

Between *Nomos* and *Natality*

Hannah Arendt on the "stateless"-condition*

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No, we will say that the politicisable is not 'in relation' with individuals or democratic decisions, but, 'in taking-up' [*en-apport*], it is provided by individuals and un-taken-up [*dé-porté*] by philosophy.

François Laruelle, 2012

Introduction

In a globally organized system, in which nation-states are the primary construct for legitimate communal political order, the category of statelessness appears as a failure of the matrix. Where does a stateless person come from? Where does s/he belong? Stateless people are neither obtainable in law, nor are they able to appeal for those rights that are grounded within state's frontiers. Stateless people possess neither a history of national belonging, which may turn them from individuals into subjects of rights, or in members within a political community. As Arendt stated, statelessness represents the lack of a place in the world, which she describes as the "rightless condition".

As one of the most important thinkers of the 20th century, Hannah Arendt (1906-1975) occupies a significant place within modern political thought. She contributed to the analysis of totalitarian political systems and regimes within Europe, as well as to theoretical reflections on the conditions or requirements for politics –such as the need of a

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public space and the meaning of participation as equal members in the discussion about public matters and in the search for common solutions. Nowadays, her writings are of great inspiration for post-metaphysical and post-essentialist philosophical approaches¹ as well as for postmodern and feminist political thought.²

Given that Arendt's political philosophy contains both, liberal and republican elements, finding a consensual label for her thinking is not an easy task. Yet, the first main distinction of Arendt's political philosophy seems to be the one she drew from essentialist philosophy refuting a natural conception of politics. In opposition to Aristotle, Arendt negated the precondition of human existence as political, and thereby, of the human as being naturally a political animal (Arendt 1958: 32). In doing so, she also refuted a nature-based grounding of human rights (Arendt 1951: 275). She neither searched to formulate a utopic order nor to discover universal moral prescriptions.

Instead, she sought to gain consciousness over the situations and experiences that provoked her to see the world as the way she did. Arendt pursued a reflection about the present, which cannot be isolated from her personal life-experiences. What she proposed is a "reconsideration of the human condition" (Arendt 1958: 3-5). Matters about the present conveyed such sincere theoretical search. Still, Arendt did not strive to formulate a universal theory of global justice.

In this paper, I intend to revisit Arendt's analysis on statelessness in order to discuss the latest developments in continental Europe's political geography. The reconstruction of the Arendtian hypotheses on statelessness should guide a reflection on the contemporary relationship between national territory, state and illegality in this continental region. My analysis on her conception of statelessness is concentrated in two main categories: *nomos* and *nativity*. By *nomos*, I refer to the meaning of legal bounding of space in Arendt's political theory, whereas by *nativity*, I address her political philosophy in regards to the phenomenological reconstruction of political existence. The scrutinizing of these concepts shall be undertaken as an attempt to re-localize the political- philosophical content of these terms within the actual geo-politicization context of Europe. The contemporary scenario shall be evaluated in the re-definition of European borders through the Schengen Agreement and the conception of European citizenship.

Through the diachronic analysis between Arendt's analysis on statelessness and the current European geopolitical ordering, I shall first scrutinize Europe's new political geography and second, the borders delimiting the political (non-)belonging within and without Europe.

This paper consists of three main parts. In part one, I shall present the juridical definition of statelessness and then contrast it with Arendt's understanding of it. Part two includes an analysis for evaluating the validity or cessation of Arendt's hypotheses on this subject. Part three offers a small resume and some critical observations.

1 For the literature used in this paper see: Richard Bernstein (2005) and Seyla Benhabib (2006).

2 See: Bonnie Honig (1995); Mary Dietz (2002); Judith Butler and Gayatri Spivak (2007).

What does “statelessness” mean?

The category of statelessness was recognized as a legal problem at the beginning of the 20th century. Yet, it was after the Second World War, that the legal connotation of this issue was reinforced with a political meaning. Once the United Nations called the International Community for caring about statelessness as a matter of global concern, the concept was for the first time defined as an international political matter.

The relatively recent politicization of this phenomenon and, consequently, the young public character of statelessness as an inter-national problem, are revealed in the lack of an academic definition. Among anthropological lexicons, there is no consensus on the definition of statelessness.³ One of the reasons may be the difficulty to refer to stateless-collectivities such as communities, nations, or ethnic groups, without classifying them normatively within a barbarian-civilization scale. Among lexicons of political theory, the word “statelessness” does not even show up.⁴ If one can speak of a consensus at all, one should refer to the legal definition of statelessness presented in the Convention Relating to the Status of Stateless Persons (1954), in which Article One states: “For the purpose of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law”.⁵

This legal definition of statelessness gives three characteristics of the subject-matter. Statelessness represents an individual state of being (embodied in a “stateless person”) given by the lack of belonging to a state; besides, it stands for an exceptionally, legally inter-national regulated status, which, at the same time, makes reference to the absence of (regular) state’s protection granted to citizens; finally, it denotes a phenomenon which jeopardizes the political order within the state’s national territory as well as between states, and requires the assistance of the International Community in order to prevent it.

Statelessness is etymologically a negative term in that it denotes the personal loss of membership and hence, the incapability to be recognized as member of a political community. In other words, it makes reference to the loss of a political identity.

Hannah Arendt, who spent thirty years of her life as a stateless person,⁶ embraces the subject of statelessness imminently in many of her writings. Yet, she granted to it special attention in her book *The Origins of Totalitarianism* (1951). In this book, Arendt analyses three forms of *puissance* (*Gewalt*) in distinction to political forms of power: i.e. anti-Semitism, imperialism and totalitarianism. In Chapter 9, polemically entitled “The Decline of the Nation-State and the End of the Rights of Man”, Arendt linked the second with the third part of the book. Her critique on human right is thus localized between the

3 The controversial barbarian-civilization distinction is either taken for granted in classical ethnologic works, in which statelessness is associated with barbarism. Considered, for example, the negative or exceptionalist connotation of nomads within social anthropology. Nomad, or stateless, as Balibar suggests may be define as warriors who plunder the sedentary populations (Balibar 2004: 15f). The association between barbarism and statelessness is completely rejected in ethnic and Black studies. See for example: Tiyanabe (2003).

4 See for example Koselleck (2004); Nohlen/Schultze (2005); Robertson (1993).

5 The complete convention is found at: <http://www2.ohchr.org/english/law/stateless.htm>.

6 In reason of her commitment to the intellectual Jewish resistance, Arendt was arrested in Germany in 1933. Fortunately, she managed to leave the country and to settle down in France. Seven years later she was again detained in the concentration camp Gurs as “enemy-alien”, in reason of French’s mistrust during the war. In 1941, she obtained the permission to migrate in the United States, where only ten years later she obtains the naturalization.

anti-political forms of community: imperialism and totalitarianism. The chapter in question, which offers an outstanding historical interpretation of the synthesis between the nation and the state within the political unity of the nation-state, also contains Arendt's most explicit analysis on statelessness.

In her conceptual reconstruction, Arendt pointed to an internal paradox. Containing the word "state", "statelessness" presupposes the pre-existence of a state, which does not recognize the stateless person as a member. Statelessness, as a human condition, implies the presence of a state, through its absence. Arendt described the first half of the 20th century as the period of time, in which a territorial division between the legality of the nation-state and the illegality of statelessness was traced. Statelessness emerged out of a former territorial partition of legality among political spaces. The invention of the state in the modern form made of statelessness a political issue. In other words, it was after its appearance in the legal vocabulary that "statelessness" took its place within the political vocabulary.

Given that to formulate a definition would mean to discover essentialities and a-temporal characteristics, Arendt's writings do not include a definition of statelessness. Instead, she offers descriptions of situations, in which statelessness has been experienced by groups of people. Besides, being aware of the singularity of historical interpretation and of history's contingency, Arendt suggests that each definition is also a distinction (Arendt 1958: 24). There is hence no use in searching for the ahistorical meaning of statelessness, nor asking "What does statelessness mean?" The question should be rather, from which other human condition does Arendt differentiate statelessness? What does she describe *ex negativo*? Answering these questions require a localization of the term statelessness within Arendt's larger terminology and grammar of politics.

Arendtian political theory accentuates the contingent character of determining the access-criteria for political membership, as well as the changeability (described as openness and/or enclosure) of the political community (Arendt 2003: 53). In this context, the political space of the nation-state and the determination of political belonging are of main significance in Arendt's conception of statelessness. In the following chapters, a reconstruction of these elements shall be pursued.

Nomos and Nativity

In "The Decline of the Nation-State and the End of the Rights of Man" Arendt formulates two central theses. Through an analysis on the nation-state building she claims that "the nation had conquered the state" (Arendt 1951: 274); next, she criticizes what she calls "the perplexities of the Rights of Man" (ibid.). Although these theses complement each other, a separated analysis has the advantage that two central categories in Arendt's political philosophy are unveiled, namely: *nomos* and *nativity*. By *nomos*, Arendt approaches the distribution of space among nations, whereas by *nativity*, she formulates the inherent singularity of human existence and the need of plurality for political life to unfold in a communal sense (Arendt 1951: 176-177). She thus presents thereby, the paradox for political communities in recognizing the equality of being different.

***Nomos*: Space and Politics**

Following an Aristotelian tradition, Arendt conceives politics as an action that only occurs through the interaction of free individuals (2003: 10). She argues that the authentic expression of politics takes place once members of the political community gather together in a common public space (polis) for deliberating about matters of collective concern (ibid.10-15). This conception of politics involves two assumptions. First, politics always unfolds somewhere; in other words, politics cannot be conceived beyond a spatial order. Besides, politics unfold only after a designation of who interacts, i.e. once a personification of the political action is possible. Both assumptions require the existence of a legal order that enables individuals to be considered free individuals and thus become subjects, i.e. a political-self being able and entitled to participate in the political community.

The constitutive character of space for politics is already found within the vocabulary of the “forgers of politics” –as Arendt refers to them - the Greeks. In ancient Greece, law represented the frontier-walls of the city-state (Arendt 1958: 194). The concept of *nomos* denotes the territorial limitations of the internal order established by the law. *Nomos* appears as a pre-political category, as a precondition for politics. In her words: “[a]ll legislation creates first of all a space in which it is valid, and this space is the world in which we can move in freedom” (Arendt 2003; translated in Lindahl 2006). The order set up by *nomos* establishes a horizontal legal relationship among individuals (who happen to inhabit within the legal space), and a vertical legal one between those subjects of rights and the state. The presence of the subject within the *nomos*, as the interaction of subjects within its confines, is thereby legalized.

By creating the conditions under which members can freely act, *nomos* limits the space of validity of political membership. It builds up the possibility to take part within a political community and to be identified as a member (Arendt 1958: 23). In this logic, political belonging and political participation are conceived as two sides of the same coin: To be emplaced within *nomos* means to become a subject of rights and member of a political community.

Bounding the subjects within a space, in which politics unfolds, through law, *nomos* opens up the condition for political equality. Political equality is thus not given by nature; it is the result of human organization (Arendt 1958: 32-33). *Nomos*, or the spatial institutionalization of political community, is for Arendt the pre-condition, and not the goal, for the possibility of political freedom. In fact, in *nomos* the space of legality coincides with the space of political freedom.⁷

Given that for Arendt it is not possible to conceive politics without a pre-given bounded legal space, her analysis on *nomos* presupposes that the relationship between politics and space, or the space for politics, involves a normative distinction between the legal status

⁷ Although Arendt shares this definition with Carl Schmitt, their uses of *nomos* have important differences. Whereas Schmitt placed the term *nomos* within his essentialist-philosophical approach as the territorial justification for the everlasting political distinction between friend and enemy (Schmitt 1933), Arendt uses *nomos* as an elementary component for creating the conditions for politics, which includes human plurality (see next chapter). Besides, in opposition to Schmitt, Arendt uses *nomos* for explaining the internal political order of a community, while using the roman term *lex* to refer to the order between political communities (see: Arendt 1951).

of members within the *nomos* and the illegality of those who are identified as alien (or outsiders) to it. Consequently, she conceptualizes the dichotomy of legal political space and the non-political outside. When Arendt speaks of “world”, she precisely denotes the limits of the political space of the *nomos*. In her terms: “What lies outside this space is lawless and properly speaking without a world” (Arendt 2003; translated by Lindahl 2006).

It is within this context, that Arendt uses the term statelessness, as a third condition between the legal and the illegal order. Giving sense to this phenomenon, she gathers the negative etymological connotation of this concept and defines it in opposition to the ordered world. Statelessness represents the lack of world. It is the condition of world-emptiness, or the lack of world. Statelessness stands for the deprivation of membership to a public life, i.e. of action, speech and appearance (Arendt 1951: 150-51). Having lost a legal space of *her* own and being unidentifiable as a member of a *nomos*, the stateless becomes lawless, s/he lives outside the pale of law, this means without world (Lindahl 2003: 882).

Europe: the *Nomos* of Nations with(out) Minorities

Arendt describes the European political geography left after the First World War as an “atmosphere of disintegration” (1951: 267). She suggests that the arbitrary modus of drawing frontiers through the Versailles Contract was the point of departure for tracing a political geography of nations, as opposed to one of states. By the polemical statement “the nation had conquered the state”, Arendt points out to the singular transformation that takes place in the source of legitimation for the building and establishment of a political community. In her words: “the transformation of the state from an instrument of the law into an instrument of the nation” (ibid.).

Signed in 1919 by European countries, The Peace Treaties brought along an artificial homogenization of the national population, so as special regulations for a percentage of the residents within a given country. This reshaping of the political world is presented in The Minority Treaties implied that only nationals, i.e. “people of the same origin” could receive regular state protection. On the contrary, persons of different nationality required “some law of exception until or unless they were completely assimilated and divorced from their origin” (Arendt 1958: 274).

The institutionalization of the term “minorities”, as a designation for groups of people, whose origins lies outside their country of residence established that the country of residence could not be responsible for them. The national state did not longer require to legally recognize people of different nationalities living within the national territory. As a result, and for the first time in the modern European state’s history, groups of people were identified as living outside their territory of origin and outside the space of their political belonging.

The category of “displaced person” exactly designates the spatial-legal condition through which minorities were labelled. Designating minorities, European nation-states were able to make use of their “sovereign right of denationalization” in order to expel a great number of its inhabitants (Arendt 1951: 279). Naturalization and deportation were

undertaken in the name of the nation instead of in the name of the law (Butler/ Spivak 2007: 11).

Arendt suggests that the rise of what she calls the “nation of minorities” is strongly connected with the emergence of the legal category of “stateless person” (Arendt 1951: 289). She goes so far to suggest that the impact of this legal division practically made of all refugees, stateless persons (Arendt 1951: 279). From this European development, in which the logics of the *nomos* became erroneously synonym for the nation, Arendt concludes that “sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion” (Arendt 1951: 279).

Through the Peace Treaties, European nations had created minorities, who were now confronted with the paradox situation of being considered non-nationals within a nationalized territory: They were living from now on within states that seek to banish them. The difficulty was that not all minorities were deportable –as it was the case of the Jewish people, who had also become a minority.⁸ Neither the country of origin, nor any other government agreed to accept them.⁹ It was the undeportability and the impossibility to repatriate the Jew that revealed the inherent illegal condition of the stateless person. Finding herself/himself in-between *nomoi*, the stateless person represents an outlaw-condition that may only be regulated through the transgression of the law. In other words, the presence of the stateless person either violates the law of the country where s/he resides, or it violates the law of the country from which s/he is expelled” (Arendt 1951: 281).

The inability of nation-states to localize the space of legality, or *nomos*, where stateless people may be banished, gave the police the faculty to directly rule over them. The police ceased to be an instrument to carry out and enforce law, and began rather acting as its own authority with its own legislation, transgressing thereby the national legal order. Beyond the nation-*nomos*, the police had the faculty to expel stateless persons outside national territory by transgressing the law of other nations.¹⁰ In this context, Arendt speaks of an “emancipation” of the police from law and government’s control (Ibid.: 285).

Arendt describes a shift in the meaning of *nomos* from a spatial legal category for limiting the space for politics and political membership, towards an essentialist category determining who counts as a member of the community and who does not. The main difference between these conceptions of *nomoi* relies on the answer to the question: “Who is the subject of rights?”

In Arendt’s political theory, *nomos* is a pre-political condition for politics. Political membership to this legal community is given after the building of the community. On the contrary, in the nation-*nomos*, the territorial boundaries of legality and of political membership are the outcome of the same founding event. Political equality is no longer

8 Arendt makes reference to the minority *par excellence* during that time, the Jewish people, but also to the holders of the Nansen passport and to all of those individuals who were unable to fulfil the criteria for repatriation (Arendt 1951: 280f).

9 In other cases individuals were deported to their country of origin, which “urgently want[ed her or] him back for punishment” (Arendt 1951: 279).

10 Arendt mentions some examples on the abuses of the German police, who had no other mechanism as to expulse minorities outside national territory in the night for they knew that they were illegally invading foreign territory. This practice was afterwards tolerated and “regulated” in the deportation camps put in place as the space for the banishment of aliens or intruders within national territory (Arendt 1951: 287-9).

achieved through *nomos*. It is moreover conceived as a necessary condition for it. This nationalist shift makes it possible to determine the illegality of the presence of people not only beyond the legal order of the *nomos*, but also within it. Following Arendt, this development in the history of the nation-state shows that the principle of equality before the law has broken down (Arendt 1951: 287).

In the development in the European political geography during the 20th century, Arendt's pre-political understanding of *nomos* became political. The nation replaced the law as the criteria for bordering state's legal territory. The *raison d'être* for the existence of political space was enacted by the nation. Equality before law did not depend on the recognition of members within a community. Rather, the quality of being equal by the virtue of birth became dominant in tracing *nomos* and building political communities. Thereby, the meaning of the *nomos* changed from the spatiality of the law to the fictive idea of an ethnic homogenous nation.

Nativity: Plurality and Singularity

According to Arendt, every human is born into the world in a singular manner because "we are all the same, that is, human, in such a way that nobody is ever the same as anyone else" (Arendt 1958: 8). Arendt understands the human condition, or better: the human condition of plurality, as the particular beginning of every existence, which she subsumes in the singularity of *nativity*.

Next to *nomos*, or the legal de-limitation of space needed for politics to unfold, *nativity* builds a further pre-political category in Arendt's thinking of politics. Arendt states: "[p]olitical action [...] corresponds to the human condition of plurality, to the fact that men and not Man, live on earth and inhabit the world" (Arendt 1958: 7). Arendt explains human plurality as the consequence of individual singularity through the category of *nativity*. The peculiarity of being by birth is found in the singular identity the newcomer is given. Since *nativity* only brings forth individuality and plurality, but no "Man" (Vatter 2006: 153), *Man*, in its singular form, exists only outside politics. Politics can only be thought in plural.

Consequently, Arendt criticizes the abstract idea of the Human Being as well as the inalienable rights derived from it. Although this critique may cause some resonance with Carl Schmitt's polemical statement "wer Menschheit sagt will betrügen" (Schmitt 1933: 48) (the one who utters Humanity wants to cheat) Arendt does not support an anti-humanist perspective.¹¹ She rather states that "Man", as singular individual, reduces individuality to a general specimen and that such homogenization eliminates both: the innate singularity of human beings and the political plurality that derives from it. According to Arendt, "Man exists in politics only in the equal rights that those who are most different guarantee for each other. This voluntary guarantee of, and concession to, a claim of legal equality recognizes the plurality of men" (Arendt 2005; quoted and translated in Vatter 2006: 142).

Given that there is no natural human equality, it is only through politics, i.e. through the inter-action, that political equality can be achieved. The important challenge Arendt

¹¹ For Schmitt as anti-humanist, and anti-Semite see *Carl Schmitt und die Juden* (Gross 2000).

gives to politics is not to remove differences, for these are inherent to human existence. Political equality is established, once individuals are no longer essentially reduced to the singular condition their *nativity* represents. Political equality does not identify persons by their differences –including differences of origins.¹² Political equality, in Arendt's terms, does not implement *nativity* as the criteria determining political belonging. *Nativity* makes politics possible in the first place.

From the outset, politics organizes those who are absolutely different with view to their relative equality (Arendt 2003: 97). Arendt canalizes the power of politics towards the capacity to create the conditions under which individuals may freely act, by enabling them to enter the political space in terms of equals. In her words, “to be free and to act are the same” (Arendt 1968: 153). It is only by acting in the political space, what Arendt metaphorically calls “the second birth”, that individuality and novelty may be unfolded. The “birth” of the subject of rights happens through the “insertion of one's self into the political world” (Arendt 1951: 186). It is through the entering of singularities in the political community that political action, i.e. speech and deeds, take place (Arendt 1951: 184). Plurality thus makes reference, on the one hand, to the equality to participate within the political community, and, on the other hand, the capacity to create difference within the public space (Arendt 2005: 10).

Being the component of political action, plurality is the ultimate condition for political life. For this reason, deprivileging action is a threat to plurality and freedom (cp. Honig 1993: 78) and hence, for politics. In reason of such a “primacy of action over actor”, Arendtian politics involves a perpetual commitment at the settlement and unsettlement of identities (Honig 1993: 77). For Arendt, the question of “who is the subject of rights?” thus remains open to change.

The Eclipse of Human Rights by National Rights

According to the French philosopher Jacques Rancière, human rights are a random variable insofar their possible value relies in the distribution of those rights. The question “who is the subject of the rights of man?” involves a subjectivization of the generic category of “man” into the empirical category of “national community” (2004: 298). Therefore, the subject of rights becomes the hypothetical subject bridging the interval between two forms of rights, the national and the universal (Rancière 2004: 302). It is around a similar subjectivization, that Arendt formulates what she calls “the perplexities of the Rights of Man” (Arendt 1951: 274).

During the 20th century, “stateless people were as convinced as the minorities that the loss of national rights was identical with loss of human rights, that the former inevitably entailed the latter” (Arendt 1951: 289). This historical association between national rights and human rights, as between the national subject and the subject of human rights, highlights that rights and political identity were not conceivable beyond the nation in

¹² This argument is found in Arendt's biography, for she did not consider herself a Jewish thinker. She spoke about her experience of being identified as a Jew by other school children during the politicization of ethnic differences in pre-Nazi Germany. She starts writing on the Jewish Question in exile (see: *The Jewish Writings*, 2007).

reason of the absence of non-national guarantee for political equality. The necessary sequence for political equality described by Arendt from *nomos* –or the legal-bounded space - to a common identity that enables plurality is inversed. Political equality ceases to be dependent on rights. It is treated as existing beyond the faculty of the law to bind a political community. Political equality becomes explainable under other criteria than the law and politics; and becomes dependent on biological origins.

Because of the connection between national rights and human rights, a loss of rights constitutes a loss of identity. In this analogous development of both forms of rights, national rights eclipse the political meaning of human rights. Human rights are alienated from political action because these cannot be claimed without state's recognition. Treated as the privilege given only to those naturally belonging to a nation, the right to political membership has been reduced to nationality. Nationality, and not legal equality, thus became the fundament criteria of distinction among political communities. In other words, ever since the nation became the *raison d'être* for *nomos*, human rights have become, in a political sense, meaningless.

Arendt found in the category of the stateless, "the "body" fitting the abstractedness of the rights" (Rancière 2004: 298). The status of the stateless is banished to the sphere of exceptionality, in which power and repression are depoliticized. This condition is no longer political. It is rather situated beyond the reach of political dissensus (ibid.).

Arendt describes statelessness as the ascription of a human condition based on illegality, which is historically entangled with the rise of nations as political communities. In Arendt's reading, the establishment of national frontiers, as the frontiers of political belonging, is a process intrinsically related to the production of the illegalization and criminalization of pre-established groups of people.

Statelessness is therefore confined to a non-political condition and the individuality of the stateless is reduced to an a-political collective identity. The lack of political identity, that the status of stateless presupposes, is articulated in humanitarian and not in political terms. In this unconditional condition, the stateless has been deprived from the fundamental human rights manifested first and above all in the deprivation of a place in the world (Arendt 1951: 296). This deprived life is "a life entrapped in its "idiocy," as opposed to the life of public action, speech, and appearance" (Rancière 2004: 298). The stateless person has become an *apatride*, i.e. *atopos*: Unable to belong to any political community. The stateless is nowhere assignable.

Either the rights of the citizen guarantee human rights, or the rights of man are the rights of the citizen, i.e. those rights attached to nationality. Human rights without citizen's rights are abnormal rights, or unpoliticized ones; these are the rights of those who have no rights, which results into a tautology (Rancière 2004: 302). Human rights are the mere derision of right. These are the "paradoxical rights of the private, poor, unpoliticized individual" (Rancière 2004: 298). Also Arendt concludes that: "it is useless to reclaim rights for those who have no rights" (Arendt 1951: 293).

Is it only through the restoration of rights at an international level that the right to political membership beyond nationality can be rethought? The categories of *nomos* and *nativity* are crucial in understanding the historical relationship between national building

and the systematic deprivation of the rights of non-nationals or minorities. However, are these also as important to the new supranational developments?

The European Post-National *Nomos*

Although Arendt speaks of universal or global history, she still could not anticipate the phenomenon that shaped political thinking after the Cold War, which has been subsumed under the term of globalization.

Ever since Arendt described the negative impacts of statelessness, many changes in the global political architecture have been undertaken. These have culminated in a post-national political order. There have been important advances in the global-polity arena for ensuring human rights and with it, stateless people's rights.¹³ The institutionalization of the Ad-hoc International Justice Tribunals into the International Criminal Court (2002) presents a singular reinforcement of the possibility and responsibility to protect and reclaim the Universal Declaration of Human Rights beyond the architecture of the nation-state. These institutional changes are constitutive components of a global regulation and prevention system against statelessness. In contrast to Arendt's time, nowadays, we speak of a Human Rights Regime as one of the fundamentals of *Global Governance*.

In this new political landscape, the nation-state has been dislocated as the exclusive political actor in the international arena. International institutions now play an important role in controlling and accounting for the decisions taken by the executive within a national, or "nationalized territories".¹⁴ At the same time, the respective national executive also plays an important role in international decision-making. Along this change, the modern Weberian triad conception of political order composed by territory, population, and state has been reorganized. In the case of supranational constructions, as the Schengen Area, or the North American Free Trade Agreement (NAFTA)¹⁵ territorial frontiers have been redrawn. In these cartographies, national territory does no longer appear to be a spatial-legal limitation. In the case of Schengen,¹⁶ the category of "national

13 Some examples are: the building of a European Court of Justice (1952), the International Convention on the Reduction of Statelessness (1961) –although according to the UNHCR only 31 countries worldwide have committed to this convention -. There have also been numerous ratifications on the Rights for Refugees such as: the European Convention on Nationality (1997), the European Charter of Fundamental Rights (2000), the establishment of an Inter-American Commission on Human Rights (1959) and the Inter-American Court of Human Rights (1969).

14 Under "nationalized territories", I refer to annexations of so-called overseas provinces, as in the case of Puerto Rico, Guadalupe and Martinique. The administrative jurisdiction under the USA and France respectively build transatlantic national territories or exceptional *nomos*.

15 NAFTA was signed in 1994 by the United States, Canada and Mexico. In reason of the number of its consumers, NAFTA is the world's largest free trade area. However, NAFTA does not foresee the free movement of people. Its borders are open only to merchandise (see: <http://www.naftanow.org/>).

16 Signed in 1985, the Schengen Area is the name give to the European space based on the free movement of merchandise and persons within the member countries. Within this area, "(c)ommon rules and procedures are applied with regard to visas for short stays, asylum requests and border controls. Simultaneously, to guarantee security within the Schengen area, cooperation and coordination between police services and judicial authorities have been stepped up. Schengen cooperation has been adopted by the EU's legal framework with the Treaty of Amsterdam in 1997. Yet, all countries cooperating in Schengen are not parties to the Schengen area. This is either because they do not wish to eliminate border controls or because they do not yet fulfil the required conditions for the application of the Schengen *acquis*" (Summaries of EU

belonging” is dislocated from state’s territory into a referential for a much wider territory. Some of the rights and duties traditionally bound to citizenship have been incorporated into conceptions of regional citizenship (Benhabib 2006; Messner 1999; Pries 2008; Rancière 2004).

The European community established by the Schengen Agreement eliminates internal, national borders and unifies external ones. Schengen operates as a single area for international travel with border controls only for those travelling in and outside of the area, but no longer within it. This new geography reorganizes the categories of national territory, rights and illegality. Yet, if Schengen constitutes a *suis generis nomos*, different as in Arendt’s time, it would also redefine political belonging beyond the *nation-nomos*; i.e. a *nomos*, in which political identities are no longer defined through national boundaries, and political equality is no longer based upon nationality. Through political equality, the category of political belonging should rather be enlarged into criteria superseding nationality; thereby, enabling the creation of a post-national *nomos* and *demos*. Is this Schengen’s case?

Composed by a common external border, Schengen alters notions of inside and outside Europe. Through this territorial integration, Europe is given a new name (cp. Balibar 2004: 15). The establishment of common borders has put into motion new process of (de-)territorializing national space and externalizing non-national elements. In this sense, Schengen puts in place a new definition of the “domestic”. In this supranational territory, the contemporary sense of the common is reflected in the ‘Europeanization’ of immigration policies. The management of people’s movement within and without the area has been treated as a crucial element for the territorial integration. Special attention has been given on asylum policies, preventive fighting against ‘illegal’ migration, and the expansion of European migration policy onto countries of origin and transit. In fact, Schengen is, at the same time, readable as a measure taken by European members against “illegal” migration.

Illegal migration makes reference to the movements of people that jeopardize the juridical order within national frontiers, as well as between countries. The non-national individuals – whose presence within a nationalized territory is always abnormal or even illegal – may also be undeportable.¹⁷ In reason of the mobility, uneasiness, and unpredictability, illegal migration is classified as a danger for the nations’ order and the sovereignty of their territoriality. What renders immigration eminently uncontrollable is its capacity to transgress the legal order challenging the rights made available by the law (ibid.). On this reading, immigration “has the potential to disorder the law by contesting the commonality claimed for a legal order” (Lindahl 2008: 126).

The freedom of movement within the Schengen area is a privilege restricted to citizens of Schengen member states. Any other mobility is carefully regulated and treated as movement of aliens. The circulation of non-members is excluded from the European cartography based on the freedom of movement, by practices that are carried out

legislation, 2009).

17 Among the current practices to avoid deportation are throwing away passports; performing a specific identity recognized as vulnerable and in need of “help”; or claiming a transnational identity such as Maghreb or Kurdistan. These practices embody the impossibility of permanently localizing, and thus identifying, the other through nationality.

precisely through a transgression of Schengen's territorial (and sometimes even legislative) limits.¹⁸ Treated as exceptional, the mobility of non-European peoples becomes undistinguished from the rubric of illegality. Considered non-regular, this migration is banished *outside* the range of sovereignty and treated instead, as belonging to realm of the alien.¹⁹ This non-European space, which coincides with the territories of non-European states, is often pictured as non-democratic and authoritarian (Tsianos/Karakayali 2005). Through the Schengen Area borders are reorganized. However, in this new territorial enclosure, nationality has not ceased to be the criteria for (de-)limiting political belonging. Schengen is rather the outcome²⁰ of an European-*nomos*. At the same time, through Schengen, a new collectivity of non-European belonging is built. Thereby, new processes of inclusion of members and of extrapolating non-members are put into place.

In a synchronic analysis of Arendt's view on statelessness, the control of illegal migration taken by the supranational-*nomos* determines spatially, on the one hand, the upcoming political membership and, on the other hand, the correlating controls of the new external borders from non-nationals, whose presence without a visa becomes, to great extent, illegal. In the actual European political geography, the modern boundaries of (il)legality have not been replaced, but rather modified. The national security of Schengen-member countries such as Germany or France is no longer just a national issue. It is now the responsibility of Ukraine and Morocco (Greven 2010). These polity's alterations have become the solution for dealing with the irregular, or non-European migrants.

It is frightening that the question of "how can stateless people be deportable?" and the invention of places for the banishment of non-members have found an answer in refugee camps, Transit Processing Centres (TPC), and agreements with the so-called Third-Safe-Countries.²¹ The stateless condition of the displaced persons during World War II has nowadays been replaced by the condition of asylums-seekers and so-called illegal migrants, who seek to enter Western countries from the South and the East of the globe. From this perspective, Arendt's prediction about statelessness being the "new mass phenomenon in contemporary history" (1951: 275) has turned out to be veridical.²²

18 For a regime-analysis on the repressive practices carried out by the police and other governmental institutions and organizations administering Transit Processing Centers (TPCs) see: Tsianos/Karakayali 2007. For the French case Balibar summarizes: "A recent report by the French Commission Citoyens-justice-police, set up in 2002 by the Ligue des Droits de l'Homme, Syndicat de la Magistrature etc., reveals that 60% of the victims of (reported) illegal violence by police forces ("bavures") are foreigners, and the huge majority of the other 40 % are "nationals", but with a "foreign" name or racial profile; which can be read also as demonstrating that nearly half of the victims are mistreated because they are identified with the "normal" targets, i.e. "visible" aliens" (Libération, 4-5, December 2004, p. 18; quoted in: Balibar 2004: 16f).

19 Paraphrasing Sandro Mezzadra, Balibar uses the expression "in the name of Europe" for referring to the contradictory effects of the violent security policies, which tend to *attract and to repel* non-European peoples inside and outside the Schengen area, meaning "installing them in a condition of permanent insecurity" (Balibar 2004: 15).

20 In order to name some examples see the architecture in the airports for pass-controls (which are divided between EU and non-EU) and ethnic policies in universities, in which the rates for education may vary up to ten thousand euros between EU-members and non-members –the latter being charged more.

21 For a conceptual reconstruction on the disturbing continuances in the uses of the German word *Lager* (camp) and its historical heritage from the fascist era see: Piper 2004. For an analysis on the institutional prolongations in constituting a permanently resident mass of non-members see: Agamben 1998.

Given that the illegal entrance and presence within the post-national territory remains one of the most important challenges for the conservation of the political order, Arendt's reconstruction of the rise of the nation and the stateless people remains significant. Her conclusions can be translated into the currently double exercise of sovereignty exert at the borders of the Schengen Area: In Europe's capacity to bind and to banish. Under this reading, an actualization of Arendt's analysis on statelessness leads one to conclude, that totalitarian solutions have indeed survived totalitarian regimes.

European Citizenship or the post-national *Nativity*

The need to give equitable treatment to Third Country Nationals (TCN) within the Schengen Area was emphasized at the Tampere European Council of 15-16 October 1999. TCN is the generic status for non-European nationals, long-term residents within the European Union (EU); i.e. "any person not holding the nationality of an EU Member State"²³, who have legally and continuously lived for a period of five years within the territory of an EU country. At Tampere, it was suggested that the Member State, in which the TCN resides, should grant a set of uniform rights, which are "*as near as possible* to those enjoyed by EU citizens."²⁴

The requirement to extend the scope of rights towards non-European residents within the EU was first formulated by the European Court of Human Rights. The Court identified a contradiction between the Regulation 1408/ 71 -which limits the application of social security schemes to employed persons and their families moving within the Community to EU-nationals²⁵- and Member States' obligations under Article 14 of the ECHR, which includes a "prohibition of discrimination" stating that: "(t)he enjoyment of the rights and freedoms (...) shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (ECHR 2010: 12). The imperative of "equality of treatment" is also based on the Article 1 of the European Convention on Human Rights (ECHR), which states: "The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention" (Quoted in Groenendijk et al 2000: 7).

The expected inclusion of TCN within a larger range of rights and duties is thus not grounded on European citizenship, but in human rights. An improvement in their status

22 For the year 2008, the UNCHR estimated that 42 million people around the world involuntarily left their country of origin.

23 Definition quoted from: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/123034_en.htm#KeyTerms. The category TNC is sometimes used generically for including "irregular migrants" or "refugees" under the same label of non-European (as in the Presidency Conclusion of the Tampere Summit in 1999). However, TCNs and refugees are not synonyms. TCN makes special reference to a regularized migration considered meaningful for both the exportation and receiving economies (Tsianos/Karakayalı 2005; for a classification of types of migrations see: UNHCR 2000).

24 Quoted from Point 21 of the document "Tampere European Council 15 and 16 October 1999. Presidency Conclusions" (http://www.europarl.europa.eu/summits/tam_en.htm).

25 Excerpt from the Article 3 of the named Regulation: "persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State" (Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31971R1408:en:HTML>).

is necessary on a humanitarian, and not necessarily on a political inclusion. “This approach starts from the principle of equal application of Community law to all and from that point identifies the departures from the principle where third country nationals are treated *differently*” (ibid.: 7; emphasis added).

This positioning of TCNs within the EU is comparable to Arendt’s conception of statelessness at the beginning of the 20th century because it localizes the subject in an unsubjected condition. The country of residence is no responsible for the political rights and duties of the non-national minorities. True, the European Economic Area Agreement in 1991 extended to TCN “on the basis of their nationality, *equivalent* free movement rights to those which it grants to nationals of the Member States” (Groenendijk et al 2000: 5; emphasis added). Different as refugees and so-called ‘irregular migrants’, TCN do “enjoy a right of movement and economic activity within the Union in their capacity as employees of a Community based enterprise who are sent to provide services for their employer in another Member State” (ibid). In some historical cases of diaspora, as in the case of Turkish minorities leaving in Germany, also factors as protecting security of workers and their family, guaranteeing non-discrimination in working conditions and social security have been included in the definition of TCN. TCN are, in this sense, considered members of the domestic market.

Yet, the conception of TCNs remains predominant an economic definition, in which labour rights, and familiar reunification rights, are more dependent on the working status of the individual and grounded on international regulations much more than on privileges earned by the merit of living within the Schengen zone. TCNs are not entitled to vote at national elections. They are also subjected to important restrictions in the labour market²⁶ and possibilities of public fund-raising.

The continuity between Arendt’s analysis on the statelessness, as the intersection of the minority’s status and the vulnerability to be banished from the national territory, is also symptomatic for the condition of the TNC within Schengen. In the most valuable achievement in supranational architecture, i.e. the free movement of persons, TCNs are either excluded (by i.e. systematic visa-denial), or their mobility is subjected to legal exceptions. Although protection against deportation is included in the category of TCN, there are important exceptions under which a State Member can decide to expulse a TCN from the Schengen space.

In accordance with Arendt’s argumentation, which highlights the relation between sovereignty and the right of expulsion of non-national minorities, the principle of international law expressed by the European Court of Human Rights states as follows: “As the Court has observed in the past, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the ECHR, to control the entry, residence and expulsion of third country nationals.” Reasons for expulsion from the Schengen Area of TCNs are related to fraud within public policy, public security and public health. TCN’s access to these spheres of the welfare state is thus regulated under different rules as for EU-nationals. In regards to the public realm, TCNs

²⁶ Jobs in the private sector are restricted to TCNs by the clause on the priority of nationals, and second-rang EU-nationals to access jobs. Students, also doctoral students, cannot work more than 120 full-days within a year.

have to behave as better citizens as the national citizens, without receiving the same rights.

A macabre continuity between the stateless-condition of non-national minorities during the 20th within Europe and the conditional partaking of TCNs within the Schengen Area is traceable in the state of individuals without any clear national legal protection (beyond human rights and international norms), and without any possibility of being fully participants of political inter-action. Political membership and political equality in the public real remain constrained.

In the architecture of Global Governance, *nomos* is situated beyond state's frontiers, at a post-national scale, yet, the decentralization of national territory and the de-territorialization of national borders have neither occasioned a "forgetting of *nomos*" (Dean 2006: 8) nor the replacement of nationality as the key-category in accessing to political membership and a political belonging to a political community. Following Giorgio Agamben, instead of declaring the state of exception, governments prefer issuing exceptional laws (Agamben 2005: 21).

The category of TCN stands for the third figure in the scales of belonging,²⁷ which can be outlined in Arendt's political thought. This *apolitical* condition of TCNs brings to light the boundaries determining, who belongs to the political community and thus is capable of acting politically, i.e. the members sharing a public space and the privilege of non-regulated mobility. This status embodies the frontier between European public law and the confines of lawlessness; the line separating a legal from a non-legal status. The thin limits between legal and illegal migration are repeatedly transgressed by practices such as 'over-stayers', so that the differences of status between TNCs and irregular migrants beyond permissible economic criteria cannot be clearly traced.

This diagnoses shows that the identitarian categories put in place by the counter-concepts national/non-national remain central in defining the political subject in the post-national space. These concepts do not necessarily have a link to citizenship, but rather refer to a cultural or original membership.²⁸ In fact, the category of TCN reinforces the domestic definition of political equality based in equal birth. Being non-nationals, TCNs do not have any claimable political rights within the confines of Schengen, which is *de facto* a new European geography.

In the name of this fate-related division of peoples between nationals and non-nationals, equal participation in political life is made dependant on equal-birth and not on the sharing of the common. Differences regarding protection of and in the labour market, restrictions and work interdiction do not promote a common sense of belonging. TNCs remain alien to the political community where they inhabit. In such a division of

²⁷ In my interpretation, I distinguish three forms of belonging in Arendt's writing: the unconditional (citizenship), the conditioned (minority-status) and the unconditional condition (statelessness).

²⁸ See for example the report of the Centre for European Reform polemically entitled *Saving Schengen: How to protect passport-free travel in Europe* (2012), which states: "By 2009, almost 40 per cent of foreigners in EU countries – some 11.7 million people – were from another member-state, mostly from Romania, Poland, Italy and Portugal (in numerical order). The remaining 60 per cent hail from the rest of Europe or Asia, the Middle East and North Africa, sub Saharan Africa, Latin America and the Caribbean. On average, these migrants tend to be less skilled and have lower rates of labour force participation than the EU natives" (Brandy 2012: 17-18). In his generalizing classification, the report however neither mentions work restrictions nor the burdens to recognition of non-EU titles and diplomas within the European Union.

humanity, the equality between non-EU residents and European peoples is, as in the case of stateless or refugees, only under the generic rubric of human rights possible. This equality is of not use to a non-European individual wishing to complain of discrimination, who cannot make reference to a Convention right.

Conclusion

This paper included a reconstruction of Arendt's depiction of statelessness by localizing it at the intersection of the concepts *nomos* and *nativity*. I pursued a comparison between Arendt's analysis on the invention of non-national minorities at the beginning of the 20th century Europe and the recent developments in the region. By comparing, on the one hand, her interpretation with Europe's post-national *nomos* and, on the other hand, the unconditional condition of national minorities with the status of TCN, an analysis on the synchronic appearances of stateless-condition has been pursued. The comparison has been valuable for evaluating the changes within the definition of membership entailed in the new European geography. The challenge consisted in translating the actuality of her analysis in the contemporary political geography.

This comparative perspective did not seek not to devalue the burdens and personal strength that asking for asylum implies. It moreover attempted to illustrate the division of humanity into European and non-European people within the supra-national-*nomos*, and to address this issue from a historical perspective based on Arendt's thought.

Arendt's approach problematizes the counter-conceptual relationship between national and non-national and distinguishes among categories of unconditional, conditional belonging and non-belonging. Next to the statuses of citizenship and non-national minority, statelessness appears as a third condition, which shows the ambivalence between a national and a legal order, as well as the dependency of human rights to civic rights. Beyond nativity and foreignness, the figure of the stateless embodies the *aporia* of human rights, inasmuch as the loss of political world by the absence of nationality. In this sense, statelessness does not stand for a non-political, but for an *apolitical* condition.

This article suggested nowadays this stateless-condition between the bordering of national vs. non-national belonging is reproduced in the distinction between European and non-European long-term residents. Without equal social status or recognition, non-European migrants are "transformed into subjects and objects of fear, *experiencing fear* of being rejected and eliminated, and *inspiring fear* to the "stable" populations" (Balibar 2004: 17). As Balibar suggests: "this is supposed to make sure that they will not become integrated into the political "constituency", in particular through their participation to common social struggles, in the end becoming "citizens" in the active sense, with or without a European passport" (2004: 15-6). From this perspective, Arendt's analysis seems not only to be compatible with our time, but also valuable.

In the supra-national order, notions of inside and outside Europe have been modified. Although areas of European Community law have indeed become more inclusive, the literature on the EU's democratic deficit agrees on the fact, that there is still no truly novel

model of supranational democracy and/or legitimacy (Jensen 2009).²⁹ In this architecture, the possibilities of attaining a higher degree of political equality outside the space redefined as post-national remain undiscussed. Sovereignty is still primarily expressed as the power to articulate decisions over access and banishment of persons living within the national territory.

As this article has shown, insofar the right to have rights is not disentangled from nationality, the national space cannot be conceived independently from a necessary artificial idea on the homogenous integrity of the national body. Despite semantic shifts and changes within the political vocabulary and the geopolitical alternations of borders, political equality remains dependent on nationality.

Even though in Arendt's conception of politics the stateless cannot be treated as a political subjectivity, an actualization of Arendt's analysis on statelessness, as a category revealing the intersection of rights, territory and identity, enables a depiction of illegality under political terms, in opposition to an ethical and cultural description of this condition. Her critique stands, so to say, beyond the humanitarian discourse, that grounds the equality of people only in a moral abstraction, by precisely pointing out the impossibility to translate the normativity of equal treatment into the political praxis. In doing so, she points out to the fact, that through the a-legal condition of the stateless, civil rights are threatened not only for outsiders but also for *insiders* - a distinction, as Balibar suggests, that becomes dubious to trace, there, where significant communities of migrants have established over several generations.

Her description of statelessness as an unconditional condition, the world-lessness of the *apatride*, should be a reminder that the stateless-condition should not be a topic expelled from political thinking for not being political. To naturalize statelessness as atopic for politics would mean reject its capacity to be politicisable. A politicization of this condition however enables altering the philosophical questions from: "who is the subject of rights?" towards the question: "who is *not* the subject of rights?" This shift from the individuality of the possessor of rights to the one who is dispossessed offers an alternative to the conception of the demos through the nation –a construction that traditionally overlooks the innate plurality in political action, which Arendt considers essential in defining the political life.

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²⁹ For instance, Frank Decker (2002) attributes the democratic deficit to the institutional deficiencies of the current electoral and party system and lack of a European demos. With the transfer of competences to the European level, the EU's supranational characteristics find no response at its social base among parties and voters (Decker 2002: 261).

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