

Border Masquerades

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Starting from a discussion of false identities among asylum seekers, this Article aims to conceptualize a substitution effect between citizenship and human rights, the two sources for individual rights. As some citizenships offer no tangible protections, large numbers of people have chosen to migrate, demanding instead the protections from vulnerability that law grants to all humans. Tracing the trope of the mask in classical texts by Hannah Arendt and Karl Marx, this Article shows that such decisions—seemingly fraudulent negotiations on the margins of legality—have significant implications for legal theory. Under conditions of radical global inequality, protracted civil wars, and climate change, contradictions between citizenship and human rights have become observable; the so-called ‘refugee crisis’ has revealed a dialectic process by which each exerts pressure on the other. The choices migrants make to shed their citizenships and expose their bare humanity instead, illuminate the oppressive, as well as emancipatory, aspects of both statuses.

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INTRODUCTION

About a decade ago, several investigators for Human Rights Watch (HRW), myself included, rode in a rental car in the Northern Greek region of Evros. After landing in the small town of Alexandroupoli at the break of dawn, we drove through the green flatlands cutting through a thick layer of mist. Following reports about border guards abusing migrants and refugees entering the country from Turkey, we headed to conduct interviews in several detention centers close to the border.¹

When a group of two Black men and one Black woman appeared on the roadside, Simone Troller, then a researcher for HRW, proposed that we stop and ask about their experiences. They told us they had fled from Somalia. The woman wore a hijab, which suggested they were Muslim. They looked exhausted, were filthy from the muddy river water, and were not keen to talk. Around noon, we encountered them again at a detention center in the village of Feres, located nearby. They had been arrested by a Greek border patrol. When they were questioned, it became clear that they were not from Somalia. We were told that their native language was Spanish and that they were citizens of the Dominican Republic.² This was hard to believe. What would a group of Dominicans be doing here, dressed up to be mistaken for Muslims, at the entry point often used by destitute migrants from closer regions?

Like many asylum seekers from around the world, migrants arriving in Greece often claimed false identities.³ At the time, Black people would often say they were Somali; people from Central Asia often claimed to be Afghan; and Arabic speakers often said they were Palestinian. In a 2010 report, the European Union's border enforcement agency, Frontex, indicated that "Three nationalities constitute 80% of the detections along the Eastern Mediterranean route: Afghan, Palestinian and Somali nationals. Over the past two years, these nationalities have

1. HUMAN RIGHTS WATCH, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees* (2011), https://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf.

2. Email from a senior colleague in Washington DC referencing a press release following this visit to Greece "Migrants from the Dominican Republic?!?! Too strange." (on file with the author, received December 3, 2010). Online sources do, however, indicate that Dominican migrants did at the time seek asylum in Greece. See, e.g., MARIANELLA BELLARD & CARIBBEAN MIGRANTS, DEPORTEES: THE HUMAN FACE OF A SOCIAL REALITY 18 (2011), http://obmica.org/images/Publicaciones/MigrationPolicyBrief/Deportados_ingls_final_m%20pb.pdf; CTR. FOR EUR. CONST. L., EUROPEAN MIGRATION NETWORK 29 (2009), https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/11a._greece_national_report_non-eu_harmonised_forms_of_protection_final_version_4dec09_en.pdf.

3. See, e.g., EUR. MIGRATION NETWORK, *Challenges and Practices for Establishing the Identity of Third-Country Nationals in Migration Procedures*, 4 (2017.), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_identity_study_final_en_v2.pdf.

consistently been the most often detected.”⁴ What were the conditions that made being Somali, Afghan, or Palestinian desirable nationalities to have at this particular moment? What were the conditions that made it plausible for an asylum seeker to wear such an implausible disguise?⁵ While global disparities in wealth and multiple crises around the world are part of such conditions, these factors alone do not explain such a decision. Legal circumstances are part of what produces such identities, as is a certain political imagination of what it means to have rights. The ways that migrants assume false identities reveal critical insights about the law, and particularly about the relationship between citizenship (in the international law sense of nationality) and human rights. As novelist J.M. Coetzee writes, in an insight that goes back to Aristotle, “Our lies reveal as much about us as our truths.”⁶

The Frontex report observes that “there would be a large number of false declarations of nationality among claimed Palestinian nationals, in particular by nationals from Maghreb (Algeria, Morocco) and Middle East countries (Iraq).”⁷ While Frontex notes that “the reason for these false declarations is currently unclear” the agency also ventures to tentatively offer one: “Perhaps the most likely reason is that they wish to avoid return or at least to reduce the length of their stay in the detention centers, but these declarations are not linked with applications for international protection.”⁸ Somalia, Afghanistan, and Palestine were all countries to which Greece and its EU supporters were unable to deport their unauthorized migrants.⁹ “Passing” as a member of one of these groups thus rendered unwanted migrants much more difficult to deport.

4. FRONTEX, *Extract from the Annual Risk Analysis 2010*, 15 (2010), <https://data.europa.eu/euodp/en/data/storage/f/2016-03-07T141501/Annual%20Risk%20Analysis%202010.pdf>.

5. As is the case today, we were living under the long and global shadow of the 9/11 attacks. Intuitively, it did not seem like an outfit associated with the Muslim religion would be the right choice for someone trying to enter clandestinely. On “plausibility,” see Allan Mackey and John Barnes, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive - Judicial criteria and standards*, 33 INT’L ASS’N OF REFUGEE & MIGRATION JUDGES (2013), <https://www.refworld.org/docid/557028564.html>.

6. J.M. COETZEE, *SLOW MAN: A NOVEL* 189 (2006).

7. FRONTEX, *supra* note 4, at 16.

8. *Id.*

9. With regard to the Palestinian, Somali, and Afghan situation, see generally EUR. COMM’N, *Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries* 110, 114 (Mar. 2013), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/11032013_sudy_report_on_immigration_return-removal_annex_1_en.pdf; with regard to Somalia, see EUR. COMM’N, *Ad-Hoc Query on asylum proceeding and returns to Somalia*, (Dec. 7, 2012), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/434_emn_ad-hoc_query_on_asylum_proceeding_and_returns_to_somalia_30octob_widerd_pdf, (evincing Greece’s policy of not carrying out removals to Somalia); with regard to Afghanistan, see *Ahmade v. Greece*, App. No. 26494/09, (Jan. 24, 2012), <https://www.refworld.org/cases,ECHR,4f4370af2.html>

The narrative of an economic migrant assuming a false identity to game the asylum system is ubiquitous across the developed world,¹⁰ and it has become closely linked to questions about migrant nationalities.¹¹ States sometimes invoke it spuriously to close their borders, even at the price of violating legal obligations.¹² For their own part, migrant advocates insist on an individual determination of protection needs, trying to stem the increasing tendency to shortcut legal niceties through collective procedures based on nationality.¹³ Neither of those issues is the purpose of this Article. Through an examination of such border masquerades, in which migrants and States play different roles, this Article examines the contradictions between two bases for individual rights.¹⁴ To do so, it revisits the trope of masking in politics, which Hannah Arendt famously developed but which appeared earlier in Karl Marx's essay, *On the Jewish Question*. Ultimately following Marx, this Article shows how tensions between two foundational legal constructs, citizenship and human rights, emerge from the ways both are severed from the economic relations they rest upon.¹⁵ The latter have played a key role in the constant redrawing of boundaries between "legitimate" and "illegitimate" migration during the so-called "refugee crisis."¹⁶

Below, I further identify the phenomenon of false and concealed identities among asylum seekers and other unauthorized migrants. I rely on various materials—academic as well as artistic—including a work by anthropologist Didier Fassin on migration and health in France¹⁷ and a scene from Nadine Labaki's award-winning film *Capernaum*, which poignantly depicts an attempt to

and *M.S.S. v. Belgium and Greece*, App. No. 30696/09, (Jan. 21, 2011), <https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609> (referring to the absence of removals to Afghanistan when not physically possible).

10. For a critique, see Heaven Crawley and Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism in Europe's "Migration Crisis"*, 44 J. ETHNIC & MIGRATION STUD. 48 (2017).

11. Take, for example, Dutch Commissioner Frans Timmermans, who, in 2016, claimed that 60 percent of new arrivals are "not refugees," but "economic migrants," citing the fact that they are "mainly Moroccans or Tunisians." Peter Clusky, *Most Fleeing to Europe are "not refugees"*, *EU official says*, IRISH TIMES (Jan. 26, 2016), <https://www.irishtimes.com/news/world/europe/most-fleeing-to-europe-are-not-refugees-eu-official-says-1.2511133>.

12. Crawley & Skleparis, *supra* note 10, at 58–59.

13. See, e.g., Elspeth Guild, *The Right to Dignity of Refugees: A Response to Fleur Johns*, 111 AJIL UNBOUND, 1933 (2017).

14. Cf. Bridget Hayden, *What's in a Name? The Nature of the Individual in Refugee Studies*, 19(4) J. REFUGEE STUD., 471 (2006).

15. See generally Martti Koskeniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN J. INT'L L. 229 (2004); Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57, 76 (2011) (suggesting that "where abuses are currently explained with reference to bad policies, laws and interpretations, the concept of planned misery would urge enquiry into the material context of such harmful thinking.").

16. See Crawley & Skleparis, *supra* note 10; Estela Schindel, *Migrants and Refugees on the Frontiers of Europe. The Legitimacy of Suffering, Bare Life, and Paradoxical Agency*, 59 REV. DE ESTUDIOS SOCIALES 16 (2017).

17. DIDIER FASSIN, HUMANITARIAN REASON (2012).

claim false identity in order to obtain minimal legal protections.¹⁸ I then characterize two ways in which law seeks to protect individuals: membership in a polity (citizenship, nationality) and membership in humanity (human rights).¹⁹ I argue that these bases of legal status differ and even contradict each other in identifiable ways. I also discuss how the two have shaped the ways migrants and their advocates have fashioned migrant claims. Next, I engage Arendt's understanding of citizenship as a kind of mask. Through a metaphor drawing upon Roman theatre, Arendt conceived of citizenship as a mask, serving to equalize members of the political community and to allow them to participate.²⁰ Forms of disguise among migrants reveal how, today, humanity plays a similar role of masking (in a global context). I then return to Marx's understanding of the separation between citizen and human in order to conceptualize the contradiction between the two bases of individual legal protection. This agonistic relationship reflects how both categories occlude contemporary questions of global inequality, which invariably remain central to unauthorized migration, and shed light on the oppressive, as well as emancipatory, potentials of law for the large part of humanity that is constantly on the move.

I.

BORDER MASQUERADES

Anthropologist Didier Fassin contextualizes France's protection of vulnerable migrants in the political economy of migrant labor in the late 20th century.²¹ Before the "closure of borders," announced in 1974,²² migrants were integrated in the lower strata of France's workforce, primarily in industrial labor and agriculture: "Coming from Southern Europe or Africa, the immigrant helped create national wealth but endured an indefinitely renewed provisional legal status. The body of the immigrant at that time was a productive body, assumed to be in good health."²³ The rise of unemployment and a restructuring of French industry during the 1970s changed the situation and the cultural assumptions surrounding migrant bodies: "despite the fact that some sectors of the French

18. CAPERNAUM (Mooz Films 2018), <https://www.capernaum.film/>.

19. Though considerable scholarship has emphasized the capacious nature of the concept of citizenship, focusing on categories such as "social citizenship," "urban citizenship," or "transnational citizenship," this Article considers citizenship as synonymous with "nationality" and as a formal status. For a discussion of the variety of citizenships, *see, e.g.*, LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2008); Audrey Macklin, *Who Is the Citizen's Other? Considering the Heft of Citizenship*, 8 *THEORETICAL INQUIRIES IN L.* 333, 334 (2007).

20. ARENDT, *see infra* note 114.

21. FASSIN, *supra* note 17, at 83.

22. *See also* Georges Tapinos, *The Dynamics of International Migration in Post-War Europe*, in *MIGRATION POLICIES IN EUROPE AND THE UNITED STATES* 133 (Giacomo Luciani ed., 1993) (tracing concomitant border-closing policies in the mid-1970s in several European States, including France, Germany and Belgium).

23. FASSIN, *supra* note 17, at 86.

economy continue to rely on it, either through temporary contracts (in agriculture and wine making) or in the form of illegal employment (in construction and the garment industry),” the immigration of unskilled labor has been rendered undesirable.²⁴

Relying on Franco-Algerian anthropologist, Abdelmalek Sayad, Fassin observes that, even under such conditions, the body of the migrant remained at the center of migrant identity in the public sphere.²⁵ The disappearance of the need for large-scale immigrant labor “paved the way for a regime of solicitation on the part of foreigners.”²⁶ This dynamic culminated in a government push for deportations.²⁷ In response, migrant advocates sought a humanitarian exception to deportation proceedings to stall deportations for migrants that suffered from serious illness, which could not be treated in their home countries.²⁸ While their bodies remained central to the cultural imagination of migrants, the struggle for humanitarian exceptions medicalized their presence and necessitated the expertise of doctors.²⁹

In response, a conservative French government first drafted a statement, which a socialist Minister of Interior ultimately introduced on June 24, 1997, which said migrants could stay in France if they were in need of medical protection for an acute condition, for which there was no available treatment offered in their home country.³⁰ In the following decade, the number of undocumented migrants legalized under the measure swelled.³¹ Fassin observes a change in the kind of claims migrants made. The 1951 Refugee Convention offers protection to those who suffer “well-founded fear” of persecution due to “race, religion, nationality, membership of a particular social group or political opinion.”³² Human rights law sometimes provides a basis for preventing

24. *Id.*

25. ABDELMALEK SAYAD, *THE SUFFERING OF THE IMMIGRANT* (2004). While his analysis differs from my own, Sayad also argues that lying among migrant communities has a deeper significance, constitutive of migrant identity, than simply making false statements. *See Id.* at 18.

26. FASSIN, *supra* note 17, at 86.

27. *Id.*

28. *Id.*

29. In an earlier paper, Fassin observes that “for asylum seekers and lawyers, [medical certification] is an ‘open sesame’; for officials and judges, it is a piece of evidence among others; and for both it is an innovation in governmentality.” Didier Fassin, *The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers*, 107 *AM. ANTHROPOLOGIST* 597, 600 (2005).; *See also* Roberto Beneduce, *The Moral Economy of Lying: Subjectcraft, Narrative Capital, and Uncertainty in the Politics of Asylum*, 34 *MED. ANTHROPOLOGY* 551, 554 (2015).

30. FASSIN, *supra* note 17, at 86.

31. *See* MACROTRENDS, *France Refugee Statistics 1960-2021*, <https://www.macrotrends.net/countries/FRA/france/refugee-statistics> (last visited Mar 21, 2021).

32. Convention Relating to the Status of Refugees, art. 1, ¶ 2, July 28, 1951, 189 U.N.T.S. 137, <https://www.unhcr.org/3b66c2aa10>.

deportation, anchored, for example, in the right to family life.³³ Yet, individuals who could otherwise have claimed family reunification—and even “genuine” refugees fearing persecution—preferred to focus their arguments against deportation on medical conditions.³⁴

Many migrants hoping to secure residence in France either exaggerated or feigned illnesses.³⁵ This trend challenged French doctors, implicating, to some degree, both their professional ethics and their political views. While the material demands of a working body (wage, benefits) became illegitimate as a basis for legal status, the minimal needs of a living body (medicine, treatment) were constructed as a measure of legitimation.³⁶

Fassin calls the process by which medical concessions replace legal rights, “humanitarian reason.”³⁷ For lawyers, the word “humanitarian” sometimes suggests an opposition to “legal,” a disanalogy that emphasizes that charity is not a matter of legal duty, but of personal choice. The process that Fassin notes was nevertheless grounded in law, primarily human rights law. The main legal framework for humanitarian reason was Article 3 of the European Convention on Human Rights, and a broad interpretation of its imperative: “No one shall be subjected to torture or inhuman or degrading treatment or punishment.”³⁸ As Veelke Derckx observed, “The area of application of Article 3 [of the] ECHR by the European Court has gradually extended from the question whether the alien, if sent back to his country of origin was at risk of being intentionally subjected to torture or inhuman or degrading treatment ... to include also considerations regarding an individual’s physical or mental health.”³⁹ Fassin’s narrative is one in which the *material* demands of migrants who have long sought to work are transformed, through Article 3, into claims about *minimal protections* that all humans should enjoy.

Yet, the new Ministry of Interior’s rule granting medical protection only lasted for a decade. As conservative observers identified the growing number of migrants avoiding deportation, they came to object to the measure and overturned it in 2008.⁴⁰ Here, too, legal institutions had an active role. The European Court

33. See COUNCIL OF EUR., COMM’R OF HUM. RTS., REALISING THE RIGHT TO FAMILY REUNIFICATION OF REFUGEES IN EUROPE (2017), <https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0>.

34. FASSIN, *supra* note 17, at 84.

35. *Id.* at 102.

36. *Id.* at 86.

37. *Id.* at 83.

38. *Id.* at 102. The landmark case starting this development was *D v. United Kingdom*, 24 Eur. H.R. Rep. 423 (1997).); see also *B.B. v. France*, App. No. 30930/96, (Sept. 7, 1998), <https://www.hrdp.org/contents/600>, where the European Commission of Human Rights found a breach of the ECHR, but a settlement was achieved.

39. Veelke Derckx, *Expulsion of Illegal Residents (Aliens) with Medical Problems and Article 3 of the European Convention on Human Rights*, 13 EUR. J. HEALTH 313, 314 (2006).

40. FASSIN, *supra* note 17, at 106–08.

of Human Rights (ECtHR) rejected “humanitarian reason” once it was perceived as an avenue for global economic redistribution. As Fassin puts it, the ECtHR held that “European countries could not be required to redress the disparities in health care between nations.”⁴¹ Fassin refers to *N. v. The United Kingdom*, where Ms. N.—an HIV-positive Ugandan national—applied to the court to dispute her failed asylum request.⁴² Though Ms. N. was ill, her condition was not considered sufficiently dire, and the majority thought the case was about disparities of wealth.⁴³ In the Grand Chamber’s own words: “Article 3 does not place an obligation on the Contracting State to alleviate such disparities,” including “[a]dvances in medical sciences, together with social and economic differences between countries.”⁴⁴

Since the Syrian civil war began in 2011, asylum seekers hoping to enter or stay in Europe have pursued similar strategies of concealment and misrepresentation.⁴⁵ During this time, a kind of “fast lane” for Syrians emerged at processing centers on the Greek Islands, and Greece limited the detention of Syrians.⁴⁶ Multiple European governments disallowed the deportation of Syrians under “temporary protection” or “humanitarian protection” statutes,⁴⁷ or by granting refugee status under the Refugee Convention.⁴⁸ Several countries also granted Syrians significant social benefits, with Germany notably leading the

41. *Id.* at 108.

42. *N. v. United Kingdom*, App. No. 26565/05, (May 27, 2008), <https://www.refworld.org/cases,ECHR,483d0d542.html>. For an illuminating analysis and critique, see Virginia Mantouvalou, *N v UK: No Duty to Rescue the Nearby Needy?*, 72(5) MOD. L. REV. 815 (2009).

43. *Id.* at 17 (“Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights”)

44. *Id.* But see dissenting opinion at 23.; see also Marlies Hesselman’s useful analysis of the case law both, leading to, and following *N. v The United Kingdom* in Marlies Hesselman, *Sharing International Responsibility for Poor Migrants: An Analysis of Extra-Territorial Socio-Economic Human Rights Law*, 15 EUR. J. SOC. SEC. 187, 200–04 (2013).

45. See generally Krishnadev Calamur, *The Flourishing Black Market in Syrian Passports*, THE ATL. (Nov. 18, 2015), <https://www.theatlantic.com/international/archive/2015/11/fake-syrian-passports/416445/>; Souad Mekhennet & William Booth, *Migrants are Disguising Themselves as Syrians to Enter Europe*, WASH. POST (Sept. 23, 2015), https://www.washingtonpost.com/world/europe/migrants-are-disguising-themselves-as-syrians-to-gain-entry-to-europe/2015/09/22/827c6026-5bd8-11e5-8475-781cc9851652_story.html; Susannah George, *The Men Who Pretend to Be Syrian Refugees*, FOREIGN POL’Y (Oct. 7, 2015), <https://foreignpolicy.com/2015/10/07/the-men-who-pretend-to-be-syrian-refugees-greece/>.

46. Schindel, *supra* note 16, at 17 (this ‘fast lane’ ended with the ‘EU-Turkey’ deal, signed in 2016, in which Turkey took on expanded responsibilities over Syrian asylum seekers); CIRCULAR ORDER OF THE HELLENIC POLICE 71778/13/511278 of 9 April 2013; see generally *S.Z. v. Greece*, App. No. 66702/13, (Jun. 21, 2018), <https://www.refworld.org/cases,ECHR,5b2cc52e4.html>.

47. Also termed ‘subsidiary protection’ outside the UK.

48. Hélène Lambert, *Temporary Refuge from War: Customary International Law and the Syrian Conflict*, 66 INT’L COMP. L. Q. 723, 741–44 (2017); Cynthia Orchard & Arthur Miller, *Protection in Europe for Refugees from Syria* REFUGEE STUD. CTR. 21 (2014), <https://www.rsc.ox.ac.uk/files/files-1/pb10-protection-europe-refugees-syria-2014.pdf>.

way.⁴⁹ Unlike in Fassin's French account, health was not the central issue that prevented the deportation of Syrians. At stake was a bloody civil war, and what refugee lawyers sometimes call, "generalized violence."⁵⁰ In Germany and elsewhere, some migrants pretended they were Syrians to gain opportunities to request asylum, as well as benefits that would otherwise be saved only for Syrian refugees.⁵¹ As Peter Bouckaert noted, "this has created a huge market for fake passports in Turkey. Many non-Syrians want to pass through [the Syrian camp,] so many Iraqis and Lebanese are buying fake passports to be processed [faster]."⁵² Being able to present oneself as Syrian became a desirable commodity.⁵³

In popular media, Nadine Labaki's award-winning film, *Capernaum*, highlights the significance of such border masquerades for destitute individuals from the Middle East with no legally cognizable asylum claims.⁵⁴ As a fictional portrait of the lives of stateless residents of Beirut, the film captures remarkably the use of false identities. The twelve-year-old protagonist—a stateless, Lebanese child named Zain Al-Hajj—rehearses his Syrian accent in search of a way out of his infernal life and into Europe.⁵⁵ As critic Yasmine El-Rashidi explains, Zain has a torturous existence in Beirut, on "the margins where the undocumented live: refugees, domestic workers who have fled abusive sponsors, poverty-stricken locals." His parents were unable "to register their children's births for lack of the necessary fees," and so have fallen "into a no-man's-land and are no longer recognized by the [S]tate."⁵⁶ He practices Syrian Arabic after he discusses a trip

49. See Orchard, *supra* note 48, at 7.

50. See, e.g., U.N. HIGH COMM'R FOR REFUGEES (UNHCR), *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update V*, U.N. DOC. HCR/PC/SYR/17/01 (2017), <https://www.refworld.org/type,COUNTRYPOS,UNHCR,SYR,59f365034,0.html>.

51. Ghaith Abdul-Ahad & Patrick Kingsley, *Concern over burgeoning trade in fake and stolen Syrian passports*, THE GUARDIAN (Sept. 8, 2015), <https://www.theguardian.com/world/2015/sep/08/growing-concern-over-trade-in-fake-and-stolen-syrian-passports>.

52. John Domokos & Patrick Kingsley, *Chaos on Greek islands as refugee registration systems favours Syrians*, THE GUARDIAN (Nov. 21, 2015), <https://www.theguardian.com/world/2015/nov/21/chaos-greek-islands-three-tier-refugee-registration-system-syria-lesbos>. Compare to another well-known story, in which extreme right-wing soldier "Franco A," received benefits under the fabricated identity of a Syrian asylum seeker for a year before his story broke out and created a significant bang in the media: Andrea Grunau, *A German right-wing extremist soldier's double life*, DEUTSCHE WELLE (DW) (Apr. 26, 2018), <https://www.dw.com/en/a-german-right-wing-extremist-soldiers-double-life/a-43540639>.

53. Compare with Ayelet Shachar, who has explored an analogy between birthright citizenship and inherited property. As she explains, "This perspective creates a space in which to explore membership entitlement in the broader context of today's urgent debates about global justice and the distribution of opportunity." AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 3 (2009).

54. CAPERNAUM, *supra* note 18.

55. *Id.*

56. Yasmine El Rashidi, *Growing up in Hell*, N.Y. REV. OF BOOKS (Jun. 6, 2019), <https://www.nybooks.com/articles/2019/06/06/capernaum-growing-up-in-hell/>.

to Europe with a ruthless smuggler working from a stall in the local market.⁵⁷ The smuggler is supposed to coordinate his delivery to Greece by boat, where Zain is expected to confront a screening interview.⁵⁸

Zain learned about the plans of a Syrian refugee girl to embark on a boat to Greece and became jealous of her hopes: to deliver herself from degrading squalor and obtain a comfortable bed.⁵⁹ He symbolizes a global underclass of humans, whose lack of legal status places them *beneath* bona fide asylum seekers from areas of large-scale, mediatized crisis.⁶⁰ Syrian asylum seekers' needs for international protection are, at least, presumed to be minimally recognized by the law.⁶¹ But a stateless Lebanese child who lives off selling powdered pain killers on the streets does not necessarily have a legal protection claim under current asylum law.⁶² If, at least, he had fled from the Syrian civil war, he would have been elevated to the status of this Syrian girl. Presumably, he would have a better chance of being granted asylum in Europe.

From Fassin's health imposters to Labaki's Zain—including countless men, women, and children—"false declarations" reveal important aspects of a political imagination of what it means to be an individual human being.

II.

THE DUALITY OF THE INDIVIDUAL

Recent decades have seen an increase in literature on the legal status of the individual under international law.⁶³ But how is this status established? Contemporary legal theory offers two basic answers to this question.⁶⁴

57. European policymakers have mobilized the way in which language (and accent) move with the asylum seeker in order to determine his or her 'true' origin. See Elena Faddian-Qasmiyeh, *Representations of Displacement from the Middle East and North Africa*, 28 *PUB. CULTURE* 457, 462. (2016).

58. CAPERNAUM, *supra* note 18.

59. *Id.*

60. See Schindel, *supra* note 16, at 18.

61. See Lambert, *supra* note 48.

62. MICHELLE FOSTER, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 1–3* (2007) (discussing the difficulty of granting legal protection to those who have fled economic death and whether the Refugee Convention framework can overcome it, through creative interpretation).

63. See generally Simone Gorski, *Individuals in International Law*, *MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L.*, (2013), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e829>; see also KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* (2011); Chiara Giorgetti, *Rethinking the Individual in International Law*, 22 *LEWIS & CLARK L. REV.* 1085 (2018).

64. See ITAMAR MANN, *HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW* 211 (2016).

One basis, conceptualized in political theory and often in domestic public law, is that the source of individual rights is citizenship.⁶⁵ Every citizen is granted individual rights. If all States are appropriately constituted, individual rights would be protected on the global sphere as well.⁶⁶ According to this understanding, rights are realized through institutionalized settings that have an implicit basis in a social contract. Members of a political community are assumed to have come together and made reciprocal promises in a social contract to uphold the law and receive fundamental political protections in return. The classical theorist of this view is Thomas Hobbes, who is sometimes also considered the earliest theorist of legal positivism.⁶⁷ For Hobbes, “natural rights” are founded on an extremely thin basis, namely “that *each man protect his life and limbs as much as he can*” (emphasis in the original).⁶⁸ I can only be truly protected by their membership in a “commonwealth.”

This view is implicit in international legal positivism as well. International legal positivism is often thought to have dominated the field during the nineteenth century, but probably only reached its full articulation in the twentieth century.⁶⁹ With many introductory international law courses still starting with the famous *Lotus* case in 1927,⁷⁰ positivism remains with us today. In this tradition, State consent, as reflected by treaty or custom, is the sole basis for international law. Positivism, thus, constructed “a system set up for States as the sole subjects of international law, while individuals were the subjects of the State and its internal laws.”⁷¹ International law is the law of interstate agreements. As such, individuals do not have a status under international law and are protected only indirectly as citizens of their own States. An injury to a citizen of a State is conceived of as an injury to the State, with the latter expected to respond by protecting its citizens, wherever they may be.

65. See ALISON KESBY, *THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW* 67 (2012).

66. This follows from David Singh Grewal’s reading of the ‘realist-utopian’ tradition, particularly as reflected by Thomas Hobbes and Immanuel Kant. As Grewal explains, “both claimed that political changes at the domestic level could produce a peaceful world [...] Contemporary democratic peace theory is, in this respect, much more continuous with prior social-contract theory than is usually recognized.” See David S. Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 *YALE L. J.* 619, 663–64 (2016).

67. For a useful critical account of this view, see James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 *U. PA. L. REV.* 383, 390–93 (1987).

68. THOMAS HOBBS, *ON THE CITIZEN* 27 (Richard Tuck & Michael Silverthorne eds., Cambridge Univ. Press 2008) (1642).

69. See David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 *QUINNIPIAC L. REV.* 99, 109 (1997).

70. *The Case of the S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 10).

71. Giorgetti, *supra* note 63, at 1087.

Hobbes is often regarded as a theorist of absolutist sovereignty.⁷² But his view that individuals are only granted legal status within their own commonwealths, and that international law is simply the law of mutual promises or treaties between those commonwealths, is not necessarily an illiberal view.⁷³ David Singh Grewal's reading aligns Hobbes' positivism with later social contract theorists, including Jean-Jacques Rousseau, Immanuel Kant, and John Rawls.⁷⁴ For theorists within this tradition, ascribing a status to the individual outside a State is a useless, or perhaps even a *harmful* exercise.⁷⁵ As Hobbes puts it, "[o]utside the circumstances of a commonwealth [*statum civitatis*] each man does indeed have the most complete liberty, but it does him no good. And the reason is that he who does all things of his own free will because he has his liberty, also suffers all things at the will of others, because they have their liberty."⁷⁶

As some have argued in the context of immigration, an independent status for the individual under international law may have detrimental implications for the possibility of realizing democratic self-government.⁷⁷ If States are to foster mutually peaceful relations and stability, they must maintain inseverable links to their citizen-members.⁷⁸ An equality among citizens across borders, it is hoped, will be realized incrementally through an enlightened foreign policy.⁷⁹ Since it is unlikely that States will agree on a legal status for all individuals, such a status is likely to become a way of dressing specific State interests as universally-binding.⁸⁰ That, in turn, further risks inviting conflict.⁸¹ With such assumptions it is not difficult to see how the recognition of refugee rights remains subsidiary to citizenship, and how unauthorized migration is *not* an adequate channel for global redistribution.

72. See, e.g., Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2020 ed.), <https://plato.stanford.edu/archives/fall2020/entries/hobbes-moral/> (Hobbes argued that to avoid the horrible prospect of governmental collapse and return to the state of nature, people should treat their sovereign as having absolute authority.")

73. Grewal, *supra* note 66, at 632.

74. *Id.*

75. *Id.* at 74 (explaining that "Hobbesian commonwealths can afford to be less bellicose than Hobbesian individuals because they are less at risk from the anarchy of the international system").

76. HOBBS, *supra* note 68, at 115–16.

77. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); see also Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELBOURNE INT'L L. J. 392, 421 (2013). The premise is also common to left supporters of Brexit, see Richard Tuck, *The Left Case for Brexit*, DISSENT MAG. (Jun. 6, 2016), https://www.dissentmagazine.org/online_articles/left-case-brexit.

78. Grewal, *supra* note 66, at 652.

79. *Id.*

80. I take this as a central point of Samuel Moyn's critique of my previous work in human rights, and specifically his emphasis for a need of "theoretical pluralism." See Samuel Moyn, *The Embarrassment of Human Rights*, 50 TEX. INT'L L. J. F. 1 (2015).

81. Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1545 (1996).

But the individual is not only legally protected as the citizen of a specific State. Another option, which diverges somewhat from the positivist tradition but is perhaps more accepted in contemporary international law, is that individuals also enjoy a protected status as *humans*.⁸² The view has its roots in the natural rights tradition.⁸³ Sir Hersch Lauterpacht—who drafted an international bill of rights, which later formed the basis for the European Convention on Human Rights—is often credited for carving a place for the individual in modern international law.⁸⁴ Anne Peters has pointed out that in a variety of contexts beyond human rights law, the individual is directly recognized as a subject of international law, regardless of their citizenship.⁸⁵ However, the most familiar context in which the individual is recognized is indeed that of human rights law. Under international human rights law, citizenship or nationality is *not* the basis for legal protection; notions of territoriality and jurisdiction are cited instead.⁸⁶ As Article 2 of the International Covenant on Civil and Political Rights (ICCPR) provides, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]”⁸⁷ Inasmuch as membership is upheld as a justification for this territorial-jurisdictional rule, it is membership in *civil society*, not formal citizenship.⁸⁸

It is for this reason that in Fassin’s account of France migrants present on French territory could raise human rights claims before the European Court of Human Rights.⁸⁹ Such claims are potentially thicker than simply refugee protection. Beyond the rights set out by refugee law, they include the entire gamut of human rights claims, including non-discrimination, the right to family, privacy, religious freedom, and more. Zain is in Beirut and is, of course, not within European jurisdiction, but his plan is to set foot on Greek soil (or otherwise within Greek jurisdiction).⁹⁰ He will thus be able to make claims upon the European State, even though he is not a citizen. He does not have to be a member in the

82. KESBY, *supra* note 65, at 92.

83. HOBBS, *supra* note 68.

84. See SIR HERSCH LAUTERPACHT, *AN INTERNATIONAL BILL OF THE RIGHTS OF MAN* (Oxford Univ. Press 2013) (1945).

85. ANNE PETERS, *BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW* (Jonathan Huston trans., Cambridge Univ. Press 2016).

86. See ALLEN BUCHANAN, *THE HEART OF HUMAN RIGHTS* 220, 285 (2013).

87. International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR]. See generally Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to* 25 *LEIDEN J. INT’L L.* 857 (2012) (discussing the philosophical exploration of this important aspect of human rights law).

88. See *Virginia Mantouvalou, N v UK: No Duty to Rescue the Nearby Needy*, 72 *MOD. L. REV.* 815, 8 (2009).

89. European Convention on Human Rights, art. 1, Apr. 4, 1950, E.T.S. 5.

90. See *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, (Feb. 23, 2012), <https://www.refworld.org/cases,ECHR,4f4507942.html>.

demos—or in its supranational extensions, such as the European Union or the Council of Europe—to speak in the name of humanity.

When it comes to unauthorized migrants, a partial list of the instruments that protect humans independently of their citizenship includes the 1951 Refugee Convention and its 1967 Protocol, the 1984 Convention Against Torture, and the entire subfield of international criminal law.⁹¹ The European Convention on Human Rights joins this list as part of a host of regional instruments.⁹² An interlocutor from the interstate tradition may, of course, point out that all of these instruments are essentially interstate agreements, wherein obligations are only *indirectly* owed to individuals. Yet such an objection is not entirely convincing. Supranational institutions, customary international law, and peremptory norms (*jus cogens*) all seem to have firmly established a grounding for individuals directly on the international sphere.⁹³ Whether articulated in quasi-positive or moral terms, the natural rights tradition has lasted even in cultural contexts in which its religious basis is no longer taken for granted.

In short, the law grants both views significant purchase. In a context where the individual has a dual legal status, the border masquerades described above reflect a generalizable insight. When the former form of protection for the individual as a citizen under sovereignty is rendered defunct, the law may enable and even *invite* a substitution effect where those who can no longer obtain legal protections as individual citizens may seek to secure the individual rights of humans provided directly by international law. They may do so, for example, by appealing to obligations under international human rights treaties. As I argue below, this substitution effect is central to the mutual pressure that citizenship and human rights have exerted upon each other in the context of a protracted global “refugee crisis.”

Both citizenship and human rights are, of course, formal statuses. As the ECtHR remarked in *N. v. The United Kingdom*, human rights do not in and of themselves ensure specific distributive outcomes.⁹⁴ Generally, they purport to be silent on questions of distributive justice, as they are assumed to eschew partisan politics.⁹⁵ And yet, basic material interests are a major driving force of migrant claims, whether they are framed in terms of citizenship or in terms of humanity. As was the case for France’s migrant labor force, a gap persists between the fundamental conceptions of rights under law and the actual interests of

91. See Martti Koskeniemi, *Hersch Lauterpacht and the Development of International Criminal Law*, 2 J. INT’L CRIM. JUST. 810, 815 (discussing “the role of individuals in international law”).

92. Ruti Teitel aptly labeled this body of law “Humanity’s Law.” See RUTI TEITEL, *HUMANITY’S LAW* (2013).

93. See generally Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533 (2001) (referring to the context of refugees).

94. *N. v. United Kingdom*, *supra* note 42, ¶ 24.

95. For a critique, see generally SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018).

migrants.⁹⁶ On the other hand, material interests can be presented through both categories—in different ways.

Global inequality, authoritarian governments, foreign military intervention, and the effects of climate change, have all rendered the citizenships of many around the world effectively useless. Such citizenships are either empty placeholders, with the corresponding States unable to ensure that their citizens can fulfill their most basic needs; or they are sometimes predatory toward their holders, such as, when the relevant States refuse to extend protections to members of specific groups.⁹⁷ Such conditions lead to consequences observable in cases of false or concealed identity: those holding citizenships with negative value may instead avail themselves of the second basis for individual protection; namely, their status as humans.

Masquerading as Somalis, the unauthorized migrants we encountered at the border seemed to be trying to substitute their citizenship in a specific State, the Dominican Republic, with that of *another specific State*, Somalia. But that is not exactly the case. Rather than retaining its institutional specificity as a State, “Somalia” functions here as a symbol of crisis: one that has become so awful as to concern international institutions and merit a protection for all humans coming from there. To follow Hilary Charlesworth, this is the kind of crisis that international lawyers savor—an opportunity to display their “universal humanism.”⁹⁸ The substitution, in other words, is replacing Dominican citizenship with *the status of subjects of such universal humanism*. It is precisely being human—sans the added layer of citizenship.⁹⁹

The migrant workers that Fasson writes about try to establish a protection granted to all humans within French territory, instead of returning to the State where they originated.¹⁰⁰ Zain, the young protagonist of *Capernaum*, found himself in a comparable condition.¹⁰¹ He is stateless, and State authorities have failed to give him access to the domestic social contract. This does not however, in itself, mean that international human rights law provides him with an alternative grounding. His inchoate attempt to pose as Syrian is an attempt to disguise as a member of a group that is *recognized* as requiring direct international protection. The fact that he doesn’t even end up pursuing this option in the film is less important. The film unmistakably captures the tragedy of what it means to rely on one’s own humanity while making demands.

96. See FASSON, *supra* note 17, at 87.

97. See generally DIMITRY KOCHENOV, *CITIZENSHIP* (2019) (discussing the majority of world citizenships as imposing liabilities upon their holders).

98. See Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 *MOD. L. REV.* 377, 388 (2002).

99. See generally Peter J. Spiro, *Citizenship as Property, Not So Valuable* 7 *LES ATELIERS DE L’ETHIQUE / THE ETHICS F.*, 63 (2012) (highlighting how different statuses may be preferred according to their material value in his review of Ayelet Shachar’s *Birthright Lottery*).

100. FASSON, *supra* note 17, at 87–108.

101. CAPERNAUM, *supra* note 18.

All these people, whether real or fictional, determined they may gain from severing their ties to a specific nationality. If they choose another national identity, it is because that identity has come to be associated with the globalized image of a victim.¹⁰² They seek inclusion in categories of people who enjoy the protections that are recognized as forms of membership in humanity, or rather, its historically and culturally specific imagination.¹⁰³ Far from being a natural category that simply includes all humans, “humanity” here should be understood as a construct of the political imagination.¹⁰⁴

III. CITIZENSHIP AS MASK

In her 1943 essay, *We Refugees*, Hannah Arendt describes the personal experiences of her generation of Post-World War II German Jews who fled Nazi persecution and reached the United States.¹⁰⁵ She discusses how, before they reached America, these people often made fraught attempts to adopt the trappings of multiple European citizenships.¹⁰⁶ Arendt, thus, tells the story of Mr. Cohn from Berlin, who wandered from his hometown to Prague, and from there to Vienna and Paris—each time confronting new forms of persecution and social exclusion.¹⁰⁷ Mr. Cohn “had always been a 150 percent German, a superpatriot.”¹⁰⁸ He tried to become an authentic citizen of these places and thereby gain legal protections granted to citizens of specific countries. Yet, time and time again, his attempts to gain citizenship in a nation-state failed.¹⁰⁹

As Arendt later explains, these failures stemmed from the very structure of European citizenship.¹¹⁰ In Europe, citizenship meant belonging in a nation-state. Such citizenship is not established by a social contract among equals, but rather underwritten with the pre-political blood, cultural, or religious ties between

102. Compare Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood* 76 L. & CONTEMP. PROBS. 235 (2013), with Christine Schwöbel-Patel, *The “Ideal” Victim of International Criminal Law* 29 EUR. J. OF INT’L L., 703 (2018), and Christine Schwöbel-Patel & Deger Ozkaramanli, *The Construction of the “Grateful” Refugee in Law and Design*, 4 QUEEN MARY HUM. RTS. REV. (2017).

103. See generally Bishupal Libmbu, *Illegible Humanity: The Refugee, Human Rights, and the Question of Representation*, 22 J. REFUGEE STUDS., 257 (2009).

104. See generally JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 33 (2004).

105. See Hannah Arendt, *We Refugees*, in *THE JEWISH WRITINGS* 264–74 (Jerome Kohn & Ron H. Feldman, eds., 1st ed. 2007).

106. Cf. Shompa Lahiri, *Performing Identity: Colonial Migrants, Passing and Mimicry Between the Wars*, 10 CULTURAL GEOGRAPHIES 408 (2003).

107. Arendt, *supra* note 105.

108. *Id.* at 271.

109. *Id.*

110. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 165–67 (1973).

members of a *nation*.¹¹¹ Mr. Cohn's travails reflect how the very notion of a nation may result in discrimination. If they do not have a certain ethnic or cultural background, citizens will not be treated as equal members; they will not receive the protections granted by the law to individuals *as citizens*. Apprehending the discriminatory cultural underwriting of citizenship, they resort to disguise. Yet the United States, Arendt explained, was not a nation-state. It was "united neither by heritage, nor by memory, nor by soil, nor by language, nor by origin. . . . Only by one thing . . . simple consent to the Constitution."¹¹² Arendt and her generation of European refugees could gain access into the American social contract and truly become equal.¹¹³

Arendt's treatment of the subject in *We Refugees*, however, did not put an end to her interests in disguise.¹¹⁴ The theme reappeared later in her work, in an argumentative form. Consider several passages from Arendt's *On Revolution*.¹¹⁵ Here, Arendt proposed the outline of a theory of *citizenship as mask*.¹¹⁶ Surprisingly, and perhaps unintuitively, there is a certain inversion in the text, when compared to the earlier *We Refugees*. Unlike citizenship in the European nation-state, which requires pre-political bonds and defies Mr. Cohn's hopeless resort to disguise, in *On Revolution* the mask is a condition *for* citizenship. Arendt's conception of citizenship harks back to Karl Marx's (very different) conceptualization in *On the Jewish Question*, which I return to below.¹¹⁷

Arendt's suggestion is that if citizenship is to provide an effective protection for individuals, as members of a political community of equals, they must somehow be masked.¹¹⁸ Arendt's starting point in the relevant part of *On Revolution* is the etymology of the Latin word *persona*: "In its original meaning, it signified the mask ancient actors used to wear in a play The mask as such obviously had two functions: it had to hide, or rather replace, the actor's own face and countenance, but in a way that would make it possible for the voice to sound through."¹¹⁹ Arendt explains the relationship between her theatrical observation, and the notion of a legal person:

The distinction between a private individual in Rome and a Roman citizen was that the latter had a *persona*, a legal personality, as we would say; it was as though the

111. *Id.*

112. See HANNAH ARENDT, HANNAH ARENDT: THE LAST INTERVIEW AND OTHER CONVERSATIONS (2013).

113. To be sure, the American immigration system was, in fact, then, as it is now, rife with racism. See Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245 (2015).

114. HANNAH ARENDT, ON REVOLUTION 97 (Viking Press 2006) (1963).

115. *Id.*

116. Paraphrasing Leora Bilsky, *Citizenship as Mask: Between the Imposter and the Refugee*, 15 CONSTELLATIONS 72 (2008).

117. Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26 (Robert C. Tucker ed., 1978).

118. ARENDT, *supra* note 114.

119. *Id.*

law had affixed to him the part he was expected to play on the public scene, with the provision, however, that his own voice would be able to sound through. The point was that ‘it is not the natural Ego which enters a court of law. It is a right-and-duty-bearing person, created by law, which appears before the law.’ Without his *persona*, there would be an individual without rights and duties, perhaps a ‘natural man’ – that is, a human being or *homo* in the original meaning of the word, indicating someone outside the range of law and the body politic of citizens, as for instance a slave – but certainly a politically irrelevant being.¹²⁰

Arendt had a well-known ambivalence about the State, yet the metaphor of the masked person refers to the protection of a person *as a citizen*.¹²¹ The individual covered by a mask is protected in a social contract of equals. Unlike the citizen in the nation-state, which purports to be based upon pre-political ties, this citizenship is artificial, a man-made outcome of agreement and institutional design. Citizenship resembles a mask precisely due to this artifice. And, because such equal citizenship establishes a political community, each citizen can meaningfully participate through discourse: by covering their faces, the true voices of citizens are revealed. As for the individual member of humanity, Arendt suggests that ultimately, there is no such thing. At best, such an individual is protected by natural law. But, as in Hobbes’ political theory, natural law grants no meaningful protections whatsoever; the individual member of humanity might as well be “a slave”.

To be equal, politically, is to equally enjoy the privilege and the protection of an artificial *façade*, covering our complexion but leaving us a hole for speech. This conception of citizenship as a mask is intimately related to Arendt’s private-public distinction.¹²² For Arendt, citizenship allows us to shed our contingent, and essentially *private*, characteristics.¹²³ The latter distinguish and differentiate among us. Private characteristics may tie us together in relationships of friendship or of love (and probably those of dislike and of animosity, as well). However, as much as these private characteristics define who we are to our friends, they have no place in politics. When we enter the public realm, we must be made equal *artificially*. This formal equalization is precisely what allows our voices to resound. We act politically through participation in a community of equals, and through membership in a social contract. It is membership in this social contract that secures our protections under the law.

120. Arendt, *supra* note 105, at 97; *see also* Ayten Gündoğdu’s masterful discussion of legal personhood and Arendt’s understanding of the mask of citizenship in AYTEN GÜNDOĞDU, RIGHTLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS 99–107 (2015).

121. KESBY, *supra* note 65, at 77–78.

122. HANNAH ARENDT, THE HUMAN CONDITION 22–78 (Univ. of Chi. Press, 1998) (1958).

123. ARENDT, *supra* note 114, at 96–98.

“Mere” humanity is removed from the law in this argument.¹²⁴ Humanity is private and associated with material existence.¹²⁵ It signals the loss of all forms of protection that are normally granted by citizenship. While public life is an artifice, private life is natural. While the life of a citizen allows one to speak in public, the life of humans renders one publicly mute and irrelevant.¹²⁶ Arendt did not write much about health, but it is safe to assume that within her typology, a medical condition belongs to the natural, private, and apolitical aspect of experience. But the border masquerades described above shed a different light on Arendt’s conceptual distinctions. Just like citizenship, humanity, too, can function as a mask. In a world where the status of the individual is directly anchored in international law, humanity—regardless of citizenship—can become the great equalizer.¹²⁷

Even if “all men are created equal” within the context of citizenship; within a global context, all citizenships are not equal.¹²⁸ Arendt did not consider that some of the world’s citizenships do not grant those who hold them the minimal protections that make citizenship worth having.¹²⁹ This reverses Arendt’s categorization, revealing a substitution effect between citizenship and human rights: when citizenship is defunct, exposing one’s mere humanity becomes a way of participating in a global political community.¹³⁰ Fassin’s migrants project political participation—for a certain period and under difficult circumstances—by transforming their own private medical condition into their public voice.¹³¹ When one seeks to appear on the global public sphere as a member of humanity, one’s true citizenship may become a quintessentially *private* matter.

IV.

HUMANITY AS MASK

What, then, are the conditions that made Somali, Afghan, or Palestinian nationalities desirable at a specific historical moment? To assume such identities

124. See HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* 269 (Harcourt Inc., 1976) (1951); see also Kesby, *supra* note 65.

125. ARENDT, *supra* note 122.

126. On speech and muteness, see Arendt, *supra* note 88, at 26.

127. See GÜNDOĞDU, *supra* note 120 (discussing the implications of the international legal status of the individual for Arendt’s theory).

128. KOCHENOV, *supra* note 97. Notwithstanding the principle of “sovereign equality,” which is central to public international law.

129. See Macklin, *supra* note 19, at 349–50.

130. Cf. MANN, *supra* note 64.

131. Such action can be characterized, following Catherine Malabou, as a form of “biopolitical resistance.” See Catherine Malabou, *One Life Only: Biological Resistance, Political Resistance*, trans. Carolyn Shread, 42 *CRITICAL INQUIRY* 429, 429–30 (2016); see also Schindel, *supra* note 16, at 23 (arguing that “[t]he paradox of this humanitarian operation is that those who qualify for admission do so precisely in virtue of their disqualification, since their status is being degraded to that of a *life to protect*.” [emphasis in the original]).

means, first and foremost, putting a spoke in the wheels of the deportation machine; ceasing for a moment its constant churn, and perhaps being released from detention.¹³² After the immediate phase, it may also mean finding a job, earning some money, and participating in the realm Marx called “civil society.”¹³³ But, it also means performing a historically-specific understanding of what it means to be human. It will, thus, affect who receives direct protection of their membership in humanity under international law. There are three observations worth considering in this example on how such an inability to be deported works.¹³⁴

One aspect of this inability to be deported has to do with the existence of ungoverned spaces and stateless territories across the globe. There are certain people that cannot be returned to their countries simply because their countries are not functioning, and so do not exist as such (*de facto* or *de jure*). If effective control over territory is a condition for statehood,¹³⁵ then many populated territories around the world may not be States (even if from the perspective of international law, they are still formally recognized as States until another State is established.)¹³⁶ With regard to a significant percentage of the world, such definitions are purely fictitious.¹³⁷ Consider a few examples. Commentators who have written about Somalia express the view that it is not a sovereign State.¹³⁸ Currently, Libya may also be considered an ungoverned territory.¹³⁹ People who migrated from, or through, such countries cannot be returned to them because these States are purely nominal: there is no State to return them to.¹⁴⁰ This is also

132. See Macklin, *supra* note 19, at 345 (discussing the *de facto* stateless (the *apatride*) and analyzing relevant case law on detention, from Australia, the US, and the UK).

133. Marx, *supra* note 117, 34–36.

134. The analysis that follows is quite similar to that in MAAIKE VANDERBRUGEN ET AL., POINT OF NO RETURN: THE FUTILE DETENTION OF UNRETURNABLE MIGRANTS (2014), <http://pointofnoreturn.eu/unreturnable/>.

135. See Montevideo Convention on the Rights and Duties of States, art 1, Dec. 26, 1933, 49 Stat. 3097, 165 LNTS 19. For the purposes of legal responsibility, see generally Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgement, 1986 I.C.J. 14 (June 27).

136. JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 667–91 (2d ed. 2007).

137. See Brian Finuncane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT’L L. 35, ¶ 1 (2012) (“Fictitious states possess international legal personality but they lack effective control over their territories and populations. Examples of fictitious states include Pakistan, Yemen, and Somalia.”); see also Nii Lante Wallace-Bruce, *Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law*, 53 NETH. INT’L L. REV. (2000); see also Dapo Akande, *Recognition of Libyan National Transitional Council as Government of Libya*, EJIL: TALK! (Jul. 23, 2011), <https://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/>.

138. See, e.g., Yemi Osinbajo, *Legality in a Collapsed State: The Somali Experience*, 45 INT’L & COMP. L.Q., 910, 910–11 (1996).

139. See, e.g., Tarek Megerisi, *Governing Ungoverned Spaces: The Case of Libya*, ATL. CMTY. (Mar. 7, 2019), <https://atlantic-community.org/governing-ungoverned-spaces-the-case-of-libya/#>.

140. Cf. Macklin, *supra* note 19, at 347–49.

true, in some sense, about Palestine. Though Palestine has in recent years been recognized as a State by many countries and international organizations, it has no *de facto* control over its occupied territory.¹⁴¹ Israel is actively preventing it from functioning as an independent State.¹⁴²

A second aspect of this non-deportability more directly relates with the status of the individual under international law. Human rights rules and standards come into play, specifically concerning the risk that one may face if deported.¹⁴³ Such a risk is part of the story in all three examples above—Afghanistan, Somalia, and Palestine. People coming from countries such as these may face a high probability of harm upon return, which they have a legal right to be protected from. Though anchored in interstate relations, the individual’s right to be protected from harm is not understood merely as an interstate obligation.¹⁴⁴ Rather, it is a reflection of an individual’s status as a member of humanity. The relevant rule is *non-refoulement*, enshrined in Article 33 of the 1951 Refugee Convention.¹⁴⁵ The rule’s outer limits are constantly negotiated when it comes to human rights law, particularly in regards to the prohibition of torture and inhuman and degrading treatment.¹⁴⁶

Today, anyone present in Europe who is at risk of suffering from torture or inhuman and degrading treatment may enjoy a protection from *refoulement*.¹⁴⁷ While its status as peremptory law (*jus cogens*) is not entirely clear,¹⁴⁸ the rule of *non-refoulement* is not ordinarily understood as an interstate obligation. Several catastrophic regions around the world stand out as necessitating *non-refoulement* protections for anyone who leaves them.¹⁴⁹ In such cases, presumptive protection is often collectively granted.¹⁵⁰ Following Charlesworth, these regions are crises

141. See Paul Eden, *Palestinian Statehood: Trapped Between Rhetoric and Realpolitik*, 62 INT’L & COMP. L.Q. 225 (2013).

142. See, e.g., AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 253 (2017) (asking the pertinent question: “Can a state that has never been a state before emerge under occupation, when the ability to exercise control over the territory, one of the conditions of statehood, is in fact denied because of the occupation? [emphasis added]).

143. Due to the principle of *non-refoulement*, see, e.g., Clare Frances Moran, *Strengthening the principle of non-refoulement*, INT’L J. OF HUM. RTS. 1–21 (2020).

144. Allain, *supra* note 93.

145. Convention Relating to the Status of Refugees, art. 33, Jul. 28, 1951, 189 U.N.T.S. 137.

146. See Cathryn Costello, *The Search for the Outer Edges of Non-refoulement in Europe: Exceptionality and Flagrant Breaches*, in HUMAN RIGHTS AND THE REFUGEE DEFINITION 180 (Bruce Burson & David James Cantor, eds., 2016); Jari Pirjola, *Shadows in Paradise – Exploring Non-Refoulement as an Open Concept*, 19 INT’L L.J. REFUGEE L. 639 (2007).

147. See, e.g., Saadi v. Italy, App. No. 37201/06, (Feb. 28, 2008), <https://hudoc.echr.coe.int>.

148. Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, 46 NETH. Y.B. INT’L L., 273 (2016).

149. Under the doctrine of “complementary” or “subsidiary” protection. See, e.g., JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* (2007); Marjoleine Zieck, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status (UNHCR)*, 54 INT’L LEGAL MATERIALS 1115, 1129 (2015).

150. *Id.*

of the “public realm, of war and conflict and violence, while crises now occur under the glare of television lights.”¹⁵¹ Examples can be found in places like Somalia, Afghanistan, and perhaps, Palestine. Today Syria,¹⁵² Libya,¹⁵³ and Myanmar¹⁵⁴ may join this list. International organizations, including the United Nations High Commissioner on Refugees (UNHCR), are highly influential in determining the applicable risk assessments.¹⁵⁵ But, of course, other less visible, yet equally catastrophic forms of structural violence are prevalent elsewhere.¹⁵⁶ The latter violence is “seen as part of the status quo, and not truly the business of international law.”¹⁵⁷ While asylum seekers arriving from the former category have come to stand for the suffering of humanity, migrants from the latter category are prone to be labelled as “economic.”¹⁵⁸

A third aspect of non-deportability is more practical. It has to do with whether the State receiving migrants has the necessary level of cooperation with the “sending” or “transit” State to conclude deportation. It is not enough that one is illegally present, or that their State of origin exists as a functioning State, but there normally needs to be a State *willing* to accept that person back.¹⁵⁹ For example, it has often been the case that the Israeli government will not accept Palestinians back.¹⁶⁰

In the last two decades, bilateral and multilateral “readmission agreements” and “safe third country agreements” have established an international legal

151. Charlesworth, *supra* note 98 at 388.

152. See UNHCR position papers quoted in *S.Z. v. Greece* ECtHR, *supra* note 46, ¶¶ 30–32, including *Position on Returns to the Syrian Arab Republic and International Protection Considerations with regard to people fleeing the Syrian Arab Republic*.

153. See U.N. HIGH COMM’R FOR REFUGEES (UNHCR), *Protection considerations with regard to people fleeing from Libya - UNHCR’s recommendations* (Mar. 29, 2011), <https://www.refworld.org/docid/4d959bf62.html>.

154. U.N. NEWS SERV., *New identity cards deliver recognition and protection for Rohingya refugees in Bangladesh*, (Jul. 6, 2018), <https://www.refworld.org/docid/5b83c73f4.html>.

155. See, e.g., U.N. HIGH COMM’R FOR REFUGEES (UNHCR), *Roundtable on Temporary Protection: 19-20 July 2012. International Institute of Humanitarian Law, San Remo, Italy: Discussion Paper*, (Jul. 20, 2012), <https://www.refworld.org/docid/506d8ff02.html>.

156. See Johan Galtung, *Violence, Peace, and Peace Research*, 6(3) J. OF PEACE RES. 167 (1969) (discussing structural violence).

157. Charlesworth, *supra* note 98 at 389.

158. See generally SCOTT VEITCH, *LAW AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING* (2007) (regarding the separation between the political and the economic, and the legal production of suffering).

159. See *Jama v. Immigr. and Customs Enf’t*, 543 U.S. 335 (2005), and the informative discussion of its aftermath in Macklin, *supra* note 19, at 350; see also Arjen Leerkes & Marieke Van Houte, *Beyond the deportation regime: differential state interests and capacities in dealing with (non-) deportability in Europe*, 24 CITIZENSHIP STUD. 319, 324 (2020) (emphasizing the “de-facto compliance of origin states with readmission agreements” as a condition for concluding deportation).

160. See *Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries*, *supra* note 9, at 110.

infrastructure for deportations.¹⁶¹ Such agreements have, at times, allowed States to deport migrants to States that are not their own, where they may have only a few ties.¹⁶² “Hosting” and detaining unauthorized migrants has consequently become a kind of global market for services.¹⁶³ Alexander Aleinikoff asked in 2016, “Is it possible to imagine a day where communities will compete for refugees, knowing that refugees bring labor, skills and access to significant public and private funding for development?”¹⁶⁴ Three years later, the answer seems clear: developing and poor States receive consideration in the form of aid money or other assistance for “cooperating” with wealthier States and holding their unwanted populations.¹⁶⁵ As was recently the case between the United States and Mexico, rarely does the diplomatic arm-twisting in such processes become publicly visible. More often it is kept under the table, or at some distance from the former US President’s Twitter feed.¹⁶⁶

The practice of some migrants who try to shed their citizenship is closely related to the way readmission agreements work. By becoming “merely human,” rightless migrants can try to prevent their deportation through such agreements. Dominicans who dress up as Somalis strategically make that decision. They are implicitly saying: *we are not citizens* of a functioning State, *we are merely human*. They understand that the human does not fit as comfortably into bureaucracy as the citizen. Moreover, the specific costumes they choose are important. They are costumes of people who enjoy the individual protections granted to humans.¹⁶⁷ They are the disguises of humans that do not have the safety net of statehood to fall back on.

161. See Thomas Spijkerboer, *The Global Mobility Infrastructure* 20(4) EUR. J. OF MIGRATION L., 452 (2018); see also Leerkes and Van Houte, *supra* note 159, at 329.

162. See Shani Bar-Tuvia, *Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il)legality and (Im)morality of Western Externalization Policies*, 30 INT’L J. REFUGEE L. 474, 486 (2018) (stressing deportation agreements to countries where refugees did not “transit”).

163. The clearest example is the so-called ‘EU-Turkey Deal’, see EUR. COUNCIL, *EU-Turkey Statement* (Mar. 18, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>; see also Caitlin L. Chandler, *Inside the EU’s Flawed \$200 Million Migration Deal with Sudan*, NEW HUMANITARIAN (Jan. 30, 2018), <https://www.thenewhumanitarian.org/special-report/2018/01/30/inside-eu-s-flawed-200-million-migration-deal-sudan>.

164. T. Alexander Aleinikoff, *Rethinking the International Refugee Regime*, 41 YALE J. INT’L L., 1, 8 (2016).

165. JEAN-PIERRE CASSARINO, UNBALANCED RECIPROCITIES: COOPERATION ON READMISSION IN THE EURO-MEDITERRANEAN AREA (2010).

166. US President Donald Trump declared on Twitter: “Now with our new deal, Mexico is doing more for the USA on Illegal Immigration than the Democrats. In fact, the Democrats are doing NOTHING, they want Open Borders, which means Illegal Immigration, Drugs and Crime.” Donald J. Trump (@realDonaldTrump), TWITTER (June 10, 2019, 3:00 AM).

167. Juxtapose this Muslim disguise to Giorgio Agamben’s discussion of the *Musulmann* (literally “the Muslim”). GIORGIO AGAMBEN, REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE 41 (Zone Books, 4th ed. 2008).

Contrary to Arendt's contention, the human is not constructed "outside the range of the law."¹⁶⁸ The legal construction of the human is surely one of a precarious entity. In many countries—maybe even all of them—the legal protections granted to humans are inferior to those granted to citizens.¹⁶⁹ Yet, some rules, such as those of international human rights law, seem to protect the human qua human, regardless of State consent.¹⁷⁰ Such rules grant real-life humans the opportunities to come close to the State's body politic and enjoy its shade. Other rules, such as those generated by readmission agreements, seek to exclude the human, keeping her at an arm's length from the body politic she wishes to access. However, they can typically do so only after determining that a given human is not only human, but a citizen of a State for which the readmission agreement applies.¹⁷¹ In such cases, citizenship becomes predatory, and determining the nationality of migrants may become a way of dehumanizing them.

These rules, whether inclusive or exclusive, are interwoven in a thick legal tapestry, constructing a status for the individual human under international law. Legally, the results may differ considerably: the protection of *non-refoulement* is very different from recognition as a Convention refugee. The latter comes with a larger set of rights, including freedom of movement, a work permit, and greater access to health care and education.¹⁷² More generally, a commitment to protect humans and the bureaucratic need to deport unwanted humans create legal ambiguities, gaps, and overlaps between contradictory rules. Those rules, in turn, generate a significant measure of uncertainty as to whether one will stay in, or leave, the country she chose to clandestinely enter, or where she will end up.

There are plenty of ways to shed one's citizenship and instead opt for the uncertain legal status of a human. On the most general level, crossing a border and placing oneself in the territory or control of another State may amount to such

168. GÜNDOĞDU, *supra* note 120.

169. But, consider the envy Eastern German racist protestors have expressed due to the so-called 'welcome culture,' mainly in West Germany. Jefferson Chase, *Lessons from Chemnitz: Eastern Germany's Right Wing Protestors Awash in Anxiety*, DEUTSCHE WELLE (DW) (Sept. 2, 2018), <https://www.dw.com/en/lessons-from-chemnitz-eastern-germanys-right-wing-protesters-awash-in-anxiety/a-45326613>.

170. See MANN, *supra* note 64, at 188; ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR 99* (1st ed. 2017) (*see also* sources cited herein).

171. SERGIO CARRERA, *IMPLEMENTATION OF EU READMISSION AGREEMENTS: IDENTITY DETERMINATION DILEMMAS AND THE BLURRING OF RIGHTS* 13–18 (2016).

172. U.N. HIGH COMM'R FOR REFUGEES, *Protecting Refugees: questions and answers*, (Feb. 1, 2002), <https://www.unhcr.org/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html> ("A refugee has the right to safe asylum. However, international protection comprises more than physical safety. Refugees should receive at least the same rights and basic help as any other foreigner who is a legal resident, including freedom of thought, of movement, and freedom from torture and degrading treatment.

Economic and social rights are equally applicable. Refugees should have access to medical care, schooling and the right to work.").

action.¹⁷³ Another common way of doing so is by destroying one's travel documents.¹⁷⁴ If I do not have a passport, I have at least temporarily severed my links to any specific citizenship. Because my citizenship is no longer immediately identifiable, I can now remove myself from the most effective legal infrastructures of deportation. I can present myself with a mask of humanity at the doorstep of another country. The hope is that the mask of humanity will allow my voice to be heard.¹⁷⁵ Contrary to the very fact of presence, which may grant access to an asylum application, and thus provide a way of making a claim, my true citizenship remains an utterly private matter. Some migrants have even reportedly tried to abrade their own fingertips.¹⁷⁶ As a result of border control increasingly relying on biometric data, the symbolic value of such a gesture may outlast its efficiency.¹⁷⁷

Additionally, the practice of lip-sewing, which migrant detention centers around the world regularly employ, is a revealing case in point.¹⁷⁸ When she described citizenship as a kind of mask, Arendt referred to the ancient Roman design.¹⁷⁹ These terracotta masks concealed the face, but had a large opening for the mouth, so the actor's voice could be heard.¹⁸⁰ Imagining Athenian democracy, Arendt thought of speech as the paradigmatic medium for politics.¹⁸¹ Diametrically opposed to Arendt's ancient Roman mask, sewing one's lips leaves one's face exposed. It is the mouth that must be shut, and speech is thus prevented.

173. MANN, *supra* note 64, at 101 (on migration as a self-help remedy).

174. Peter Hille, *Thousands of deportations fail due to lack of papers*, DEUTSCHE WELLE (Apr. 2, 2018), <https://www.infomigrants.net/en/post/8404/thousands-of-deportations-fail-due-to-lack-of-papers>.

175. Thus, broadening the basis for political participation beyond the *demos*. See, e.g., Tamara Caraus, *Migrant Protests as Acts of Cosmopolitan Citizenship*, 22(8) CITIZENSHIP STUD. 791 (2018).

176. L. Sears, *Asylum Seekers Sanding off Fingerprints: Report*, THE LOCAL CH (Feb. 6, 2012), <https://www.thelocal.ch/20120206/2485>.

177. Steve Scherer, "No Fingerprints!" *Chant Migrants in Italy as EU Cracks Down*, REUTERS (Dec. 17, 2015), <https://www.reuters.com/article/us-europe-migrants-lampedusa-fingerprint-idUSKBN0U02H720151217>.

178. See Jenny Edkins & Véronique Pin-Fat, *Through the Wire: Relations of Power and Relations of Violence*, 34(1) MILLENNIUM: J. OF INT'L STUD., 1 (2005); Pierre Monforte & Pascal Durour, *Comparing the Protests of Undocumented Migrants Beyond Contexts: Collective Actions as Acts of Emancipation*, 5(1) EUR. POL. SCI. REV., 83, 85 (2013).

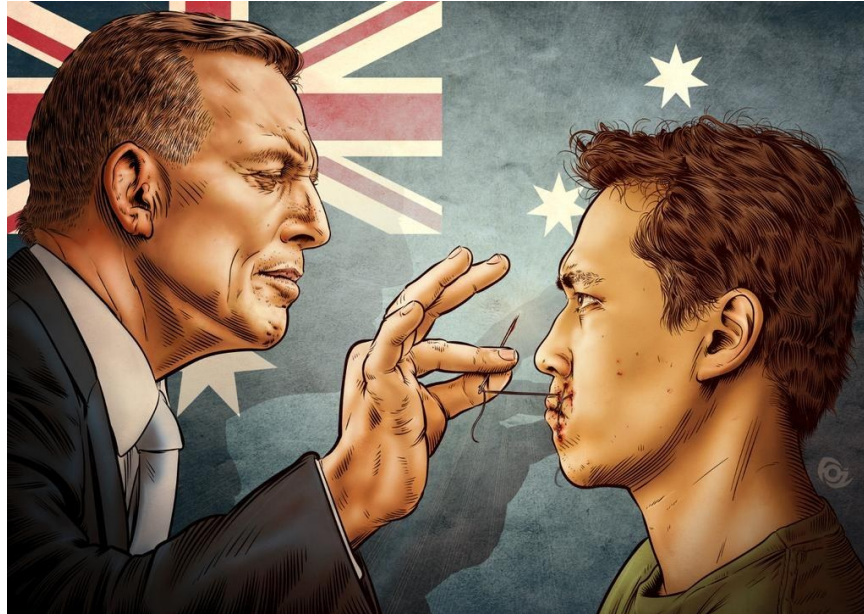
179. ARENDT, *supra* note 114.

180. *Id.*

181. See ARENDT, THE HUMAN CONDITION, *supra* note 122, at 25–27.

Whereas the voice was effective within a political community, presence under State jurisdiction triggers the protections of international human rights law.¹⁸²

Former Australian Prime Minister Tony Abbott Sewing the Lips of an Asylum Speaker, by James Fosdike (2015).



Another related set of practices that migrants have engaged in—perhaps more familiar from prisoners’ protest vocabularies—are hunger strikes and self-harm.¹⁸³ Posing as a refugee from a war-torn country and seeking collective protection appeals to the consciousness of humanity associated with the crisis. Hunger strikes and self-harm are appeals to humanity evocative of the presence of a suffering human body. They echo Fassin’s examples discussed above;¹⁸⁴ as Virginia Mantouvalou comments, in *N v. United Kingdom*, the ill, HIV-positive applicant was not considered close enough to death to be able to stay her removal.¹⁸⁵ Hunger strikes and self-harm bring migrants and asylum seekers closer to dying.

182. Cf. Paulina Ochoa Espejo, *Taking Place Seriously: Territorial Presence and the Rights of Immigrants*, 24 J. POL. PHIL. 67, 68 (2016) (arguing that “Physical presence in specific places can confer political rights and obligations on individuals.”)

183. See Richard Bailey, *Up Against the Wall: Bare Life and Resistance in Australian Immigration Detention* 20 L. & CRITIQUE 113, 130 (2009).

184. FASSIN, *supra* note 17.

185. See Mantouvalou, *supra* note 42, at 817.

Often, to be human means to be “vulnerable”; that is, vulnerable according to a specific set of priorities that reflect the proclivities and biases of international human rights law.¹⁸⁶ For example, a victim of torture is often able to substantiate a protection claim and become non-deportable. In the United Kingdom, a complex discussion has emerged on the forensics of torture and its relationship to deportability. Take the case of Mr. KV, an asylum seeker who said he had been active in the Tamil Tigers.¹⁸⁷ Mr. KV appealed to the UK Supreme Court. The issue was whether to rely on expert testimony that found Mr. KV’s scars were “SIBP”—“self-inflicted by proxy.”¹⁸⁸ A finding of SIBP means that an asylum seeker has intentionally been tortured by a service giver, in order to leave a mark that would help establish a protection claim.¹⁸⁹ Refugee advocates say such government allegations are “inherently unlikely,” and perhaps they are right.¹⁹⁰ In Mr. KV’s case, both the trial and appeals courts attempted to discern precisely how the striped hot iron burns on his back were imprinted, relying on their pattern and shape.¹⁹¹ The Supreme Court finally remitted Mr. KV’s appeal to the Upper Tribunal for fresh determination, while giving considerable weight to the fact that SIBP injuries are likely to be extremely rare.¹⁹²

Evidence of torture is significant when demonstrating that one would be in danger if deported; hence the possible motivation to forge evidence.¹⁹³ At the same time, the fact that torture plays such a central role in immigration proceedings reflects the heightened status of the prohibition on torture in international law. Victims of torture are protected not only because their rights have been violated, but because they suffered a violation of enormous cultural magnitude.¹⁹⁴ While torture becomes a kind of “trump card” in the game of

186. There is a large literature in law and the humanities on cultural biases reflected in human rights law. See, e.g., José-Manuel Barreto, *Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto*, 3 TRANSNAT’L LEGAL THEORY 1–2 (2012) (addressing the need for “a radical reconceptualization of the human rights paradigm” due to its Eurocentric progeny); MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 10 (2002) (discussing the “demining metaphor” of human rights, “pitting savages, on the one hand, against victims and saviors, on the other”).

187. *KV (Sri Lanka) v Sec’y of State for the Home Off.* [2019] UKSC 10, <https://www.supremecourt.uk/cases/docs/uksc-2017-0124-judgment.pdf>.

188. *Id.* at 2.

189. Bernard Robertson & Charles Berger, *Interpreting Evidence of Torture*, 27 MED. L. REV. 687, 688 (2019).

190. Michael Spencer, *Self-inflicted torture by proxy: inherently unlikely*, UK HUM. RTS. BLOG (Mar. 15, 2019), <https://ukhumanrightsblog.com/2019/03/15/self-inflicted-torture-by-proxy-inherently-unlikely/>.

191. *KV (Sri Lanka) v Sec’y of State for the Home Off.*, *supra* note 187, at 4.

192. *Id.*

193. See generally U.N. HIGH COMM’R FOR REFUGEES (UNHCR), *UNHCR and IDC (2016), Vulnerability Screening Tool - Identifying and addressing vulnerability: a tool for asylum and migration systems* (2016), <https://www.refworld.org/docid/57f21f6b4.html>.

194. PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY (2008) (asking the simple, yet provocative question, “if we are quite willing to kill, why not torture?”).

evading deportation, evidence that one has suffered abject poverty, or a lack of access to health or education, means nothing. No asylum seeker ever forges evidence that they cannot possibly sustain themselves in their country. For a migrant who engages in SIBP to avoid being returned to abject poverty, it is apparent that in their view abject poverty is worse than being tortured.¹⁹⁵

As I have emphasized, wearing humanity as a mask is not only about the law—refugee law, or international human rights law, more generally. Political imagination of what it means to protect “humanity” is also at stake. Whoever wants to avail herself of the protections granted to humanity must become human in a way that comports with a cultural imagination in which human rights are central. Karl Marx famously observed this when he commented, “it is not man as citizen but man as bourgeois who is taken to be the true and authentic.”¹⁹⁶ For contemporary thinkers in the Global North, the relevant imagination of humanity is often consonant with a specifically liberal, Anglo-European understanding of human rights.¹⁹⁷ Being human then is associating oneself with one of various identities that liberalism champions: a member of the opposition in a non-democratic context or a member of a persecuted minority. Closely related are protections for a woman or a child (hence, the frequent reports about misrepresentations of age among migrants.)¹⁹⁸ And if those do not work, at the very least, one may cut one’s links to a specific citizenship. This means not only interfering with the bureaucracy of deportation, but also fitting oneself into a conception of humanity as a stateless, peripatetic, and globally homeless community—which we all belong to on some level.

Of course, one may contend, that these methods of cutting the link between a person and their citizenship do not bring anyone “within the range of law”¹⁹⁹ for a simple reason: they are deceptive and sometimes illegal choices. No one enters the range of law by committing perjury. While such an argument may sound compelling, it is ultimately unconvincing. Even if one does have an obligation to tell the truth, it remains unclear whether that obligation necessarily overcomes other considerations. One such consideration is a person’s claim that no matter what they say, they deserve to have a life worth living. It is inevitable that people misrepresent parts of their accounts, but their “half-truths are not thought to undermine the moral basis of the claim.”²⁰⁰

195. Cf. Josh Rogin, *Cheney: We waterboarded U.S. soldiers, so it’s not torture*, FOREIGN POL’Y (Sept. 9, 2011) <https://foreignpolicy.com/2011/09/09/cheney-we-waterboarded-u-s-soldiers-so-its-not-torture/>.

196. Marx, *On the Jewish Question*, *supra* note 117, at 38, 46.

197. Cf. Hayden, *supra* note 14, at 482.

198. EASO AGE ASSESSMENT PRACTICE IN EUROPE 12–14 (2013), <https://www.easo.europa.eu/sites/default/files/public/EASO-Age-assessment-practice-in-Europe1.pdf>.

199. Paraphrasing Arendt, *supra* note 105, at 97.

200. TOBIAS KELLY, THIS SIDE OF SILENCE: HUMAN RIGHTS, TORTURE, AND THE RECOGNITION OF CRUELTY 92 (2012); *see also* Beneduce, *supra* note 29, at 557.

Claims of membership in humanity may be more important, more pressing, and ultimately, have a stronger legal defense than any other factor. Membership in humanity arguably governs refugee protection under existing treaty law. Article 31 of the Refugee Convention provides, “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization”²⁰¹ Legally recognized refugees do not normally lose their status just because they have lied, as long as they suffer a “well-founded” (i.e. true) fear of persecution.²⁰² Perhaps more importantly, all these lies reveal a fundamental truth: while a migrant may not be a member of the “humanity” that a Anglo-European culture champions, she is doubtlessly a human being.

To summarize, when migrants seek protection by crossing international borders, Arendt’s categories are inverted. Arendt implies one’s mask of citizenship is the very condition of public life within a political community.²⁰³ This is not the case when one moves across borders, especially when one’s citizenship has become useless or detrimental to oneself. When migrants wander without a reliable citizenship, their belonging through citizenship becomes a private aspect of their life. Humanity, rather than citizenship, becomes their public appearance. Movement and physical presence, rather than voice and speech, are their channels for political participation. In a world where all citizenships are not created equal, hope may emerge that humanity becomes the equalizer among otherwise vastly disparate statuses.

V.

DIALECTICS OF CITIZENSHIP AND HUMANITY

If humanity can be the mask providing one’s measure of equality, what does this substitution effect mean for citizenship? Can citizenship still, at the same time, function as the basis for political community? With the liberal political imagination of “humanity” growing ever more controversial within Anglo/European societies, this is one of the most important questions of our time. To consider it, however, we must remember that membership through citizenship and membership through human rights are both formal statuses. They reflect

201. See also Immigration and Asylum Act 1999, c. 33, § 31 (UK); *R v. Asfaw* [2008] UKHL 31 (appeal taken from Eng.) (including interpretation of the *travaux préparatoires* and analysis of English case law on the matter).

202. UNHCR, NOTE ON THE CANCELLATION OF REFUGEE STATUS 9 (2004), <https://www.refworld.org/pdfid/41a5dfd94.pdf> (explaining that “A change in the credibility assessment will justify cancellation only if the initial finding on credibility regarding core aspects related to an applicant’s eligibility for refugee status is clearly contradicted by elements contained in the record of the case at the time of the original determination, or inconsistent with new and reliable information that has come to light with regard to facts which were material to the credibility determination”).

203. ARENDT, *supra* note 114.

neither the fully human experience, nor the conditions in which such experience appears. Importantly, neither represent the economic relations they rest upon. Yet, such relations surely matter from the perspectives of migrants. Today, for example, which citizenship one holds matters much more than the *de jure* status of citizenships. The latter question cannot be severed from global economic relations.

Some States may grant their citizens a ‘political community’ through political participation on formally equal footing, as well as a sufficient level of subsistence and welfare. In such conditions, citizenship may reflect a formal equality among otherwise different members, as Arendt imagined.²⁰⁴ Citizenship is a kind of mask separating public from private life. Karl Marx, who wrote about citizenship as such an overlay on humanity in *On the Jewish Question*, characterizes it as citizenship in the secular State.²⁰⁵ This does not coincidentally echo Arendt’s critique of European citizenship—discussed above—and her preference for American citizenship; indeed, they both focus their analysis on this matter in the United States.²⁰⁶ For both Marx and Arendt, the State establishes distinctions between the public and private realms.²⁰⁷ For both, in such a State, not only faith, but also property can be held as private.²⁰⁸ As Marx explains, only in such a State can the market perfect its separation in a sphere distinct from the State—one he calls “civil society.”²⁰⁹ In Marx’s words: “The *droits de l’homme*, the rights of man, are, as such, distinct from the *droits du citoyen*, the rights of the citizen. Who is *homme* as distinct from *citoyen*? None other than the *member of civil society*.”²¹⁰

While the citizen is constituted by political participation through voting, the human (*homme*) proclaims the rights “of enjoying and of disposing at his discretion of his goods and income, of the fruits of his labor and industry.”²¹¹ Of course, Marx’s analysis is not true across time or for all States, nor is it accurate for all countries’ citizenships.²¹² A crucial question in terms of how these distinctions work is whether one’s citizenship provides one with a legal status preferable to that of a human. A would-be migrant may perceive that presenting

204. In her last interview, Arendt famously argued that “America is not a nation state.” See <https://www.youtube.com/watch?v=3OFKx3yqJvw&t=284s..>

205. Marx, *supra* note 116. For an illuminating analysis of Marx’s critique of rights in *On the Jewish Question*, see Paul O’Connell, *On the Human Rights Question*, 40 HUMAN RIGHTS Q. 962, 965–67 (2018).

206. See ARENDT, *supra* note 113, at 85–86, 97; Marx, *supra* note 116, at 41–43 (in both cases the analysis appears in the context of a comparison between American and French revolutionary traditions).

207. See Arendt, *supra* note 121, at 50–67; Marx, *supra* note 116, at 41–43.

208. Marx, *supra* note 116, at 34.

209. *Id.* at 34.

210. *Id.* at 41.

211. *Id.* at 42.

212. See *supra* note 96.

herself as a “mere human” in another country is more beneficial than expecting her citizenship rights to be realized at home. The hope would be to become a member of “civil society” through the exertion of labor and the earning of income, even if it is impossible to access citizenship.²¹³ Such an expectation, whether warranted or not, may make one decide to move and leave home. (The same holds true regardless of whether such a would-be migrant also happens to be a refugee. As one Afghan, a member of the Hazara minority and a legally recognized refugee residing in Greece, once told me: “if you are persecuted because of your political opinion, you can always change your mind; if you don’t have food to put on the table, you have no choice but seeking asylum elsewhere.”²¹⁴)

The substitution effect between citizenship and humanity, identified above, reflects an underlying contradiction between the two kinds of social membership. The most determinant factor—their *respective material value*—is not prescribed by either of their formal structures. While some citizenships function as a form of property, others are loads of debt.²¹⁵

Unlike Arendt, Marx *criticizes* the masking aspect of citizenship and the way it has perfected a separation between the State and the market.²¹⁶ For Marx, “Legal, formal equality – the domain of rights – is but a guise that masks true relations within civil society. It is a veneer of public sameness beneath which lies a “real” structure of difference in the private sphere.”²¹⁷ While for Arendt, such a separation is a condition for a political community of equals, for Marx, it demonstrates the limits of “political emancipation.” He thus calls for “human emancipation” to supersede it.²¹⁸

Following his cue, it is important to do away with any *a priori* distinction between political action to advance “public” interests and action intended to advance family or even personal interests.²¹⁹ If you are a citizen, you can participate in your own domestic realm: whether through voting or through participation in a capitalistic market. If you are a human, you carry with you a body against which certain forms of violence are, at least in theory, always prohibited under human rights law. This makes possible an option of action,

213. BOSNIAK, *supra* note 19, at 18 (developing the notion of “citizenship as membership”).

214. Field notes from a visit to Izmir, Turkey.

215. See Spiro, *supra* note 85; SHACHAR, *supra* note 51.

216. Interestingly, this may bring him closer to the earlier Arendt of *We Refugees*, where she seems to marshal a critique of rights *as such*. See Lyndsey Stonebridge, *Refugee Style: Hannah Arendt and the Perplexities of Rights*, 25 TEXTUAL PRAC. 71, 76 (2011).

217. Raef Zreik, *Rights, Respect, and the Political: Notes from a Conflict Zone*, in LIVING TOGETHER: JACQUES DERRIDA’S COMMUNITIES OF VIOLENCE AND PEACE 107 (Elisabeth Weber ed., 2012).

218. Marx, *supra* note 116, at 40.

219. Indeed, in the context of migration and the need to provide documentation the very limits of the ‘family’ may be negotiated and re-defined. See Leslie Butt et al., *False Papers and Family Fictions: Household Responses to “Gift Children” Born to Indonesian Women During Transnational Migration*, 20 CITIZENSHIP STUD. 795 (2016).

crossing borders, and claiming protection from such violence. Such action, in turn, opens possibilities of participation in informal markets abroad (and in a particular part of “civil society”). Distinctions between the ‘private’ and ‘public’ spheres of one’s life will be *an outcome* of the decision on how to act, not a *precondition* for action.²²⁰

In a decision whether to express one’s interests as a citizen of a State, one will consider how one’s own State serves as an instrument to remove them from resources and opportunities abroad. Due to the thickening web of deportation agreements, some citizenships have become instruments of border policing. Rather than ensuring or protecting rights, participatory or other, citizenship in particular States has become a technology of fixing human bodies to specific territories in the Global South.²²¹ Such a reality may lead a person to shed her citizenship and wear the mask of humanity.

The thinner and scarcer the protections granted by citizenship, the more likely it is that the preferred mode of action will be crossing borders. The law makes a place for both options, but from between them an aspiration to advance a “human emancipation” emerges that neither option embodies: a kind of emancipation that is both political and economic at one and the same time.

State agencies often try to determine a migrant’s citizenship, while migrants may try to conceal it. The allocation of nationality and its attachment to certain bodies is sometimes meant to enable deportation and to open certain possibilities of violence towards those bodies. Determining that one is from the Dominican Republic allows her deportation to the Dominican Republic. Determining that one is from Ghana allows her deportation to Ghana. For a State that seeks to deport migrants, sometimes discovering the truth of one’s belonging becomes less important than making a determination. To reiterate, it is much more difficult to deport mere humans, or those coming from places that symbolize mass human catastrophes.

A contradictory relationship between citizenship and humanity is observable in a dynamic that is familiar to lawyers representing unauthorized migrants: in their motivation to enforce borders, States may resort to misrepresentation or lying to force migrants, with potentially genuine and legally recognized needs for protection, into deportable legal categories.²²² The border masquerade is a macabre dance between States and migrants in which both sides participate. Perhaps the most familiar example is the endless cat and mouse chase regarding

220. Cf. Simon Behrman, *Legal Subjectivity and the Refugee* 26 INT’L J. OF REFUGEE L. 1 (2014) (calling for a re-politicization of the refugee category).

221. Tendayi Achiume has thus described migration as an act of decolonization. E. Tendayi Achiume, *Migration as Decolonization* 71 STAN. L. REV. 1509 (2019).

222. Cf. Melanie Griffiths, ‘Establishing Your True Identity’: *Immigration Detention and Contemporary Identification Debates*, in IDENTIFICATION AND REGISTRATION PRACTICES IN TRANSNATIONAL PERSPECTIVE: PEOPLE, PAPERS AND PRACTICES 281, 293 (James Brown & Gayle Lonegran, eds. 2013) (discussing the systematic pressure identification practices put on individuals to “invent” aspects of their identity including age, name, nationality).

the identity of Eritrean refugees. Since Eritrean nationals have long been recognized as deserving international protection, government lawyers often insist that asylum seekers are not truly Eritreans but Ethiopians.²²³ The substitution effect between citizenship and humanity thus comes full circle: a migrant's humanity is in the final stage substituted with a citizenship that is not their own for the bureaucratic purposes of the State.

Among other measures, global inequality is a disparity in the quality of citizenship held by people around the world. Since the so-called "refugee crisis" hit the headlines in 2015, we have been witnessing an outcome that can be articulated in terms of a tension between citizenship and humanity.²²⁴ Vast disparities in the quality of citizenship have resulted in the movement of enormous populations, with many migrants hoping to put the mask of humanity to beneficial use.

This increase puts pressure on domestic citizenship. It perhaps trite to comment that "sovereignty is back."²²⁵ Attacks on human rights in multiple parts of the world demonstrate a fear that humanity will dilute citizenship and end up rendering both categories dysfunctional. But this is nothing new. Arendt describes such attacks in her writing on the interwar period.²²⁶ Fassin documents them with the decline of "humanitarian reason" in France, about a decade ago.²²⁷ "Populist" discourse against migrants, and its culmination during the Covid-19 pandemic,²²⁸ are only the latest iteration. But as long as States survive, it is likely that human rights survive as well. Human rights' legal source is independent from States even if, discursively and dialectically, they are bound up with States.²²⁹ Human rights will thus remain a vocabulary for action, the ultimate goals of which inevitably include the global redistribution of wealth.²³⁰ Which vocabulary is more useful for "human emancipation," citizenship or human rights, is a judgment to be made in the context of specific struggles.

223. See, e.g., THE AFRICAN REFUGEES DEVELOPMENT CENTER (ARDC), "YOU ARE ETHIOPIAN UNTIL PROVEN OTHERWISE": CONTESTED NATIONALITY, ETHNIC ERITREANS AND STATELESS PERSONS IN ISRAEL (2013), <https://www.issueab.org/resources/21673/21673.pdf>.

224. Cf. Anne McNevin, *The Liberal Paradox and the Politics of Asylum in Australia*, 42 AUSTL. J. OF POL. 611 (2007).

225. Roland Paris, *The Right to Dominate: How Old Ideas About Sovereignty Pose New Challenges for World Order*, 74 INT'L ORG. 453 (2020).

226. Arendt, *supra* note 123.

227. McNevin shows similar developments in Australia at the time, *supra* note 223, at 622.

228. See generally E. Tendayi Achiume, Thomas Gammeltoft-Hansen & Thomas Spijkerboer, *Introduction to the Symposium on COVID-19, Global Mobility and International Law*, 114 AM. J. OF INT'L L. 312 (2020).

229. MANN, *supra* note 63 (conclusion).

230. See O'Connell, *supra* note 204, at 988.

CONCLUSION

Through an engagement with the widely observed phenomenon of false identities among unauthorized migrants, this Article aims to conceptualize a substitution effect between the two basic protections law provides: that of individuals as members of a citizenry, and that of individuals as members of humanity. By invoking false identities, migrants often aim to become “un-deportable.”²³¹ I described this as an act of shedding one’s citizenship and asserting the rights that presumptively belong to all humans. Such actions, which seem to be merely fraudulent negotiations on the outer margins of legality, nevertheless shed light on the fundamental structure of law. As I have shown, the two foundational statuses at the basis of law do not rest on consonant assumptions. In a dialectic process that occurs in conditions of radical inequality and multifarious protracted crises, they exert mutual pressure, and their internal contradictions become gradually more observable.

To conclude, let us return to language from a Frontex report, according to which unauthorized migrants engage in certain misrepresentations “*to reduce the length of their stay in the detention centres.*”²³² The language captures the figure that is at the center of the “refugee crisis.” Whether a genuine refugee or not, this person has lost belief that the protection mechanisms granted by international law can provide her with security. At best, she can strategically use certain rules of law protecting a specific notion of human life to free herself of detention and render herself un-deportable. The next phase will be an attempt to integrate as a worker into “civil society” and to send remittance money home. The price may be forgoing any functional form of citizenship in a political community of formally equal members. Yet, it may still be closer to *emancipation* than what her former State can grant domestically.

231. On what it means to be “non-deportable” (as they call it) see Arjen Leerkes and Marieke Van Houte, *supra* note 158.

232. FRONTEx, *supra* note 44, at 16.