condition that is created simply by external factors, though such factors do need to be taken into account, as the discussion of the contemporary normalization of detention and deportation points out. Rightlessness needs to be understood also as a condition symptomatic of the perplexities of human rights. As the detention and deportation cases from the ECtHR underscore, some of the clauses in international human rights law can give rise to the possibilities of eroding the personhood of migrants and rendering their rights dependent on discretionary decisions. These cases indicate the need to conduct critical inquiries into international human rights law to see how “it leaves open the possibility of its own retraction” in certain circumstances.[155]

This argument does not suggest that rightlessness, understood as depersonalization, is inevitable given the tensions between equal personhood and territorial sovereignty. In fact, as highlighted by both of the ECtHR cases, there are different ways of navigating the perplexities of human rights, and some of these ways are more promising than others for the purposes of establishing migrants as equal persons before the law. Attending carefully to these different possibilities, an Arendtian framework refrains from the conclusion that human rights norms are doomed to perpetuate problems of depersonalization or that depersonalization is intrinsic to the concept of personhood.[156]

One of the crucial reasons for rethinking “rightlessness” as a critical concept in an age of rights, then, is the fragility of the guarantees offered by existing inscriptions of legal personhood in international human rights norms. As Arendt’s analysis of statelessness highlights, however, what is at stake in rightlessness is not merely an unmaking of one’s legal status. Rightlessness also denotes a precarious political and human

standing. The next chapter aims to make the case for rethinking “rightlessness” as a critical concept for understanding the plight of asylum seekers and refugees who are confined in camps that deny them the possibilities of participating in the ongoing constitution of a political and human community through their labor, work, and action.

Notes:

(1) Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028 (US Dist. 1993).

(2) Lizzy Ratner, “The Legacy of Guantánamo,” *The Nation*, July 21, 2003.

(3) For the detention of asylum seekers, undocumented migrants, and HIV-positive refugees on Guantánamo, see Dastyari, “Refugees on Guantanamo Bay”; Wilsher, *Immigration Detention*, 240–242. For the marginalization of HIV-positive refugees on Guantánamo, see Shemak, *Asylum Speakers*, 66–69. The 1987 statute barring the HIV-positive foreigners as “inadmissible undesirables” from entering the United States was not repealed until 2010.

(4) International Coalition of Sites of Conscience, “Guantánamo Public Memory Project,” 14, September 2011, accessed April 13, 2012, http://hrcolumbia.org/guantanamo/blueprint.pdf. Guantánamo has long been used as a site for containing undesirables, as highlighted in this report: “The unique qualities of the site—its legal ambiguity, political isolation and geographic proximity, and architectures of confinement—have been used and reused to detain people who fall between the boundaries of legal protections and political imperatives” (3).

(5) Arendt, *The Origins of Totalitarianism*, 295.

(6) Dastyari, “Refugees on Guantanamo Bay,” 7. For the legal challenges faced by asylum seekers in Guantánamo, see also Shemak, *Asylum Speakers*, 52–60.

(7) See Brandt Goldstein, “Guantanamo: The Prequel,” *The Wall Street Journal*, December 4, 2007. In 1997, however, the Inter-American Commission on Human Rights ruled that the US policy of interdicting and forcefully returning Haitian refugees violated several rights under the American Declaration of the Rights and Duties of Man; it listed violations of the right to life, right to liberty, right to security of person, right to equality before the law, right to resort to courts, and right to seek and receive asylum. See The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Inter-American Commission on Human Rights (IACHR), 1997, accessed May 19, 2012, http://www.refworld.org/docid/3ae6b71b8.html.

(8) On “the proliferation of ‘little Guantánamos’ near airports and other border-spaces,” see Feldman, “Terminal Exceptions,” 340.

(9) On the so-called “Pacific Solution,” see Hyndman and Mountz, “Another Brick in the Wall?”; Rajaram and Grundy-Warr, “The Irregular Migrant as Homo Sacer.” It can be argued that Guantánamo served as an example for Australian policies; see Dastyari, “Refugees on Guantanamo Bay.”

(10) See, for example, Basaran, *Security, Law and Borders*, chap. 3; Makaremi, “Governing Borders in France”; Bigo, “Detention of Foreigners.”

(11) Andrijasevic, “From Exception to Excess”; Klepp, “A Contested Asylum System”; Human Rights Watch, *Pushed Back, Pushed Around*. For an Arendtian critique of some of these border control practices, see, for example, Hayden, “From Exclusion to Containment.”

(12) Arendt, *The Origins of Totalitarianism*, 296.

(13) On the shift from citizenship status to legal personhood as the basis of rights within a human rights framework, see, among others, Benhabib, *The Rights of Others*; Cohen, “Changing Paradigms of Citizenship” and “Dilemmas of Arendtian Republicanism”; Jacobson, *Rights Across Borders*; Sassen, “Repositioning of Citizenship”; Soysal, *Limits of Citizenship*. There are notable differences among these scholars, as noted in the Introduction. For a detailed account

of the crucial developments regarding migrants' human rights, see in particular Grant, "Rights of Migrants"; Weissbrodt, *Human Rights of Non-Citizens*.

(14) See, for example, Agamben, *Homo Sacer*; Esposito, *Third Person*.

(15) Bosniak, "Human Rights within One State," 205, 201.

(16) Fassin, *Humanitarian Reason*, 4; see also 264–265n.

(17) See Donnelly, *Universal Human Rights*, 8. For an understanding of rights in terms of "the recognizable capacity to assert claims," see also Waldron, *Dignity, Rank, and Rights*, 50.

(18) See, for example, Bohman, "Citizens and Persons," 331.

(19) See the use of the term "rightless" in *The Origins of Totalitarianism*, 267, 279, 288n, 290, 293, 294, 295, 300; for "rightlessness," see *The Origins of Totalitarianism*, 295, 296.

(20) Arendt, *The Origins of Totalitarianism*, 296.

(21) Arendt, *The Origins of Totalitarianism*, 295.

(22) Arendt, *The Origins of Totalitarianism*, 293–294; see also 296–297.

(23) Keck and Sikkink, *Activists Beyond Borders*, 27.

(24) Keck and Sikkink, *Activists Beyond Borders*, 27.

(25) Arendt, *The Origins of Totalitarianism*, 293–294, 297.

(26) Arendt, *The Origins of Totalitarianism*, 295–296; see also "Guests from No-Man's-Land," 212; "Disenfranchised and Disgraced," 233.

(27) Arendt, *The Origins of Totalitarianism*, 288. Arendt revisits her argument about the precarious legal personhood of the stateless in her discussion of Eichmann's capture in Argentina and prosecution in Israel: "[I]t was Eichmann's de facto statelessness, and nothing else, that enabled the Jerusalem court to sit in judgment on him. Eichmann, though no legal expert, should have been able to appreciate that, for he knew from his own career that one could do as one pleased

only with stateless people; the Jews had to lose their nationality before they could be exterminated." Arendt, *Eichmann in Jerusalem*, 240.

(28) Arendt, *The Origins of Totalitarianism*, 447.

(29) Arendt, *The Origins of Totalitarianism*, 296.

(30) Arendt, "Statelessness," 2; see also *The Origins of Totalitarianism*, 296.

(31) Arendt, *The Origins of Totalitarianism*, 286.

(32) Arendt, "Statelessness," 2; see also *The Origins of Totalitarianism*, 296.

(33) Arendt, *The Origins of Totalitarianism*, 286–287; see also 295.

(34) For this point, see, for example, Guenther, *Solitary Confinement*, xxiv.

(35) Arendt, *The Origins of Totalitarianism*, 283, 286.

(36) Hegel, *Philosophy of Right*, 71. For the Hegelian elements in Arendt's argument about personhood, see Tsao, "Arendt and the Modern State," 127–128.

(37) On civil and social death, see Guenther, *Solitary Confinement*, xviii-xxvii. Arendt's distinction between the stateless and the criminal has achieved a new salience in the contemporary setting. In the so-called War on Terror, the US government detained many of the suspects by referring to violations of immigration law (e.g., overstaying a visa). As David Cole notes, the government's goal was "to avoid those constitutional rights and safeguards that accompany the criminal process but that do not apply in the immigration setting." Cole, *Enemy Aliens*, 34. See also Wilsher, *Immigration Detention*, chap. 5.

(38) Feinberg, "Nature and Value of Rights," 252. See also Honneth, *Struggle for Recognition*, 119–121.

(39) Feinberg, "Nature and Value of Rights," 252.

(40) Arendt, "Guests from No-Man's-Land," 212.

(41) Arendt, *The Origins of Totalitarianism*, 301; emphasis added.

(42) Arendt, *On Revolution*, 106; see also “Prologue,” 12; *Denktagebuch,* vol. 1, 8. For a detailed, illuminating analysis of Arendt’s account of *persona* as mask, see Moruzzi, *Speaking through the Mask*, especially chap. 3. Moruzzi’s analysis centers on questions of social identity and does not go into the topic of legal personhood.

(43) Arendt, “Prologue,” 12.

(44) Arendt, *On Revolution*, 107; see also “Prologue,” 12–13.

(45) See, for example, Noonan, *Persons and the Masks of Law*, 22, 27; Naffine, *Law’s Meaning of Life*, 29–30.

(46) Arendt, “Prologue,” 12.

(47) Arendt, *On Revolution*, 106. This etymology of *persona* is quite contested; see, for example, Trendelenburg, *History of the Word Person*, 6–8. For the etymology of *persona*, see also Mauss, “Category of the Human Mind,” 14–15. Arendt is quite aware of the problems with this etymology, which makes her insistence on using it even more worthy of attention: “Although the etymological root of *persona* seems to derive from *per-zonare*, from the Greek ξωνη, and hence to mean originally ‘disguise,’ one is tempted to believe that the word carried for Latin ears the significance of *per-sonare*, ‘to sound through.’” Arendt, *On Revolution*, 293n.

(48) Dewey, “Corporate Legal Personality,” 661, 660.

(49) See the discussion in Naffine, *Law’s Meaning of Life*, 29–30; see also Naffine, “Who are Law’s Persons?,” 349–350.

(50) Naffine, *Law's Meaning of Life*, chap. 7. James Griffin's work, deriving human rights from the dignity of human beings as normative agents, can serve as a contemporary example. It is important to note that one of the sources that Griffin draws on is the fifteenth-century Italian philosopher Giovanni Pico della Mirandola's *Oration on the Dignity of Man*, which rests on theological assumptions about human dignity, especially the idea that it is God who left man "free to determine his own nature." See Griffin, *On Human Rights*, 31; see also 152. Griffin's secular formulation of dignity as normative agency no longer makes reference to God but still holds on to the idea of an inherent human attribute to which rights are attached. For the theological background of human dignity, see Habermas, "Concept of Human Dignity," 474; McCrudden, "Human Dignity," 658–659.

(51) Naffine, *Law's Meaning of Life*, 358. Even post-metaphysical understandings of human dignity have a tendency to derive human rights from some intrinsically and uniquely human qualities. This idea can be seen in George Kateb's existential understanding of human dignity, which is rooted in the idea that human beings are superior to other species because of their distinctive capacity to serve as the stewards of nature. Kateb, *Human Dignity*; see in particular chap. 3. For an alternative account that takes issue with the efforts to derive human dignity from inherent human attributes, see Waldron, *Dignity, Rank, and Rights*. Waldron underscores the origins of dignity in the idea of rank or status and proposes rethinking the modern notion of human dignity in terms of the universalization of a high-ranking status that was reserved for only the nobility in the past. To highlight the crucial role that law plays in this universalization, Waldron draws on Arendt's understanding of personhood as an artifice created by law. See Waldron, *Dignity, Rank, and Rights*, 20.

(52) Trendelenburg, "History of the Word Person," 21. For the impact of Christian theology on the modern conception of personhood, see Esposito, *Third Person*, 70–75; Mauss, "A Category of the Human Mind," 19–20.

(53) Arendt, *On Revolution*, 107.

(54) Arendt, *The Origins of Totalitarianism*, 277, 301; see also "Guests From No-Man's-Land," 212.

(55) Villa, *Politics, Philosophy, Terror*, 119.

(56) Villa, *Politics, Philosophy, Terror*, 138; see also Dossa, *Public Realm*, 93.

(57) Arendt, *On Revolution*, 108. For an analysis, see also Owens, *Between War and Politics*, 100–101.

(58) Arendt, *The Origins of Totalitarianism*, 299.

(59) Arendt, *The Origins of Totalitarianism*, 301.

(60) In her critical analysis of Israeli citizenship, Leora Bilsky makes a similar point about Arendt's understanding of personhood as an artificial mask: "The mask equalizes by covering the face of the actor. This characteristic of the mask highlights Arendt's inversion of the modern understanding of equality as a natural condition of human beings." Bilsky, "Citizenship as Mask," 74.

(61) Arendt, "Introduction *into* Politics," 94. For a similar interpretation of Arendt in this regard, see Balibar, "(De)constructing the Human," 733–734.

(62) I rely on the following sources in my discussion of *capitis diminutio*: Long, *Notes on Roman Law*, 2–4; Berger, *Encyclopedic Dictionary of Roman Law*, 380–381; Esposito, *Third Person*, 79.

(63) Arendt, "We Refugees," 264–265.

(64) See the entry on "*deportatio*" in Berger, *Encyclopedic Dictionary of Roman Law*, 432.

(65) See the entry on "*interdicere aqua et igni*" in Berger, *Encyclopedic Dictionary of Roman Law*, 507.

(66) Arendt, *The Origins of Totalitarianism*, 297.

(67) For the possibilities of unmaking and diminishing personhood, often through the use of categories and hierarchies established by law, see, for example, Dayan, *The Law is a White Dog*, 40; Guenther, *Solitary Confinement*, 46–47.

(68) Naffine, *Law's Meaning of Life*, 12.

(69) Bosniak, “Human Rights within One State,” 207.

(70) On the precarious personhood of migrants, see Bosniak, “Human Rights within One State”; Dal Lago, *Non-Persons*; Johnson, “‘Aliens’ and the U.S. Immigration Laws”; McKanders, “Sustaining Tiered Personhood.”

(71) Noonan, *Persons and the Masks of Law*, 19.

(72) Noonan, *Persons and the Masks of Law*, 26, 27.

(73) Agamben, *Homo Sacer*, 123–125.

(74) Arendt, *On Revolution*, 187; “Introduction *into* Politics,” 178–179. For the Roman elements in Arendt’s understanding of law, see, among others, Breen, “Law Beyond Command?,” 21–24; Taminiaux, “Athens and Rome,” 176–177; Tsao, “Arendt against Athens,” 109.

(75) Arendt, *The Origins of Totalitarianism*, 301.

(76) Ricoeur, “Approaching the Human Person,” 45.

(77) This sentence draws on Ricoeur’s formulations of personhood; see “Approaching the Human Person.” Axel Honneth offers a similar understanding of personhood, as he suggests that the denial of rights entails not simply “the forcible restriction of personal autonomy” but also the “loss of self-respect, of the ability to relate to oneself as a legally equal interaction partner with all fellow humans.” Honneth, *Struggles for Recognition*, 133, 134.

(78) Brubaker, *Citizenship and Nationhood*, 24. For an analysis demonstrating the problems of denying long-term residents the right not to be deported, see Carens, *Ethics of Immigration*, 100–106.

(79) Walters, “Deportation, Expulsion,” 277; see also Gibney, “Is Deportation a Form of Forced Migration?”

(80) Arendt, *The Origins of Totalitarianism*, 278.

(81) European Convention of Human Rights (ECHR) has an explicitly stated prohibition against collective expulsion of aliens (Protocol No. 4, Article 4). ICCPR does not have such an explicit prohibition, but collective expulsion has come to be interpreted as a measure in violation of Article 13, which

entitles an alien lawfully present in the territory of a state to an expulsion decision reached in accordance with law. For further discussion, see Office of the High Commissioner for Human Rights (OHCHR), “Expulsions of Aliens in International Human Rights Law,” September 2006, accessed May 21, 2012, www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf.

(82) OHCHR, “Expulsions of Aliens,” 17–18.

(83) See Article 33 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol; hereafter, the Refugee Convention. Accessed June 13, 2012, http://www.unhcr.org/3b66c2aa10.html.

(84) See Allain, “*Jus Cogens* Nature of *Non-Refoulement*,” 535; Fabbricotti, “Inhuman or Degrading Treatment,” 658–659.

(85) See Article 33 (2) of the Refugee Convention.

(86) Arendt, *The Origins of Totalitarianism*, 282.

(87) On the securitization of asylum and immigration, see, for example, Bigo, “Security and Immigration”; Huysmans, *Politics of Insecurity*.

(88) Normalization of deportation plays a role similar to the construction of walls in this regard. For an analysis of walls as symptoms of a waning sovereignty, see Brown, *Walled States*.

(89) De Genova, “Migrant ‘Illegality’ and Deportability,” 439.

(90) *N. v. The United Kingdom*, Appl. No. 26565/05, Council of Europe: European Court of Human Rights, May 27, 2008, accessed May 12, 2012. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86490.

(91) Cover, “Foreword: *Nomos* and Narrative.”

(92) Seyla Benhabib, *Another Cosmopolitanism*, 70; see also 48–49.

(93) Cover, “Violence and the Word,” 1601.

(94) See, for example, Bohmer and Shuman, *Rejecting Refugees*; Tuitt, *False Images*.

(95) See Shuman and Bohmer, “Representing Trauma”; Bohmer and Shuman, “Producing Epistemologies of Ignorance.”

(96) Bohmer and Shuman, *Rejecting Refugees*, 11. For the challenges that asylum seekers face in authorizing their testimonies, see also Shemak, *Asylum Speakers*, chap. 1; Simmons, *Human Rights Law*, chap. 6; Tuitt, *False Images*, chap. 5.

(97) Fassin, “Compassion and Repression,” 372. See also Fassin, *Humanitarian Reason*; Ticktin, *Casualties of Care*; Ticktin, “Where Ethics and Politics Meet”; Watters, “Refugees at Europe’s Borders.”

(98) For an analysis of this development, see, among others, Harvey, “Dissident Voices”; see also Fabbricotti, “Inhuman or Degrading Treatment.”

(99) N v. UK, §42.

(100) N v. UK, §47–50.

(101) N v. UK, §44.

(102) N v. UK, §49.

(103) Quoted in N v. UK, §17.

(104) N v. UK, §47.

(105) This statement is from the ruling of the Court of Appeal in the UK; quoted in N v. UK, §16.

(106) Arendt, *The Origins of Totalitarianism*, 288.

(107) Arendt, *The Origins of Totalitarianism*, 296.

(108) Airey v. Ireland quoted in N v. UK, Joint Dissenting Opinion of Judges Tolkens, Bonello, and Spielmann, §6; hereafter Dissenting Opinion.

(109) N v. UK, Dissenting Opinion, §8.

(110) N v. UK, Dissenting Opinion, §26.

(111) N v. UK, Dissenting Opinion, §9.

(112) The dissenting judges ruled out this more promising possibility, as they stressed that they would not offer a different interpretation of the scope of Article 3; they argued that N.'s case concerned civil rights, not socioeconomic rights. See N v. UK, Dissenting Opinion, §6 and §24.

(113) See, for example, Arendt, *The Origins of Totalitarianism*, 300–302.

(114) In this sense, today's asylum seekers are similar to the refugees that Arendt wrote about: "No one really knows what to do with them once compassion asserted its just claim and reached its inevitable end." Arendt, "Guests from No-Man's-Land," 212.

(115) Karara v. Finland (1998), S.C.C. v. Sweden (2000), Bensaid v. UK (2001), Arcila Henao v. The Netherlands (2003), Ndangoya v. Sweden (2004), Amegnigan v. the Netherlands (2004). See the discussion of these cases in N v. UK, §36–41.

(116) Robert Cover, "Violence and the Word," 1628. For an analysis that shows how a humanitarian framework cannot help but sacrifice lives as a result of "either a sorting that emphasizes survival . . . or one that emphasizes severity of need," see Redfield, "Sacrifice, Triage, and Global Humanitarianism," 205.

(117) See the references to this "high threshold" in N. v. UK, §38 and §43.

(118) Agamben, *Homo Sacer*, 139; emphasis added.

(119) See note 115 for the list of these cases. For Agamben's appropriation of this Latin term, see in particular *Homo Sacer*, 71, 82, 139.

(120) Fassin, *Humanitarian Reason*, 119.

(121) Bloch and Schuster, "At the Extremes of Exclusion"; Wilsher, *Immigration Detention*, chap. 6.

(122) Migreurop, "Encampment Map," December 19, 2012, accessed July 7, 2014. http://www.migreurop.org/IMG/pdf/Carte_Atlas_Migreurop_8012013_Version_anglaise_version_web.pdf. For the difficulty of estimates, see also Gorski, Fernández, and Manavella, "Right-Based Approach," 3. For a critical analysis

of the proliferation of “camps” in Europe, see, for example, Duvall, Gündog˘du, and Raj, “Borders, Power, and Resistance.”

(123) Global Detention Project, “France Detention Profile,” last updated April 2009, accessed May 24, 2012. http://www.globaldetentionproject.org/countries/europe/france/introduction.html#c1938. Maximum length of detention was increased from 32 days to 45 days in June 2011. It is also important to note the evolution of time limits for immigration detention since the 1980s; in France, maximum length of immigration detention used to be 7 days in 1981. See Flemish Refugee Action, “Factsheet: The Detention of Migrants in France,” January 2014, accessed July 7, 2014. http://pointofnoreturn.eu/wp-content/uploads/2013/12/PONR_Factsheet_FR_HR.pdf.

(124) Arendt, *The Origins of Totalitarianism*, 279, 284.

(125) Arendt, *The Origins of Totalitarianism*, 286.

(126) For the use of solitary confinement in immigration detention in the United States, see Ian Urbina and Catherine Rentz, “Immigrants Held in Solitary Cells, Often for Weeks,” *The New York Times*, March 23, 2012.

(127) Jesuit Refugee Service-Europe, *Becoming Vulnerable in Detention*, 8, 43–45.

(128) Nina Bernstein, “Companies Use Immigration Crackdown to Turn a Profit,” *The New York Times*, September 28, 2011. See also American Civil Liberties Union of New Mexico, *Outsourcing Responsibility*.

(129) UNHCR, “UNHCR’s Guidelines,” 3–5.

(130) *Saadi v. the United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, January 29, 2008, accessed May 23, 2012. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84709.

(131) Saadi v. UK, §61. In a previous case, Chahal v. UK (1996), the Court had already established that detention for the purposes of deportation was a legitimate measure even if

there was no risk of absconding, provided that it was not indefinite.

(132) Sub-paragraph (f) of Article 5 (1) allows “the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

(133) Saadi v. UK, §47.

(134) Saadi v. UK, §51–53.

(135) Linda Bosniak, “Human Rights within One State,” 210.

(136) Amuur v France quoted in Saadi v. UK, §64; for the discussion of what constitutes “unauthorized” entry, see Saadi v. UK, §65. On this point, see also Cornelisse, *Immigration Detention and Human Rights*, 310–312.

(137) Saadi v. UK, §78; see also §76–77.

(138) Saadi v. UK, §80.

(139) The UK government justified detention of Saadi in these terms; see Saadi v. UK, §18; the majority of the judges agreed with this assessment (§77).

(140) Saadi v. UK, §78. The attempt to give Oakington a humanitarian aura overlooks the fact that “*any* deprivation of liberty involves the state’s monopoly on the use of violence, no matter how ‘relaxed’ (!) the regime at a particular detention centre may be.” Cornelisse, *Immigration Detention and Human Rights*, 308; emphasis in the original.

(141) Saadi v. UK, §25.

(142) On the lack of generally recognized guidelines regarding the maximum duration of detention, see Amnesty International, *The Netherlands*, 23; on the lack of a global definition of what “arbitrary” detention means, see Saadi v. UK, §68.

(143) “Directive 2008/115/EC of The European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally

Staying Third-Country Nationals." Accessed November 21, 2013. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF.

(144) Saadi v. UK, §79.

(145) Saadi v. UK, The Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann, and Hirvelä, 33; hereafter Partly Dissenting Opinion.

(146) Saadi v. UK, Partly Dissenting Opinion, 33.

(147) Saadi v. UK, Partly Dissenting Opinion, 34; emphasis in the original.

(148) Torpey, *Invention of the Passport*, 156.

(149) Arendt, *The Origins of Totalitarianism*, 296.

(150) Saadi v. UK, Partly Dissenting Opinion, 36.

(151) Saadi v. UK, Partly Dissenting Opinion, 32; emphasis added.

(152) Bhabha, "Internationalist Gatekeepers?," 161. It is also important to note that the distinctions that asylum advocates draw between "asylum seekers" and "undocumented immigrants" have come to be abused by states to undermine the credibility of asylum claims, as can be seen in the use of terms such as "bogus asylum seekers." For states' tendency to manipulate these distinctions, see, for example, Dummett, *On Immigration and Refugees*, 44–45.

(153) Roberto Esposito, "The *Dispositif* of the Person," 24. For an analysis of the fissures that borders introduce to the notion of "humanity" within a human rights framework, see Kesby, *Right to Have Rights*, chap. 4.

(154) Esposito, *Third Person*, 74.

(155) Judith Butler, *Precarious Life*, 86.

(156) For this view, see, for example, Esposito, "The *Dispositif* of the Person," 24. As an alternative to "the personhood-deciding machine," Esposito develops a theory of the "impersonal," drawing on figures such as Simone Weil,

Emmanuel Levinas, Michel Foucault, and Gilles Deleuze.

Esposito, *Third Person*, 13; see also chap. 3.