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Amor mundi: Hannah Arendt's political phenomenology of world

Borren, M.

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Chapter 7

The pathologies of in/visibility I: public invisibility and natural visibility. On the stateless and today's illegal aliens

In this chapter, I will explore the pathologies of natural visibility or exposure and public invisibility on the basis of a case study, the historical and current predicament of undocumented aliens. In sections 1 through 3, I will reconstruct Arendt's phenomenology of statelessness and her hermeneutic deconstructions of the intertwinement of the discourses and practices of human rights and the nation state system. In §1, I will sketch her extensive meditations on the lived experience of statelessness in the interwar period in European history. §2 is devoted to an interpretation of these phenomenological reflections and her critical account of the Enlightenment discourse of human rights, in terms of the pathologies of in/visibility. Arendt's deconstructions, I will argue, call for a rethinking of the Enlightenment discourse of human rights. In §3, I will demonstrate the painful relevance of Arendt's phenomenological and hermeneutic reflections up to now, by juxtaposing her account with current Dutch policies and practices concerning aliens.

1. European refugees between the wars

In one of the rare essays in which she reflects on her personal experiences, Arendt gives a personal account of the condition of German Jews, including herself, fleeing the Third Reich.¹ She warns that 'being a Jew does not give any legal status in this world': once they become stateless, they lose the right to protection by 'any specific law or political convention'.² She writes: 'If we should start telling the truth that we are nothing but Jews it would mean we expose ourselves to the fate of human beings who, unprotected by any

¹ Arendt, 'We refugees', JW. Arendt herself was stateless between 1933, the year in which she fled Nazi-Germany, and 1951, the year in which she acquired American citizenship.

² Arendt, 'We refugees', JW, 273.

specific law or political convention, are nothing but human beings.³ In 1940, she had already noticed that post-WW I-Europe witnessed ‘the emergence of a new class of people (...): the *stateless*’⁴. She calls them ‘the most important product of recent history’⁵ and ‘the most symptomatic group of contemporary politics’⁶. In the chapter ‘The decline of the nation-state and the end of the rights of man’ in *The origins of totalitarianism*, she gives a more detailed account of the emergence of statelessness as a mass-phenomenon in pre-totalitarian, inter-war Europe.⁷

The disintegration of multinational and multiethnic states, most notably Russia, the Ottoman Empire and the Habsburg Empire, formed the historical-political context of this account. She relates how at the end of WW I, this disintegration produced two novel groups of people: minorities and stateless people. The successor states created by the peace treaties after the model of the nation-state, such as Yugoslavia and Czechoslovakia, produced minorities consisting of around 30 % of their populations. These emerging groups of minorities had to be protected by laws of exception, by means of the so-called Minority Treaties, which failed more often than not. Additionally, an unprecedented number of refugees was produced, including 1.5 million White Russians, a million Greeks, 700,000 Armenians, half a million of Bulgarians, and hundreds of thousands of Germans, Hungarians and Romanians, who were forced to leave their country and move elsewhere, even though they had nowhere and nobody to turn to and, in fact, became stateless. The two legitimate ways of solving the problem within the limitations of national sovereignty were nationalization⁸ or repatriation, i.e. expulsion. While nationalization procedures broke down, repatriation and expulsion were no longer possible; the first because the country of origin usually refused to take the refugee back; the second because he had become

³ Arendt, ‘We refugees’, JW, 273.

⁴ Arendt, ‘The minority question’, JW, 128.

⁵ Arendt, ‘The minority question’, JW, 127.

⁶ OT, chapter 9.

⁷ On Arendt’s account of human rights and the rights to have rights, see Cohen, 1996; Isaac, 1996; Michelman, 1996. Since the beginning of this century: Benhabib, 2001, 2002a, 2002b, 2002c, 2002d, 2004a, 2004b, 2004c, 2007; Balfour and Cadava, 2004; Balibar, 2001, 2004 and 2007; Wilde, 2008; Cotter, 2005; Parekh, 2004, 2007, 2008a and 2008b; Butler, 2007; Birmingham, 2006, 2007; Hamacher, 2004; Bauman, 2002; Jalusic, 2007; Krause, 2008; Menke, 2007; Brunkhorst, 1996; 2008; Rancière, 2004; Heuser, 2008; Owens, 2005; Bernstein, 2005; Heuer, 2007; Williams, 2002, 2005; Lang and Williams, 2005. On Arendt’s account of and criticism of the nation-state and nationalism, see Blättler, 2000; Canovan, 1999; Tsao, 2004; Mahrtdt, 2005.

⁸ ‘Nationalization’ means ‘naturalization’. In order to avoid confusion, however, I use the term ‘naturalization’ solely to denote the process of the reduction of human beings to specimens of natural man as described in chapter 6.

‘undeportable’.⁹ So the masses of stateless persons revealed the breakdown and legitimization crisis of all the main political and juridical institutions and ideals of interwar Europe; not just of the nation-state system, but of the human rights regime as well.

The key to the stateless refugee’s predicament, Arendt argues, is the loss of ‘his place in a community’, of ‘his political status’ and ‘the legal personality which makes his actions and part of his destiny a consistent whole’.¹⁰ As a consequence, he 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.’¹¹

This predicament would repeat itself innumerable times afterwards, for example in the case of the Jews fleeing the Third Reich after 1933, and of the expulsion of Palestinian Arabs after the foundation of the state of Israel in 1946. Already during the war, Arendt accused the Zionist leaders of simply overlooking the ‘Arab problem’, being too preoccupied by the thought that ‘the people without a country needed a country without a people.’¹² The foundation of the state of Israel, inspired by Theodor Herzl’s Zionist ideology, which Arendt regarded as ‘Jewish nationalism’, effectively left the Arab Palestinians ‘the choice between voluntary emigration or second-class citizenship’¹³ and led to ‘the creation of a new category of homeless people, the Arab refugees.’¹⁴

In both cases, the problem of minorities and the stateless, the nation-state turned out to be incapable of serving as a guarantee of civil rights. Looking back on the peace conferences following WW I, Arendt observes that ‘all politics dealing with minorities, and not just with the Jews, have foundered on the existent and abiding fact of state sovereignty.’¹⁵ The precursor of the UN, the League of Nations, which was supposed to relieve the negative consequences of national politics, was not able to offer a political solution, because it had no binding force of law and ‘turned out to be a club that one could resign from whenever one wanted.’¹⁶ Proposing a depoliticizing cultural solution, by offering minority rights in order to secure ‘cultural autonomy’¹⁷, the League of Nations could not bring about any change in the ‘underlying state of affairs’, that is, the fact that these people could not participate in politics on a par with the national majority. Arendt concludes: ‘Culture without politics - that is, without history and a national context -

⁹ OT, 276.

¹⁰ OT, 301.

¹¹ OT, 301.

¹² Arendt, ‘Peace or armistice in the Middle-East?’, JW, 432.

¹³ Arendt, ‘Zionism reconsidered’, JW, 343.

¹⁴ Arendt, ‘Peace or armistice in the Middle-East?’, JW, 444.

¹⁵ Arendt, ‘The minority question’, JW, 127.

¹⁶ Arendt, ‘The minority question’, JW, 127.

¹⁷ Arendt, ‘The minority question’, JW, 126.

becomes vapid folkloristics and *Volk*-barbarism.¹⁸ In the case of the stateless, the principle of national sovereignty again proved to be a serious hindrance to a political solution.¹⁹

Arendt's reflections in the 1940's and early 1950's on the experiences of statelessness, displacement and refugeeship contain *in nucleus* many of the intuitions about the meaning of politics that would later guide her phenomenology of the political. Her reflections on, and experiences of, statelessness contain all 'essential motifs' she would elaborate theoretically in *The human condition*, such as plurality, action, opinion, freedom and world.²⁰ I read her account of the predicament of the stateless as featuring the simultaneity of the two pathologies of political action and citizenship I described previously: obscurity, due to public invisibility, and exposure, due to natural visibility. The stateless refugee is the exemplary non-citizen, the exact opposite in every respect of the citizen. Her condition is antithetical to political action, that is, to participation in public space. Indeed, the key to participatory visibility is the right to belong to a political community, i.e. political membership. She suffers simultaneously from harmful visibility and harmful invisibility. First, because she is deprived of her legal personality and her ability to appear through words and deeds in the space of appearances, which renders her publicly invisible. And, second, because she is reduced to organic life; I will call this the 'naturalist reduction'.²¹ This reduction did not emerge as a consequence of malicious intentions of governments in the first place, i.e. in the years following WWI, but of the contradictions of the system of the nation-state, on the one hand, and human rights declarations, on the other hand; two institutions which heritage is still very much alive and problematic. I will explain this argument in detail in the next section.

¹⁸ Arendt, 'The minority question', JW, 128-129.

¹⁹ For this reason, Brunkhorst's (2008, 155) argument that Arendt failed to appreciate the 'great and deeply ambivalent advances of the modern European nation state' and harboured a 'too rosy picture' of the sovereign European state, is simply wrong. She would have defended a 'bulwark theory of the nation-state', arguing that the nation-state protects us against *internal* imperialism. Brunkhorst quotes the following excerpt from the English translation of the German version of *The origins of totalitarianism (Elemente und Ursprünge totaler Herrschaft)*: 'Until now the greatest bulwark against the unlimited domination of bourgeois society, against the conquest of power through the mob and the introduction of imperialistic politics in the structure of Western states has been the nation-state. Its sovereignty, which once was supposed to express the sovereignty of the people, is now threatened from all sides.' However, this quote cannot be found in *The origins of totalitarianism*, nor in *Elemente und Ursprünge totaler Herrschaft*.

²⁰ Cf. Bernstein, 2005, 58: 'Statelessness, the sudden loss of political rights (...) was the basic phenomenon that provoked [Arendt's] reflections (*Nachdenken*) on the meaning of politics.'

²¹ See chapter 6.

2. The in/visibility of stateless refugees

Arendt argues that the miserable fate of stateless people reveals that the modern nation-state system is based on the contradiction between, on the one hand, its universalistic claim to the discourse of human rights and, on the other hand, the particularism and naturalism of the principle of national sovereignty; a contradiction she describes as a ‘deadly sickness’, which therefore inevitably breaks down.²² However, the relationship between human rights and national sovereignty is not only ‘conflict-ridden’, but also simultaneously one of dependence, for the human rights regime is dependent upon the cooperation and consent of sovereign nation states.²³ The stateless refugee is the one who reveals both the concealed contradictions, and their breakdown, Arendt asserts. The nation-state is founded upon the tension between two equally constitutive principles, on the one hand, its universalistic principle of legal equality of all its residents; and on the other hand its naturalist principle of national sovereignty. Due to the latter, the nation-state turns out to be factually unable and unwilling to treat non-national aliens, including those without a nationality whatsoever, i.e. stateless people, as legal persons; and as such undermines the first principle. It is important to stress that the problem of refugees and statelessness is not just a problem of totalitarian regimes, though these may ‘have done the most to produce the uprootedness and misery of the refugee’, but also, and more disturbingly, of liberal democracies.²⁴

Arendt demonstrates that this state of affairs can be traced back to the prehistory of the discourse of human rights. Our current discourses and practices of respectively civil and human rights simultaneously came into being in the wake of the French Revolution as they were articulated in the first declaration of human rights of 1789. This led to the unwitting identification of human rights with civil rights from the very start. As a consequence, the universal identity of being human, that is, the ‘man’ of the ‘rights of man’, converged with the national identity of being citizen. This convergence is expressed in the title of the 1789 declaration of human rights, the *Déclaration des droits de l’homme et du citoyen*. This convergence implies that the ideal of human rights is thoroughly imbued with a naturalist and nationalist, and therefore exclusive, restrictive, arbitrary and deterministic logic, which gives the lie to its supposed universalism. The high-minded ideals of universal

²² OT, 290.

²³ ‘The rights of man are neither inalienable nor universal and (...) the principle of state sovereignty can be used to deny individual rights and to produce refugees. The full realization of human rights is not possible both because of and in spite of state sovereignty. The relationship between state rights and human rights is simultaneously one of conflict and of dependence (of the latter on the former), and refugees are the manifestation of this conflict-ridden, but dependent, relationship.’ (Cotter, 2005, 100).

²⁴ Cotter, 2005, 96.

human rights turn out to conceal a false inclusivism. This contradiction constitutes no less than a bomb underneath both the politics of the nation-state system, and the human rights regime.

Like the identification of human and civil rights, a similar identification of citizenship with nationality is implicitly presupposed in the discourse of human rights. The fact that even formal UNHCR documents use these notions interchangeably, testifies to the strength of this identification to the point that it has been naturalized, that is, has become a matter of fact, and is no longer noticed any more. The principle of the modern nation state holds that only those people who are either born on the territory of a particular state, or from have parents who are nationals of that state, are regarded as citizens of that state. The first principle is called *jus soli*, 'right of soil', i.e. territory, and is traditionally followed as a policy to determine one's citizenship in France and Anglo-Saxon countries, for example the US. The second principle, on the other hand, is *jus sanguinis*, 'right of blood', i.e. ethnicity, and has traditionally been applied in Germany until 2000, and also, for example, in The Netherlands since 1984. Consequentially, citizenship, i.e. political membership, is grounded on birth within a certain territory or within a certain ethnic group. The ideology of the modern nation-state system thus ties citizenship to the arbitrary conditions of one's birth, *natio*.²⁵ Note that this argument also implies that, according to Arendt, human nature is the secret of human rights as well, since, human rights and citizenship coincide. She argues that the modern nation-state system is based upon two contradictory principles: the state or civic principle of legal equality, that is constitutionalism or the *Rechtstaat*; and the national principle of sovereignty or nationalism; be it based on blood, i.e. ethnicity or *jus sanguinis*; or soil, i.e. territory or *jus soli*. The nation-state system is the product of 'the conquest of the state through the nation' in the nineteenth century.²⁶ In this system, national interest, embodied in the principle of national sovereignty, gradually acquired priority over legal institutions as a consequence. As soon as national interest became prevalent over considerations of common interest, the former 'precarious balance'²⁷ between the two collapsed into absolute national sovereignty, i.e. into nationalism. Note that Arendt takes issue with the condition of nationality, rather than statism.²⁸ Indeed, membership in or

²⁵ Although Arendt is primarily referring to *jus sanguinis* and its presupposition of ethnic homogeneity, since as a former German citizen she knew this particular type of nation-state intimately. The ideal of ethnic homogeneity is still very much alive in most societies today, both at the level of popular sentiments and in the rhetoric of some politicians. Recently, at least in the Netherlands, it has lost some popularity to the ideal of cultural homogeneity, although it still remains to be seen if this does, actually, have a different referent.

²⁶ EU, 208.

²⁷ OT, 275.

²⁸ I use the term 'statism' in a normatively neutral sense, as 'constitutionalism' or *Rechtstaat*.

belonging to a state, a polity, is a *conditio sine qua non* for human dignity. Nationality, however, is exclusive, arbitrary and restrictive as a matter of course for it is grounded in natural, immutable properties one can do nothing about, that is, in birth within a particular territory or ethnic group. A universally given human property, biological birth, i.e. nativity, that should be the basis of the human condition of natality and universal inclusion, i.e. the right to belong to some political community, is tied in a deterministic and arbitrary way to natural boundaries, territory or ethnicity, which are subsequently naturalized into nationality. For legal citizens, the convergences of Man, citizen and national are unproblematic, to the point that they will not even notice them, because the convergences are naturalized and concealed. For Arendt natality, though inextricably related to nativity, is opposed to any form of naturalization, for she regards it as a human condition instead of a definition of human nature.²⁹ And since political organization in modernity is fully determined or monopolized by the nation-state system, those without a nationality have nowhere to turn to. Geographically, the nation-state system operates as an all-encompassing global system, or what Oliver Marchart calls a *Globus*, as opposed to *mundus*, world.³⁰ For under conditions of the nation-state system ‘there is no longer any ‘uncivilized’ spot on earth, because, whether we like it or not, we’ve really started to live in One World.’³¹ But actually, it is a closed economy with a leak in it. The nation-state system produces its own outside, through which a residual group of people, those without a nationality, are excluded inevitably and irreversibly, only to become completely invisible. As I will argue in a moment, it turns out that the camp is the sole space left over in this system for those who pass through the leak. ‘Die Lager sind die einzige Patria die die Welt dem Apatriden anzubieten hat’³².

The ambiguities of human rights, citizenship, nationality and human nature are illustrated by the tension between the second and third articles of the 1789 *Déclaration des droits de l’homme et du citoyen*. The second article reads: ‘The aim of all political association is the preservation of the natural and imprescriptible³³ rights of man. These rights are liberty, property, security, and resistance to oppression.’ Subsequently, the third article states: ‘The principle of all sovereignty resides essentially in the nation. No body or individual may

²⁹ See chapter 2 for the difference between a ‘human condition’ and ‘human nature’. Corresponding to what, respectively who we are, nativity and natality are distinct but not separated: the capacity to start something new is grounded in (though not reducible to) the immutable biological feature of birth. Cf. the distinction between the ‘principle of givenness’ and the ‘principle of initium’ (Birmingham, 2006, 2007).

³⁰ Marchart, 2005.

³¹ OT, 297.

³² Arendt, 1955, *Elemente und Ursprünge Totalitärer Herrschaft*, 594; OT, 284.

³³ I.e. inviolable.



Figure: Representation of the *Déclaration des droits de l'homme et du citoyen*, 1789.

exercise any authority which does not proceed directly from the nation.³⁴ As a consequence, only nationals, i.e. natives, can be citizens, and only citizens can have ‘inalienable’ human rights. In other words, human rights, Arendt argues, can only be protected through civil rights, which can only be claimed by nationals, though one would expect the protection of human rights to pertain to those individuals who have lost the very protection of a nation-state against arbitrary violence in the first place. Born under an unlucky star, a human rights regime came into being that was in name supposed to protect the weak and the stateless, but in fact accomplished the reverse. Due to a weaving fault, those people who need the protection of human rights most, are actually benefited least. In a world governed by the nation-state system, human rights claims are powerless. At best, they are a sign of a ‘hopeless idealism’, but more often than not they operate like a ‘fumbling feeble-minded hypocrisy’³⁵, covering up the incapacity of the sovereign nation-state to grant non-citizens, i.e. non-natives, human rights. The nation-state system does not provide for a political community for every individual, as a result of a structural and irresolvable friction or conflict between national sovereignty and universal human rights. This state of affairs is completely independent from the intentions of its individual officials, whether or not benevolent. In fact, Arendt writes about the phenomenon of statelessness between the two wars, ‘no ill will was involved’.³⁶ Instead, it is the result of structural and irresolvable frictions and conflicts within the discourses of the nation-state and human rights. In this system, a passport, i.e. national citizenship, is the most precious thing a human being can possess. As Kalle, one of the two protagonists of Brecht’s *Flüchtlingsgespräche*, has it at the start of his ongoing conversations with Ziffel, another refugee from Nazi Germany in Helsinki’s station buffet, sometime at the beginning of WW II:

Der Paß ist der edelste Teil von einem Menschen. Er kommt auch nicht auf so einfache Weise zustande wie ein Mensch. Ein Mensch kann überall zustande kommen, auf die leichtsinnigste Art und ohne gescheiterten Grund, aber ein Paß niemals. Dafür wird er auch anerkannt, wenn er gut ist, während ein Mensch noch so gut sein kann und doch nicht anerkannt wird.³⁷

It is by no means sure that the assumptions of the 1948 UN Universal declaration of human rights (UDHR) are less naturalist than the 1789 French *Déclaration*. The recent experiences with totalitarianism had bred an acute awareness of the significance of national

³⁴ *Déclaration des droits de l’homme et du citoyen*, 1789. See the caption of the picture of the 1789 *Déclaration*: ‘Aux representans du peuple François’ (figure).

³⁵ OT, 269; cf. EJ, 271.

³⁶ Arendt, 1955, ‘Statelessness’, paragraph 7.

³⁷ Brecht, 2000, opening.

citizenship for one's legal status. The drafters of the UDHR were aware of the difficulties that come with a naturalist basis of human rights, Serena Parekh writes. Indeed, 'the debate over the extent to which 'nature' should be called upon to ground human rights became one of the central debates during the entire process of drafting'.³⁸ Article 14.1. states that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' and article 15: '(1) Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' Still, this awareness is highly ambiguous, since human rights are still related to human nature. They are deemed inalienable, as is illustrated in the first preamble: '[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Furthermore, its first article is almost identical to the first article of the French declaration of 1789, stipulating that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'³⁹

In our days, the legacy of the naturalism of both human rights declarations is still alive and kicking, both in transnational migration policies and practices, and in theoretical justifications of human rights. In a discussion on contemporary philosophical justifications of human rights, Parekh calls this still influential position 'essentialist'. Typical for its adherents, she writes, is that they 'base their justification of human rights on some essential feature of the human being or morality'.⁴⁰ Prime examples of philosophers defending such an essentialist justification of human rights include prominent and widely read philosophers such as Amartya Sen and Martha Nussbaum who justify human rights by referring to the 'capabilities' and needs of human beings as such, in their natural state. Parekh includes Sen, for example, among the essentialists because 'he seems to take for granted a kind of moral realism - that moral principles exist independently of human recognition or power relations, and that they simply need to be discovered. In other words, he is assuming that morality is in some way natural and independent of human action.'⁴¹

Arendt, on the contrary, argues that rights, including human rights, are constructs, conventions based on promises. Only belonging to a concrete, artificial, political community, not to the human species, guarantees the granting of rights. Her phenomenology of statelessness shows that the predicament of the stateless is marked by the consequences of a series of convergences: human rights - civil rights or citizenship - nationality - human nature. Since they are not born on the territory in which they are

³⁸ Parekh, 2007, 763-64.

³⁹ UN, 1948.

⁴⁰ Parekh, 2007, 763.

⁴¹ Parekh, 2007, 767-68.

residing and do not possess a national identity, that is, a passport, stateless people are not considered citizens and hence cannot claim human rights protection. Their experience is marked first of all by a loss, and second by their shifting human status. The stateless have lost membership of a political community, that is, the worldly space in which actions are performed and seen, opinions articulated and heard. The essence of the condition of the stateless is their deprivation of membership of any political community, 'a place in the world which makes opinions significant and actions effective'⁴². The 'calamity' of the stateless

(...) is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion (...) but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them (...) [T]heir freedom of opinion is a fool's freedom, for nothing they think matters anyhow. (...) Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice (...) They are deprived, not of the right to freedom, but of the right to *action*; not of the right to think whatever they please, but of the right to *opinion*.⁴³

In sum, stateless refugees suffer from public invisibility. Secondly, an anthropological shift occurs, because the stateless are reduced to members of *homo sapiens* and therefore 'thrown back (...) on their natural givenness'⁴⁴ or 'the abstract nakedness of being human'⁴⁵.

[T]hey begin to belong to the human race in much the same way as animals belong to a specific animal species. The paradox involved in the loss of human rights is that such a loss coincides with the instant when a person becomes a human being in general - without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself - *and* different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.⁴⁶

The stateless are just visible as natural man. Along with their public visibility to the world, they lose the quality that renders people human, that is, their unnaturalness, those aspects of human existence and modes of human being-together which are irreducible to organic

⁴² OT, 296-97.

⁴³ OT, 295-96.

⁴⁴ OT, 302.

⁴⁵ OT, 299.

⁴⁶ OT, 302.

life, but refer to the artificiality and constructed character of both the world and its citizens. In other words, they lose their natural invisibility in the world. The metaphor of the mask draws attention to the protection against exposure required for political action and speech. People need a political community, which guarantees protection through the establishment of legal institutions and rights. As a consequence of forced demasking, the deprivation of legal protection, both the paradox of citizenship, i.e. of disclosure and concealment⁴⁷, and the paradox of plurality, i.e. of equality and difference⁴⁸, break down. The latter breaks down, when the norm of equality is no longer guaranteed by the constitution, civil rights, the law, etc. Difference, our unique perspective on the world, evaporates. Political equality gives way to natural sameness, the naturally given similarity of human beings. Indeed, Arendt holds that equality is not an inalienable human property, but only comes into being as soon as people start to act and speak vis-à-vis each other in public space and mutually grant each other equal rights, equal treatment before the law, equal educational opportunities, etc. In other words, equality is an effect of an operation of equalization.⁴⁹

How did this naturalization, the reduction of the stateless to natural man, proceed? Just like some decennia later at the gates of Auschwitz Jews were deprived of their juridical and moral personality, the stateless were robbed of their mask of legal personality, which left them solely with their 'humanity'.⁵⁰ This process started with de-nationalization, followed by restrictions and even the abrogation of the traditional right to asylum. Next, the problem of statelessness was transferred from the nation-state to the police. Since the stateless person is an 'anomaly for whom the general law did not provide'⁵¹, she become subject to the police's arbitrary and unrestricted rule.

They are put under police observation, but [the] police now loses its constitutional character of being only the executor of law and becomes the legislator as well as the executor. (...) What happens to these people under police rule is no longer the concern of anybody. With their citizenship they lost as it were the contact with mankind.⁵²

Without ever having committed a crime, the stateless refugee can be apprehended and incarcerated at any given moment, since someone without the right to residence and work

⁴⁷ See chapter 6.

⁴⁸ See chapter 2.

⁴⁹ See chapter 2, the paradox of difference and equality.

⁵⁰ 'The Nazis who were such legal pedants therefore always were careful to deprive those whom they intended to exterminate of their citizenship. First, Jews who were deported and every Jew who had left the country lost his citizenship (1940). Second (...) [they stipulated?] that the people of the Eastern occupied territories do not have any 'Staatsangehörigkeit'.' Arendt, 1955, 'Statelessness', paragraph 12.

⁵¹ OT, 286.

⁵² 'Statelessness', paragraph 11 and 12.

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‘had of course constantly to transgress the law’.⁵³ What is more, being a criminal or an enemy alien in times of war is preferable to being a stateless refugee, since the law does recognize and validate the criminal, respectively the enemy alien, by virtue of the criminal or hostile act he commits. In other words, the criminal’s and enemy alien’s mask is respected. ‘The distinction [between stateless people and the criminal] shows their rightlessness in terms of domestic law; the [distinction between stateless people and the enemy alien in times of war] in terms of international law.’⁵⁴ Prisoners of war ‘can be interned according to certain international conventions. Their status [is] always supervised and much better than that of refugees whose only refuge was the Legion Étrangère.’⁵⁵ In contrast, the refugee’s ‘treatment by others does not depend on what he does or does not do’⁵⁶.

[W]hat happen[s] to [the criminal is] the consequence of a deliberate act and [it puts him] not at all outside the law. The police has a very restricted right to deal with him. His punishment is his right and again it is regulated by law. Jail and food is given him not out of charity but out of right. [For the] stateless no deliberate act [is] necessary, but his mere presence. [He has] no right to stay anywhere, not in prison either. Except [when] he commits a crime (...) normalization [befalls him] (...) through being an exception to the norm.⁵⁷

So, being stateless means being rightless: ‘everything can be done, only decency or charity preserve the right to live.’⁵⁸ This leads to the absurd situation, a reversal, in fact, of ‘the entire hierarchy of values which pertain in civilized countries’, that committing a crime improves a stateless person’s situation.⁵⁹ The question around which all discussions about the ‘refugee problem’ revolve, Arendt argues, is: ‘How can the refugee be made deportable again?’⁶⁰; cynically adding in a 1955 lecture, ‘as though being deportable is the highest right.’⁶¹ Finally, the extension of the police’s competence in dealing with the stateless paved

⁵³ OT, 286.

⁵⁴ ‘Statelessness’, paragraph 10.

⁵⁵ ‘Statelessness’, paragraph 10. As we today know, flagrant violations of these international conventions, i.e. the Geneva convention, occur, with Guantánamo Bay as its sad acme, identifying the non-state enemy combatant to illegal aliens. The French Foreign Legion has traditionally been composed of enlistees from countries suffering social or political crises. For example, before and during WW II, many Eastern-European Jews fled to France and enlisted in the Legion.

⁵⁶ OT, 296. cf. ‘the objective enemy’ (422-24).

⁵⁷ ‘Statelessness’, paragraph 10.

⁵⁸ ‘Statelessness’, paragraph 12.

⁵⁹ OT, 286.

⁶⁰ OT, 284.

⁶¹ ‘Statelessness’, paragraph 8.

the way for the establishment of internment camps, as the only remaining solution for dealing with the stateless. Each and every of the successive measures, that is, denationalization, expulsion, the abrogation of the right to asylum and the interment of people in camps, were formally recognized as rights pertaining to nation-states by virtue of their sovereignty.⁶²

The political catastrophe of statelessness is comprised by the reduction of individuals to the naked naturalness of being-nothing-but-human, of being human-all-too-human or to 'bare' or 'naked' life, with Agamben's phrase.⁶³ Human dignity, Arendt demonstrates, does not refer to some natural quality, but only flourishes under conditions of plurality and publicity, that is, in participatory visibility and natural invisibility, under the protection of legal rights. It has nothing to do with respecting a supposedly inalienable human nature, but can only come about through the sheer artificiality of a man-made world, agreements between people and membership of a shared common and public world. This points to a fundamental lack in the discourse of human rights, namely the incapacity to formulate its own condition. This condition is what Arendt calls 'the right to have rights', which is 'the right to belong to some kind of political community at all'⁶⁴. What ultimately determines the regrettable fate of the stateless individual is not so much that he or she has lost civil rights and therefore human rights, but that she has no 'right to have rights'. The discourse of human rights is not able to address the real problem of stateless people, that is, that they do not belong to a community whatsoever. As a consequence, stateless people lose all significance as well as their human dignity and sense of meaningfulness, since, according to Arendt, to live a truly human life is to live a political life. Obscurity and exposure means having no right to have rights; it consists, from the point of view of the stateless, in the spread of rightlessness.⁶⁵ However, the spread of rightlessness affects citizenry as well; not because citizens are like the stateless, which as rights bearing nationals they obviously are not, but because person's rightlessness implies 'the spread of lawlessness' which corrupts society as a whole as well. 'If we look at the whole of our civilization, then the fact of statelessness and our incapacity to deal with it shows clearly that there is a danger from within, that lawlessness or destruction may come through processes of decay.'⁶⁶

⁶² 'Sovereign right of expulsion' (OT, 283).

⁶³ Agamben, 1998.

⁶⁴ OT, 296-97.

⁶⁵ Arendt here refers to Nazi practices and 'logics': 'If we ask ourselves what the danger is, the best answer may again be taken from the ruthless extremism of Nazi-logics: foundling is 'stateless' as long as his racial belongings has not been determined.' ('Statelessness', paragraph 14, 4).

⁶⁶ 'Statelessness', paragraph 14, 4

In sum, the stateless reveal the false universalism and naturalism of the sovereign nation state system, the fact that human nature is the principle of citizenship and human rights, and, moreover, that non-natives are excluded and reduced to the ‘nakedness of being human’⁶⁷.

Rethinking human rights and the nation-state

Arendt's phenomenology of the condition of statelessness and her hermeneutic deconstructions of the human rights regime and the nation state system, thus seems to end on a rather dark note. In *The origins of totalitarianism*, she is clear as to what communities can not live up to the ideal of regaining citizen's participatory visibility and protecting natural man's invisibility: neither the nation-state, nor the human rights regime; the reason being that they are both complicit in the logic of naturalization which is the very problem of statelessness. Neither, though, did she support the alternative of a sovereign ‘world-government’.⁶⁸ In her view any mode of sovereignty should be suspected as being grounded in the confusion of politics with rule. In her mind, the political, as the realm of freedom, does not allow for sovereignty.⁶⁹ The abolishment of the plurality of states would, she fears, lead to a police state.

Still, Arendt was not opposed to human rights *per se*. Rather, she challenged the unfortunate historical foundations of our present human rights discourse and its consequences. Hers is an internal criticism of human rights, calling for another discourse, rather than a frontal attack, I believe. Hence I disagree with both scholars who argue that Arendt rejected human rights *tout court*⁷⁰, and with those who argue that Arendt simply supports human rights.⁷¹ Since human rights are historically grounded in nationalism, they may not be effectuated to protect those without nationality. So she basically shows the failure of the human rights regime, despite its good intentions, as something that is highly ineffective or empty, due to its intertwinement with the sovereign nation-state. The only sensible interpretation of the notion of human rights is to belong to a common world that takes responsibility for individuals' right to have rights. Both in earlier and later pieces⁷²,

⁶⁷ OT, 299.

⁶⁸ Cf. her essay ‘Karl Jaspers, citizen of the world’, MDT, 81-94. Arendt argues about the absurdity and impossibility of a sovereign world government: ‘a forbidding nightmare of tyranny’ and ‘the end of all political life as we know it’ (81). Cf. Kant's fear for a ‘global Leviathan’. The unity of mankind and Jaspers concept of ‘world citizenship’ does not consist in a world government but in ‘limitless communication’.

⁶⁹ For Arendt's critique of sovereignty, see chapter 3.

⁷⁰ Cohen, 1996, for example.

⁷¹ Isaac, 1996; Parekh, 2007, for example.

⁷² Arendt, ‘The minority question’, JW; ‘The rights of man’. What are they?, Modern Review, 1947; ‘The social question’, OR; epilogue to EJ.

Arendt envisaged alternatives to both the nation-state and a world government: first, a European or cosmopolitan federalism and, second, a reformulation of human rights. Hence I disagree with those scholars who hold that Arendt was too pessimistic.⁷³ In 1940, she favored federalism as an alternative to the sovereign nation-state grounded in a homogenous national identity. Only a (European) federation, regarded as a non-sovereign, civic association, could dissolve the ‘Trinitarian unity’⁷⁴ of nation, state and territory, she thought.⁷⁵

The notion that nations are constituted by settlement within borders and protected by their territory is undergoing a crucial correction. (...) There may soon come a time when the idea of belonging to a territory is replaced by the idea of belonging to a commonwealth of nations whose politics are determined solely by the commonwealth as a whole. That means European politics - while at the same time all nationalities are maintained. (...) [B]elief in a single homogenous European nation is belief in a utopia - and not a pretty one at that (...) But I do not think it is utopian to hope for the possibility of a commonwealth of European nations with a parliament of its own.⁷⁶

She first proposed it as a political solution to the ‘Jewish question’. The Jews, she argued in 1940, ‘are the first to have an interest in pan-European politics’ since they are Europeans, but as a minority did not constitute a nation. The only chance of the Jews - ‘our sole salvation’ and ‘indeed the only chance of all small peoples’ - she argued, ‘lies in a new European federal system’ in which minority people are recognized and ‘represented in a European Parliament’. ‘If everything were to play out very well, they might be the forerunners of a new Europe.’⁷⁷ In post-WW II pieces she additionally pleaded for a reformulating of human rights and the establishment of supranational organs of law for the

⁷³ Benhabib, 2002a; Powers, 2004, among others. The American genocide-scholar Samantha Powers, for example, argues that ‘Arendt’s suspicions about the false promise of liberal internationalism were well-founded, but what she underestimated was the intrinsic appeal of human rights principles around the world - a resonance that has resulted more in the bottom-up promotion of human rights than in the top-down protection envisaged in 1948’: Amnesty International, Human Rights Watch, but, above all, ‘far more important than international human rights groups’ are ‘the hundreds of thousands of indigenous human rights groups... throughout the developing world’: ‘It is with these groups that hope lies.’ (Powers, 2004, 36). Equally, though, I disagree with Agamben, that Arendt was justly pessimistic, since in Agamben’s work all her normative concepts such as equality, human dignity and the right to have rights disappear. Cf. Menke, 2007, for a similar argument.

⁷⁴ Bauman, 2002.

⁷⁵ Heuer, 2007; Cohen, 2006. See chapter 8 in which I elaborate Arendt’s preference for the council-model of democracy.

⁷⁶ Arendt, ‘The minority question’, JW, 129-30.

⁷⁷ Arendt, ‘The minority question’, JW, 128-30.

exclusive purpose of guaranteeing the right to have rights, that is, the right to wear the mask, parallel to supranational courts pursuing crimes against humanity. The UN, being and international organ of sovereign nation-states, principally fails to meet this end.⁷⁸ All other rights, she thought, could be guaranteed by international law that respects nation-states' sovereignty. Arendt may have drawn her inspiration from the American Bill of Rights, which she compared favorably to the French *Déclaration des droits de l'homme et du citoyen*. Whereas the latter was grounded in life itself or ζωή, formulating the right to the fulfillment of basic material needs, after the French Revolution; the former was formulated after the American Revolution and meant to check and control state sovereignty in order to protect human beings as citizens and to guarantee basic rights.⁷⁹

3. Today's in/visible aliens

Today's predecessors of the stateless refugees Arendt described, are the global masses of people - the UNHCR estimates their number at more than 28 million worldwide⁸⁰ - who are stateless *de jure* or *de facto*, including refugees, asylum seekers and illegal immigrants.⁸¹

⁷⁸ In the epilogue to *Eichmann in Jerusalem* she judges harshly about Eichmann's trial. Her criticism did not concern the verdict, but the juridical arguments that were used to arrive at it and the legitimacy of the court in Jerusalem. Both failed gravely in the light of the crimes committed. She emphasizes that the national Socialist regime committed crimes that were unprecedented. Still, Eichmann was sentenced to death by an already existing tribunal, i.e. the national Israeli court, for an already existing crime, i.e. crimes against the Jewish people. Arendt passionately argues that Eichmann should have been put to trial for crimes against humanity, by an international court.

⁷⁹ OR, 108-09.

⁸⁰ As of the beginning of 2009. This number includes 10.5 million 'refugees of concern to UNHCR', 4.7 million displaced Palestinians (registered as refugees in camps in the Middle East of United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), more than 0.8 million asylum-seekers of concern to the UN refugee agency and an estimated 12 million stateless people (UNHCR, 'Figures at a glance', consulted March 2010).

⁸¹ International law acknowledges that refugees and asylum seekers may formally, i.e. *de jure*, be national citizens, though *de facto* be stateless. The distinction between statelessness *de jure* and *de facto* is implicitly recognized in the UN's *Convention relating to the status of refugees and stateless persons* (1951), art. 1, lid A, sub 2: 'As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is *unable*, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' For political reasons, international law does not recognize illegal immigrants as stateless, i.e. as entitled for asylum. In the light of the argument of this chapter, this should not come as a surprise. The regulation of immigration

Not everyone in the world today is a citizen, i.e. national. Not everyone enjoys, *de jure* or *de facto*, citizenship, i.e. nationality, in the country in which she is residing. Reversely, besides citizens, including those who have successfully passed through and completed an asylum procedure and foreign residents with a permanent staying permit, many nation-states contain on their territories substantial amounts of more or less permanent non-citizen residents. Who are these non-citizens? They consist of a heterogeneous group of people, who, for a variety of reasons, left their country of origin, living on foreign soil without either willing or being able to apply for citizenship. This group of non-citizen persons includes those who are not (yet) legally recognized as refugees, stateless persons, civilians as well as non-state enemy combatants, and illegal immigrants. A second group of non-citizens comprise those who do not enjoy citizenship but have not left their countries, so-called internally displaced persons. Apart from the latter group, highly generally speaking, this group results from increasing transnational migration flows.

Philosophers only recently started to take serious the challenge transnational migration poses to their theoretical frameworks, based as a matter of course on the nation-state system. Seyla Benhabib argues that the shifting status of the nation-state as a consequence of increasing global migration, constitutes a theoretical challenge to liberal political philosophy, including, I would add, its deliberative democratic versions, in particular to John Rawls' work. In her view, the theoretical self-understanding of current liberal democracy lags behind the sociological facts of late modernity. Especially the fiction of present nation-states as closed societies and the state-centeredness of most schools of political thought needs adjustment.⁸² Philosophical reflections on normative issues, including human rights, provoked by globalization and migration predominantly go under the heading of global or international justice, mainly addressing juridical and moral issues. Instead, I will investigate the critical force, relevance and currency of Arendt's politics of visibility in the context of the problems of statelessness and refugeeship. The merit of Arendt's reflections on statelessness is that she helps us understand and reflect upon some of the most pressing and complex questions which haunt political arenas, imagination and philosophy today. Her reflections challenge us to think beyond the confines of our conventional moral and political vocabulary, most notably the very concepts of the nation-state and human rights. All of these were more like problems than adequate answers to the global political condition Arendt witnessed. Her account may serve as a critical tool for understanding and reflecting normatively on the political predicament of statelessness.

and the formal acknowledgment of refugees as asylum seekers are traditionally seen as the main and clearest prerogatives of nation-states by virtue of their sovereignty.

⁸² Benhabib, 2004 a; cf. Pogge, 2007 and Fraser, 2005.

Chapter 7

Obviously, much has changed, seemingly to the benefit of refugees and stateless people. Formally, ethnicity is no longer a ground for exclusion, for example due to antidiscrimination laws. Politically, in Europe, the federative ideal seems to have been realized in the shape of the European Union, as it gradually came into existence after WW II. Legally, much has changed for the better in the realm of international law and human rights since Arendt wrote her chapter on the problem of statelessness. However, to start with the first, in issues and policies concerning immigration, the EU operates in fact like a super nation-state, just shifting the inner borders of the individual member nation-states to the outer borders of Europe, the so-called Fortress Europe. It seems that Arendt has been too optimistic in 1940 when she embraced the European ideal.

Whereas in Arendt's days, statelessness constituted an inner-European problem, today's non-citizen residents in Europe, including refugees and illegal immigrants, come from countries outside the European Union. Developing a common European asylum and immigration policy has lately been given priority. Example of the current politics of in/visibility include the underground existence of illegal immigrants in the EU, who frequently fled from former nation-states that have fallen apart, ranging from anonymous African castaways, washing ashore on the Spanish beaches, to the illegal immigrants camping in the no-man's land just outside of Calais awaiting flight to the UK as stowaways. They do not formally exist for the French government, an official declared lately, since they obviously do not register as asylum seekers. Their sole appearance consists in being watched by CCTV surveillance cameras.

I suggest that, in the context of the Netherlands in the present-day, the pathologies of the visible are primarily found among certain categories of aliens and particular asylum seekers involved in an application procedure. These consist in undocumented aliens trying to make a living in Dutch society, and non-convicted undocumented aliens in custody, who suffer the consequences of an increasingly restrictive migration policy, in addition to the emergence of a regime of control, surveillance and identification of aliens. Disturbing parallels stand out between the successive measures that Arendt observed Western-European nation-states take against stateless refugees in the first half of the twentieth century, on the one hand, and the way in which the Netherlands and other Western-European countries currently deal with asylum seekers and undocumented immigrants, on the other hand. I will point out three parallels. First, over the last two decades we have once again become witness to ever more restrictive European immigration and asylum policies. This process produces new groups of illegal aliens in Western European countries and refugees haunting the outer borders of the European Union. As a Human Rights Watch report notes: 'Over the past several years, the Netherlands has left behind its traditionally protective stance toward asylum seekers to take up a restrictive approach that

stands out among Western European countries.⁸³ In 2001, the Dutch Aliens Act 2000 entered into force, for the purpose of revising ‘the existing legislation on the admission and expulsion of aliens, the supervision of aliens who reside in the Netherlands, and border control’. Its primary aim was to speed up and improve decision-making in asylum cases and to make ‘problems surrounding immigration’ ‘more manageable’ (catchword: ‘Clearer rules, shorter procedures’)⁸⁴. One of the key instruments in this objective was the adoption of the ‘accelerated application procedure’⁸⁵ that demands the full processing of an initial application within 48 hours. Since the initiation of this course of action, 60% of all applications in the accelerated procedure have been rejected.⁸⁶ The number of asylum application in the Netherlands has decreased dramatically over the last few years. In 2000, 44.000 people applied for asylum in the Netherlands; in 2004 this number has dwindled to 9.800.⁸⁷ This fact made Rita Verdonk, the contemporary Minister for Immigration and Integration, conclude that the Aliens Act had ‘proven to be successful’⁸⁸; a remark that nurtures the impression that the reduction of the number of asylum seekers in itself had been one of the objectives of the new asylum policy.

A number of authoritative organizations have criticized Dutch migration and asylum policies recently, especially after the implementation of the 2000 Aliens Act.⁸⁹ In 2006, the Commission evaluating the Aliens Act, commissioned by the government, concluded that there is ‘evidence that decisions established in the accelerated procedure are indeed less meticulous than those established in the normal procedure.’⁹⁰ The brevity of the application procedure affects functionaries’ meticulousness, and especially increases the risk of *refoulement*, i.e. of the deportation of applicants to unsafe countries. Reformulated in Arendtian terms, the careless and unfair execution of the procedure deprives the applicants of their protective mask of legal personality.⁹¹ Human Rights Watch and the UNHCR

⁸³ Human Rights Watch, 2003, executive summary.

⁸⁴ Ministry of Justice, 2004, 1.

⁸⁵ ‘AC-procedure’ means ‘asielprocedure in het aanmeldcentrum’, asylum procedure at the application centre, or the so-called ‘48 hour procedure’.

⁸⁶ Human Rights Watch, 2003, executive summary.

⁸⁷ IND, 2010, ‘Cijfers en rapportages’.

⁸⁸ Ministry of Justice, 2006, 4.

⁸⁹ UNHCR Committee against Torture, 2007; Human Rights Watch, 2003; Council of Europe Parliamentary Assembly, 2005.

⁹⁰ Commissie Evaluatie Vreemdelingenwet, 2006, 24; translation mine. Cf. asylum lawyer Frans-Willem Verbaas’ account of the asylum policy from within, 2005.

⁹¹ This is not to say that undocumented aliens are completely de-juridified, devoid of any rights. Children have a right to education and in life-threatening situations illegal aliens can claim first medical aid. However, for a number of reasons, illegal aliens do hardly ever use these rights.

Commission against Torture warned that the Dutch migration policy violates the principles of the 1951 Convention and protocol relating to the status of refugees (the Refugee convention for short⁹²). As in Arendt's days, this criticism appears to be without consequence. The Dutch government does not show interest in these warnings - nor, as a sovereign state, can she be forced to do so. The 'rights of Dutchmen' take precedence over the 'rights of man', with a variation on the line by Edmund Burke that Arendt quotes frequently.⁹³

Secondly, the Aliens Act of 2000 assigned wider responsibilities in tracking down illegal immigrants to the police, and extended this competence to other public officials as well. In a leaflet that the Ministry of Justice issued to inform the public on the Aliens Act, this is formulated as follows: 'The Aliens Police and the Royal Military Constabulary have the right to check and see whether aliens are lawful residents in the Netherlands. They may stop them, ask them for identification and take them away for questioning if they suspect that they are illegal immigrants. They may also stop vehicles, confiscate travel and identity documents and, if they suspect unlawful residence, enter a home without the owner's permission.'⁹⁴ Since 1994, the year in which the Restricted Compulsory Identification Act ('Wet op de uitgebreide identificatieplicht') was put into force, police officials have been entitled to request of people in public spaces that they show their identity documents in the case of a 'reasonable suspicion' of illegal residence.⁹⁵ They may do so 'whenever this is reasonably required during the course of their duties'⁹⁶. Questioned about the effectiveness of compulsory identification as a means of increasing public security and safety, the policy aim of the act, the Minister of Justice, Mr. Donner, in fact, paved the way for arbitrary and unrestricted police action by defending the enforcement of compulsory identification to the parliament as follows: 'It is about the police operating more efficiently. This is sure to contribute to security, to the sense of security and the atmosphere of security.'⁹⁷

Moreover, since then, other 'supervisors' ('toezichthouders')⁹⁸, that is, public officials other than the police, are also entitled to request the submission of identification documents. Employers may also request employees to show their ID. Although the restriction of illegal immigration is not the aim of compulsory identification – since 2005, it

⁹² UN, Refugee convention, 1951 / 1967.

⁹³ OT, 175-184 ('The rights of Englishmen vs. the rights of man'), 299; OR, 108-09, 148. Burke argued against political systems based on abstract 'rights of man' and called for concrete and particular civil rights instead, the 'rights of Englishmen' (Burke, 2001 [1790], 183).

⁹⁴ Ministry of Justice, 2004, 14.

⁹⁵ Aliens Act, section 50.

⁹⁶ Politiewet ('Police Act') 1993, section 8a; Compulsory Identification Act, 1994, section 2; translations mine.

⁹⁷ Volkskrant, January 15, 2005. All translations of Dutch newspapers' articles are mine.

⁹⁸ Compulsory Identification Act, 1994, section 2.

has applied to everyone on Dutch territory over the age of 14 - it obviously has major consequences for undocumented aliens.⁹⁹ The implementation of the Linkage Act ('Koppelingswet') in 1998 has reinforced these consequences. This act excludes undocumented aliens from entitlement to most rights, public provisions, services and benefits, by means of linking the entitlement to rights with one's residence status. It stipulates that only Dutch citizens and immigrants who legally reside in the Netherlands are allowed to lay claim to public provisions, such as social benefits. If an undocumented alien nevertheless applies for public provisions, the 'relevant body' may report her to the police 'although it is not obliged to do so'¹⁰⁰. Deterrence and discouragement of illegal residence are the aim of this act.

Aside from these Dutch laws and measures, European conventions and accords are equally relevant for aliens. The Dublin Convention, implemented in 1997¹⁰¹, was established in order to coordinate the application process for asylum seekers among the EU member states. The primary aim of the convention is to prevent asylum seekers from applying in multiple member states. They are obliged to apply in the member state that they first entered and are excluded from any further applications in other member states. In order to facilitate the implementation of European migration policies, comprehensive and technologically advanced systems of identification, surveillance and registration are being developed, the results of which are stored in databases and subsequently integrated into European networks. These systems join information and communication technologies, on the one hand, and biometric devices, taking fingerprints, iris scans, X-ray and DNA

⁹⁹ Obviously, reliable figures on undocumented aliens are not available. Estimates of their number vary between 78,000 and 88,000 non-European illegal aliens and between 40,000 and 60,000 European illegal aliens on a yearly basis (Heijden et al, 2006; Engbersen et al, 2002) On the one hand, due to the expansion of the number of EU member-states, the number of European illegal aliens will decrease. On the other hand, it is expected that the number of undocumented immigrants will rise as a consequence of the increasingly stricter Dutch migration and asylum policy. Not everyone whose application is rejected leaves the Netherlands but some go into hiding; and many others simply do not initiate a procedure because of their low chance of success and, instead, settle illegally on Dutch territory right away. Research commissioned by the Dutch Ministry of Justice states that they estimate that the number of illegal non-Europeans between April 2005 and April 2006 comprised between 62,000 and 114,000; and the number of European illegal aliens between 12,000 and 70,000 (Heijden, 2006). Four years before, Engbersen et al. had estimated the number of illegal non-Europeans between 65,000 and 91,000; and the number of European illegal aliens between 47,000 and 72,000 on a yearly basis. They expected real figures to be higher, as many undocumented aliens keep indoors to lead a shadow life (Engbersen et al, 2002).

¹⁰⁰ Ministry of Justice, 2004, 8.

¹⁰¹ Signed in 1990. Present signatories are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, the United Kingdom, Austria, Sweden, Finland and Switzerland.

identification technologies, on the other hand. Sociologist Godfried Engbersen, the leading Dutch expert on illegal residence, convincingly argues that these systems of administrative internal migration control - its agents are public officials and professionals protecting public institutions and the labor market from the intrusion of illegal immigrants - increasingly replace external border controls in European countries. The most appropriate metaphor for European immigration policies is no longer that of a 'fortress', but of a 'panopticon'.¹⁰²

Rodhan Al Galidi, a poet who fled to the Netherlands from Iraq, has meticulously documented his experiences as an asylum seeker and, finally, as an undocumented immigrant in weekly columns in regional Dutch newspapers.¹⁰³ What catches the eye is the abundance of bureaucratic measures and rules he encounters. In a column titled 'Captive' ('Gevangen'), he writes:

Yes, I'm a captive. Both my soul and my body are. Not even in the prisons I've been in, did they succeed in doing so. That only happens in the Netherlands. (...) No prison in countries which are said to be unfree, affects the soul. She is free. Strong. Even in the harshest of prisons. But here... They are so shrewd that they are even able to catch the soul. (...) They have my fingerprints. If I leave for another country which takes my asylum case seriously into account, they will return me to the Netherlands, because it is here that I first handed in my fingerprints.¹⁰⁴ I changed my name in order to flee my native country. Should I cut off my hand and fingers and throw them away so as to be able to leave the Netherlands? (...) Sometimes I sense that Saddam Hussein's shoes are fairer than the heads of the COA's¹⁰⁵ employees. You can flee Saddam Hussein, unlike the COA. Saddam kills your body. These people kill your very heart and soul.¹⁰⁶

After that, he describes his fortnightly trips from the Asylum seekers centre to stamp documents at both the police office and the COA, an obligation which appears to be subject to, at least seemingly, arbitrary change of rules, which both the COA's officials and the police refuse to explain.

Arendt could not possibly have foreseen the current force and omnipresence of technologically enabled regimes of surveillance and identification. She was aware that

¹⁰² Engbersen and Broeders, 2007, 1595.

¹⁰³ Such as *De Gelderlander* and *De Leeuwarder Courant*.

¹⁰⁴ Al Galidi is referring to the Dublin Convention that aims at preventing asylum seekers from submitting applications in multiple EU member states.

¹⁰⁵ COA is *Centraal orgaan Opvang asielzoekers*, the Dutch organization in charge of the reception of asylum seekers, in particular through managing asylum seekers centres.

¹⁰⁶ Al Galidi, 2002, 34-35; translation mine.

technology, as a mode of work, or making, is only able to make visible what we are, never who we are. Through new information and communication technologies and biomedical technologies, the scope of natural, i.e. naturalizing, visibility is taking off. At the same time, natural visibility increasingly has to be taken more literally than Arendt could ever have imagined given the level of technological progress. Advanced technologies penetrate the body, right into the very cells out of which it is composed, in order to identify the individual with what he is by nature, namely someone who is born at this or that time, to such and such parents, furnished with a so-and-so shaped body, etc.

Increasingly, however, these regimes of surveillance are extended to include everyone residing on the nation-state's territory, its citizens as well. The state's legal citizens are also subject to a breathtaking expansion of registration and surveillance measures and techniques, which directly affect the protection of their private lives and bodies. Salient examples include the introduction of compulsory identification; the near-omnipresence of camera surveillance in public space; the obligation to submit fingerprints when applying for a passport¹⁰⁷; the installation of smart power meters in domestic residences; the substitution of regular public transfer tickets by chip cards registering one's personal details, etc. This is enabled by the joined effects of innovations in information and communication technology, and transformations within the juridical apparatus, which are increased, though not initiated, by the so-called war on terror after September 11, 2001. Especially the augmented competences of the police threaten citizens' privacy, i.e. their natural invisibility. The shared features of the pathology of privacy, on the one hand, and the pathology of illegality, on the other hand, are the exposure of life itself, national and personal identity; and the impairment of civil rights. Arendt already saw sharply the state's tendency to extend control to all its residents: "The clearer the proof of [the nation-state's] inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police."¹⁰⁸

A third and final parallel between Arendt's observations and current practices and policies concerning illegal aliens, is the resurfacing of the question of 'how to make the refugee deportable again'. The current Aliens Act provides for a 'return policy' for those asylum seekers whose application is rejected, including forced expulsion of those who refuse to leave. Along with undocumented aliens, the Dutch state detains non-convicted asylum seekers who have exhausted all legal procedures pending their expulsion. Under Section 59, the Aliens Act allows for the restriction or deprivation of an alien's freedom of

¹⁰⁷ In the Netherlands as of October 2009.

¹⁰⁸ OT, 290.

movement in certain cases in order to prevent someone going into hiding to avoid deportation.¹⁰⁹ Next to undocumented aliens who have been apprehended in the street and asylum seekers whose application has been rejected and are detained in order to be expelled, another group of non-convicted aliens in custody are those who entered the Netherlands by air- or seaports, in most cases Schiphol Airport, and who cannot lay claim to residence. Under section 6¹¹⁰ of the Aliens Act, all of these aliens are detained in border custody straight away. The aim of this measure is to prevent entry into the Netherlands. Some of them apply for asylum and have to await the procedure in custody, known as the so-called ‘Closed OC-procedure’¹¹¹. These applicants are detained for 100 days on average; but peaks of 381 days have been reported.¹¹² At a rough estimate, 22,000 non-convicted aliens are detained in the Netherlands per year, which amounts to 31% of the total population of prisoners.¹¹³ Many of them are not incarcerated in regular prisons, but in expulsion centers, detention boats, police cells and on secret locations. The detention of non-criminal aliens is a relatively recent development, operating within a ‘juridical twilight zone’¹¹⁴. Although the detention conditions of aliens is a ‘black box’ as far as the world is concerned, both human rights organizations and penal law scholars have provided evidence that these are worse than those of convicted criminals. The detention of non-criminal individuals violates basic principles of penal law, in particular the principles of *ultimum remedium*, of ‘minimum restrictions’ and of ‘resocialization’¹¹⁵. Basic rights are violated in custody, such as the right to privacy. Most of the undocumented aliens are kept under a regime of ‘restricted community’, i.e. solitary confinement, which is usually only inflicted on extremely violent criminal detainees. Unlike convicted criminals, they are detained for an indefinite period of time. Moreover, under-aged children are detained.¹¹⁶ Applying the basic test Arendt devised to detect de-juridification is revealing: ‘The best criterion by which to decide whether someone has been forced outside the pale of law is to

¹⁰⁹ Aliens Act, Section 59, 1: ‘If necessary in the interests of civil order or national security, our Minister may, with a view to expulsion, order the remand in custody of an alien who is not lawfully a resident.’

¹¹⁰ Aliens Act, Section 6, 1. ‘An alien who has been refused entry into the Netherlands may be required to stay in a space or place designated by a border control officer’; 2. ‘A space or place as referred to in subsection 1 may be secured against unauthorised departure.’ And Vc 2000, A5/2.2.3.

¹¹¹ OC means ‘Onderzoek- en Opvangcentrum’, investigation and reception centre.

¹¹² Vogelaar 2007. Investigation by the Dutch Refugee Council Association (VluchtelingenWerk Nederland), commissioned by the UNHCR. Cf. Boone 2003, 305.

¹¹³ Kalmthout, 2007.

¹¹⁴ Kalmthout in NRC, December 14, 2005.

¹¹⁵ Boone, 2003.

¹¹⁶ Boone, 2003; Kalmthout, 2007; Human Rights Watch 2003. In February 2008, it was announced that a law is in the making that prohibits the detention of under-aged children for over 14 days.

ask if he would benefit by committing a crime.’ If that indeed improves one’s legal position, ‘one may be sure that he has been deprived of human rights.’¹¹⁷ ‘I don’t know for how much longer I will be detained. If I had committed a crime, that for sure would have been clear’, a Polish man in alien detention reported recently.¹¹⁸

The difficulty of nationalizing, assimilating, or repatriating refugees combined with the comprehensiveness of the nation-state system, has led to the production of groups of individuals whose citizenship has been suspended, sometimes indefinitely, and whom could be called in-between-, semi-, and factually even non-citizens. Corresponding to the suspended legal status of undocumented aliens, refugee reception centers, the back rooms of immigration offices in airports and asylum-seekers detention centers, etc. abound, that from a legal point of view could be called ‘non-places’, i.e. ‘u-topia’s’¹¹⁹. Governments increasingly take recourse to the construction of places with an in-between status, for example the detention centers for undocumented aliens already mentioned and sites created within the juridico-political framework of the Australian government’s euphemistically called ‘Pacific Solution’, among which most notoriously the island of Nauru.¹²⁰ The EU is currently considering setting up similar offshore ‘asylum seeker processing centers’ in North Africa.¹²¹

Law, bureaucracy, i.e. policy measures and practices, and technology align to produce a significant group of in-between or semi-citizens within Dutch society, in particular asylum seekers involved in an application procedure; undocumented aliens trying to make a living in Dutch society; and non-convicted undocumented aliens in custody. They are subject to procedures of identification obsessed with establishing national identity, i.e. their

¹¹⁷ OT, 286.

¹¹⁸ Volkskrant, June 23, 2006.

¹¹⁹ See Introduction to Part III, n.20.

¹²⁰ The ‘Pacific Solution’ was the name of the Australian policy between 2001 and 2007 of transporting asylum seekers to detention camps on small island nations in the Pacific Ocean which were previously excised from Australian territory, in order to prevent them from landing on the Australian mainland and from applying for a visa or asylum. On these excised islands, they had no right to apply for either a visa or asylum.

¹²¹ Although it is a detention place for so-called ‘non-state enemy combatants’, instead of undocumented immigrants, Guantánamo Bay, is of course another example of such a non-place that essentially follows the same logic. I will return to this argument in the Conclusion. BBC News reported that ‘the European Union has agreed to help to finance five United Nations projects inside Africa aimed at dealing with asylum seekers.’ (BBC News, October 1, 2004). These ‘projects’ consist of camps destined to process asylum seekers outside the EU, in North Africa, before they reach European territory. At the same time, a proposal was launched for an EU-wide asylum agency, or, in the words of the EU’s Dutch presidency, for ‘the establishment of a European office in matters relating to the common European asylum system’ (Daily Telegraph, October 2, 2004). The UNHCR questioned the legality of such camps, asking under what legal code these would be managed.

ethnicity and place of birth or nativity, and mapping and storing the unique surface of their bodies by means of their fingerprints, iris scans, photos and videos; as well as the interior of their bodies, that is, their bones through X-Ray; and DNA, as ways of establishing what rather than who they are. The ultimate aim of identification is to tell legality from illegality, that is, those who are to participate in this nation from those who are not, and thus to decide upon expulsion. As non-nationals, they are only human, due to the convergence of nationality and citizenship; as non-citizens, the human rights regime is unable to change their situation, due to the convergence of civil rights and human rights.

The politics of in/visibility simultaneously features regimes of exposing and regimes of obscuring; the first severely impairing aliens' natural invisibility, the latter their participatory visibility. Due to the weakening of their legal status, they are more or less deprived of the protective mask one needs to enter the space of appearances. They are at the mercy of authorities' arbitrary decisions, since nobody, literally, sees or can control what happens to them. This is especially pressing for undocumented aliens, either those in detention or those trying to make a living in Dutch society. Since they obviously do not register as asylum seekers or residents, and hardly ever apply for benefits, 'as a matter of principle' they do not 'exist' for the authorities¹²², nor does society at large see them. This means that they are invisible and are deprived of the capacity to appear as a who, as is illustrated in many accounts of undocumented aliens. As an undocumented Moroccan who had been in custody for over half a year said: 'I know I don't exist. That's simply how things are.'¹²³ And after a fire broke out in a detention centre at Schiphol Airport on October 27, 2005, killing 11 illegal immigrants, one of the survivors reported in a newspaper interview: 'I thought: if I should die, I've been nobody. I don't exist here. (...) Only if I can talk, will I know that I do exist again.'¹²⁴

An evaluation of the 'effectiveness, efficiency and legitimacy' of the Linkage Act, commissioned by the Ministry of Justice, also concludes that its implementation has not succeeded in reducing the existing counts of illegal residence and labor, nor in deterring new aliens from settling here illegally, but has merely 'increased chances of creating a permanent marginalized group within our society'.¹²⁵ In other words, rather than doing away with undocumented aliens, the Linkage Act renders them ever more invisible, i.e. obscure. It has succeeded in recreating, in striking similarity, the desperate predicament of the stateless that Arendt has analyzed so perceptively more than half a century ago.

¹²² NRC, September 8, 2001.

¹²³ Volkskrant, June 23, 2006.

¹²⁴ NRC, November 5, 2005.

¹²⁵ B&A groep, 2001, 25.

The politics of in/visibility produces a large number of non-citizens within Dutch society, who are simultaneously obscured and exposed. Illegal immigrants have recently developed various strategies of what I think might best be called self-obscuration, that is, of making oneself invisible. Undocumented aliens are the one group who, at the level of individuals, though not as a group, benefit from maintaining, supporting and even increasing their invisibility, through manipulation or even obfuscation of their personal and national identities. Engbersen lists three major counterstrategies that he joins under the heading of creating ‘foggy social structures’: the adoption of a false identity, through purchasing false identification documents; the obliteration of one’s identity, by destroying documents; and, finally, hiding one’s illegal status from others. Some of them resort to the withdrawal from the public sphere altogether to stay at home semi-permanently. Illegality, he argues, is an ‘invisible status’, in that the undocumented aliens tend to go out of their way to hide it from others out of fear of abuse. As an illegal immigrant, public visibility is obviously dangerous, risking deportation at any time. Their lives are therefore ruled by secrecy, the ‘essential characteristic of their social identity’¹²⁶, or what I would call self-induced obscurity. This feature, Engbersen argues, is the main point of divergence between undocumented aliens, on the one hand, and other marginalized groups, on the other hand.¹²⁷ Undocumented immigrants are ‘shadow people’¹²⁸; they are forced into underground existence, that is, public invisibility, to lead a ‘shadow life’ in the ‘twilight zone’ of society.¹²⁹ Although self-obscuration proves to be a fairly successful strategy for mere survival in preventing identification and expulsion, it is politically irrelevant. Their natural invisibility is certainly not conducive to participation. Due to strategies of self-obscuration, illegal aliens are almost dead to the world, since they neither appear as who, i.e. citizen, nor as what, i.e. man.

In conclusion, Arendt’s account of the politics of in/visibility seems to have lost none of its critical force, as interlocking regimes of obscuring and exposing are still operative within Dutch society. Moreover, the modern discourse of human rights, as it emerged after the French revolution, is still very much alive, both within political theory and in political practices and policies concerning transnational migration, among others. Meanwhile regimes of exposure have emerged that undermine even further the already precarious political status of the nation state; the fact it is based on a contradiction it cannot solve and becomes exacerbated ever more. And the careful hope Arendt invested in a federal European community seems to have been even too optimistic.

¹²⁶ Engbersen, 2001, 241.

¹²⁷ Engbersen, 2001; 2007.

¹²⁸ Ivereigh, 2007.

¹²⁹ Engbersen, 2001, 243.

Chapter 7

I hope to have demonstrated that increasing police control as a solution to the problem of illegal immigration, is not going to solve the political problem of the nation state, that is, the contradiction between the universalistic principle of human rights protection, on the one hand, and the nationalistic, that is, naturalist and restrictive, principle of sovereignty, on the other hand. Amplifying policing eventually increases the exposure of all people residing in its territory, illegal aliens as well as legal citizens, turning the nation slowly but surely into a police state.

