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Two Problems Surrounding the Universality of
Human Rights

A Master's Thesis

by

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Submitted on
17th May, 2018

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Acknowledgements

This thesis marks the end of an academic and personal period that I chose to undertake in the hope of gaining a better understanding of our world, or at least the tools for such an understanding. And, just as in the world we inhabit, it has been marked and determined by the unexpected, life and death, joy, uncertainty and failure on occasions, and, more than anything else, the help and kindness of others.

I would not have been able to enter this program without the full tuition exemption I was generously granted by the Department of Philosophy. I too enjoyed an achievement stipend for two semesters. I am grateful for this opportunity, and for the willingness to help in all matters I have always encountered from all members of this department.

Among them, I wish to heartily thank my supervisor, Siobhan Kattago, for teaching me these years through her academic and personal example, establishing a truly enriching intellectual relationship with me where I felt the freedom to pursue my ideas with rigour, and an essential touch of the wisdom usually known as common sense.

My ideas and personal way of addressing them benefitted from discussions with many friends and colleagues, among them Merily Salura, Mirt Kruusmaa, Francisco Martínez and Semyon Reshenin. The incisive work of Karel Pajus as my opponent in this thesis has notably improved its argument and clarity. None of the above is however responsible in the least for the likely shortcomings of the final form I have given to this thesis.

Riin Prikk kindly welcomed me in her home for more than a year as I came and went from Tallinn to Tartu, and she managed to enlarge my Estonian vocabulary in the process.

I dedicate this thesis to the memory of Heino Rinde, and to the future of Säde Veyrat.

Finally, I would not have been able to pull my studies off without the patient love, encouragement, and unwavering determination of my wife, Liis Palumets. I cannot thank you enough for all this. But I will surely try.

Introduction- The Act of Just Declaring Universal Rights (But Signing a Treaty)

This thesis argues that our contemporary understanding of human rights grounded in the United Nations *Universal Declaration of Human Rights* (UDHR) of 1948 (see Appendix 1 for the full text) and further developed in two international covenants (1966) carries within itself a series of problems that persist to this day. It claims these problems are rooted both in how the notion of the *universality* of human rights constrains the functioning of the polity, and in the conceptual error of proclaiming rights for every human being outside a political space. In support of this argument, I ground my critiques in the theoretical work of Carl Schmitt and Hannah Arendt respectively. The targets of my criticism are both the standard international legal interpretation of these rights as compiled in the *General Comments*¹ to the treaties on human rights published by the United Nations Office of the High Commissioner of Human Rights (OHCHR, 2008), and the direction in which they compel concrete decisions in extreme circumstances. I will use the practical example of the 2015 refugee crisis in Europe to exemplify the latter.

The universality of human rights is not directly defined in the declaration –the notion being just *declared*– although its meaning and intent can be inferred from the usage of the pronouns “everyone” and “no one” at the beginning of all but two of its 30 articles. They are meant to be held by every human being for the very fact of being a human being. The declaration does not enter into how to ascertain who is human or not, but the general consensus within the human rights community is well summed up by Jack Donnelly: “Human rights, following the manifest literal sense of the term, are ordinarily understood to be the rights that one has simply because one is human. As such, they are equal rights, because we either are or are not human beings, equally.” (Donnelly, 2007). Moreover, the declaration had a prescriptive intent when the preamble states:

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and

¹ These *General Comments* published by the UN Office of the High Commissioner on Human Rights contain an ample body of comments declared by the same office to be “authoritative interpretations of the relevant treaty provisions” to each of the human rights treaties approved by the United Nations.

international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. (Universal Declaration of Human Rights, 1948)

The UDHR proclaims the existence of “rights” that it proceeds then to define, but not to justify². These rights would be the foundation of later declarations and international agreements conforming a “core” of nine international human rights treaties³ between 1965 and 2006 (OHCHR, Core International Treaties, n.d.), –in particular, the two covenants of 1966⁴– together with other treaties and international organizations and organs that would conform an international sphere of human rights law. Further international agreements would ground their legitimacy on this common core on human rights and have the United Nations, through its different agencies, as their “guardian⁵”, i.e. the 1951 Refugee Convention. Many of its principles were as well incorporated as fundamental rights in the constitutions of most democratic countries later on.

This should not be confused with *humanitarian* law derived from the Hague (1899 and 1907) and Geneva (mostly four agreements in 1949 and a further one in 1975) conventions that pertain to the sphere of the laws of war, and make no appeal nor claim to human rights nor any sort of universal inherent rights, being mere legal agreements between nations aimed at mitigating the damaging consequences of the scourge of war. Indeed their application is only possible in situations of international conflict, with a reduced set of rules for internal conflicts. They also stipulate the obligation of signatory states to persecute those who violate them. These conventions have been ratified by all states on the planet and are thus –and only because of this fact without any further claim to it– universally applicable (ICRC, Treaties, States parties, and Commentaries).

What might seem like merely a technicality in the difference between human rights law and humanitarian law is actually part of the core of my critique to them. On one side, the universalist language of the declaration mimicked in subsequent treaties is unequivocal in stating the “equal and inalienable rights of all members of

² And neither do the international covenants.

³ UN (2006). *The core international human rights treaties*. Geneva: United Nations.

⁴ The International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

⁵ However, not as their guarantor, since “According to the legislation, States are expected to cooperate with us in ensuring that the rights of refugees are respected and protected.”

irnatural

the human family”, implying *all* human beings; on the other, those very same treaties are nothing but agreements between countries bound exclusively to the signatories of those agreements. True enough, this language is limited to the preambles and lacks any normative value; and yet it states a clear claim to judge, censor, and orient the behavior of non-signatory parties to those treaties, to all humanity. Moreover, guidance on how to legally apply the human rights doctrine shows a clear design of making their universality a legal *de facto* reality⁶, possibly beyond the scope and reach of the treaties it discusses. It could also be argued that this language does have political consequences when the public accepts and determines its behaviour on the notion of human rights and the needs for *humanitarian* interventions.

Which brings us to the notion of *right*, the other part of the expression “human rights”. A “considerable consensus amongst rights advocates” defines rights “initially, as a justified claim or entitlement” (Orend, 2002, p. 17). This definition sets rights as needing the existence of others in order to be, for otherwise, there is no point in issuing a claim⁷ when there is no one to grant or contest it, and neither there is in bothering to justify it; since we articulate justifications in order to persuade others of the legitimacy –another concept ultimately needing of the existence of others– of our claims⁸. It would be hard to conceive of rights without the existence of others to grant or contest them. The notion of rights, inasmuch as it relates the claimant to others, could then be called a *relational* concept, one that cannot exist without the presence of others. The existence of others is necessary because these justified claims pertain to and compel the behaviour of others. The fundamental way through which human beings regulate their collective behaviour is through social organization, which putting forward rules, prescriptions, rights and laws gives rise to its own political nature. Once a given justification for a certain claim is generally accepted within an organized collectivity, it is codified as law, and thus becomes a legal right,

⁶ A very clear example of this is the following definition of human rights from a UN document aimed at offering “a thorough legal analysis and guidance” to all sort of actors, including states, on the application of human rights law: “These rights, *which are inherent in all human beings*, whatever their *nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status*, are interrelated, interdependent and indivisible. They are *often expressed* and guaranteed by law, in the form of treaties, customary international law, general principles and soft law.” (the emphases are mine). (OHCHR, 2011, p. 5).

⁷ The Oxford English Dictionary gives two definitions of “claim” as a noun: (1) “an assertion that something is true” and (2) “a demand or request for something considered one’s due”. It is in this second sense that we are considering the term.

⁸ Further practical proof of this could be found in how we automatically respond with a “why” any time anyone states having a *right* to something.

becoming its fulfillment also a political matter. Human rights are deeply political inasmuch as they are a clear command on how to treat other human beings that aspires to become law, and thus incontestable in daily practice.

What human rights are and how they are justified –or not– form a vast field of theoretical work in itself that cannot be addressed here. For the purposes of this thesis, human rights are an incontestable international legal given affecting national⁹ political spaces, and one that presents an extra-legal claim of universality in attributing those rights to all human beings, independently of whether their political membership acknowledges them or not.

In choosing to focus on the universality of human rights, I consciously avoid discussions over the notion of human dignity, natural law, cultural relativism and human rights, or even the accusations hurled at them of cultural and political imperialism. All these matters belong to the content and results of declaring human rights to be held by every human being, as well as to the foundations and justifications of their existence. However, my interest lies in the political consequences of granting *rights* –a notion necessarily contained within a common legal and political framework– to every single human being independently of their political condition or citizenship.

This becomes more apparent when the drafting process of the UNDHR is examined closely. The 1948 declaration was meant to be a practical document. In order to achieve this goal, the philosophical grounding was often neglected for the sake of expediency, to the point that philosopher Jacques Maritain, who was heavily involved in the drafting of the declaration, recalled that: “It is related that at one of the meetings of a Unesco National Commission where Human Rights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. ‘Yes’, they said, “we agree about the rights but on condition that no one asks us why’. The ‘why’ is where the argument begins.” (Maritain et. al., 1948, p. I). Glendon (1999) quotes more significant evidence of this:

“The Commission's Chair, Eleanor Roosevelt, quickly realized that the group would have to concentrate on specifics if the project was to stay on course. She steered the discussion back to the problem of organizing the group's work schedule. Thereafter, the question of foundations surfaced only sporadically. One such occasion was the presentation of a discussion draft by

⁹ I choose to focus on *national* political spaces due to the nation-state nature of our contemporary world, but a parallel reasoning could be made for any other sort of political form of organization.

the Secretariat of the U.N. Human Rights Division. Australia's Colonel Roy Hodgson demanded to know what was the philosophy behind the paper: "What principles did they adopt; what method did they follow?" John Humphrey, the Canadian head of the Human Rights Division, replied that the draft "was based on no philosophy whatsoever." It was, he said, merely a collection from existing constitutions of "every conceivable right which the Drafting Committee might want to discuss." At the very end of the drafting process, and without much discussion, the Commissioners did make a statement about the basis of human rights in the Preamble to the 1948 Declaration. (...) The word "dignity" appears at so many key points in the Declaration that many scholars believe it represents the Declaration's ultimate value. Louis Henkin puts it this way: "Eschewing –in its quest for universality– explicit reliance on Divine inspiration or on Natural Rights, the Declaration provided the idea of human rights with a universally acceptable foundation, *an ur principle*, human dignity." (the emphasis is mine)

It is this "ur principle" that makes human rights unfathomable beyond 1948 that in effect enshrines an incontestable notion of human dignity that, in turn, endangers the justificatory element all rights must have. For when the justification to a right cannot be fully assessed it becomes doctrine and endangers its legitimacy. This has led Mary Ann Glendon (1999) to conclude that "the human rights project will rest on shaky foundations unless and until philosophers and statespersons collaborate on the business that the framers left unfinished."

It might be objected that I have not truly entered into the discussion over whether dignity is a valid notion for grounding human rights or not. After all, if we are to talk about rights, it is the reasons behind them that must be examined. Though I acknowledge the long tradition surrounding the concept that continues up to this day, dignity in itself is no legal concept. Though widely acknowledged to be "the foundation of human rights", it is nowhere to be found in legal documents beyond the preambles or moral addenda to an article. It is not defined in any manner, only invoked as an inalienable property of being human. Surely enough, the concept is being used and shaped though juridical balancing in practice (McCrudden, 2008), but the resulting doctrine has not been enshrined in a concrete definition anywhere yet. This thesis is concerned with the political impact of concrete juridical results that can be assessed and contested as the basis for political action. Though human dignity is an indisputable part of human rights, its ambiguity makes it flexible and hard to ground any concrete practice on it.

What could appear as a simple enough act of declaring and prescribing a set of rights for every human being alive also implied a revolution in the way that fundamental rights have been conceived in previous declarations, and this is the main source of the problems that this thesis addresses. I fully agree with Samuel

Moyn –and indeed ground this thesis– on the following:

True, the conceptual foundation of rights even before the Universal Declaration may have been natural or even “human” for some thinkers, especially at the high tide of Enlightenment rationalism. But even then, it was universally agreed that those rights were to be achieved through the construction of spaces of citizenship in which rights were accorded and protected. These spaces not only provided ways to contest the denial of already established rights; just as crucially, they were also zones of struggle over the meaning of that citizenship, and the place where defenses of old rights, like campaigns for new ones, were fought. In contrast, human rights after 1945 established no comparable citizenship space, certainly not at the time of their invention—and perhaps not since. If so, the central event in human rights history is the recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside rather than serve as its foundation. (Moyn, 2012, p. 13).

In declaring human rights to be *universal*, held equally and inalienably by all human beings independently of their political membership, a new sphere or moral authority of indeterminate political might was created *above* the nation-states through which mankind currently conducts its political existence. The consequences of this new source of rights enabling every single human being on Earth to contest the authority of the nation-state involve at least the two different problems that this thesis discusses.

In order to assess the implications discussed above, the thesis will first examine Carl Schmitt’s notions of *the political* and the sovereign (chapter I). Schmitt defines the domain of the political as that where a people is able to configure itself in opposition to an *enemy* that has conflicting interests of a potentially existential nature. The domain of the political is under the constant watch of a sovereign that steps into action as last resort when it understands circumstances demand *exceptional* measures to preserve the body politic. I will argue that, since human rights mostly forbid killing enemies (any human being), they render the Schmittian domain of the political void and distort the ability of a political community to act in its own interests. The role of the sovereign is also usurped by a foreign authority whose main role is not to serve the body politic. I claim this presents a risk of serious dysfunction for the nation-state.

Following this, we will look into Hannah Arendt’s discussion of the inherent contradiction within the notion of human rights as being held by every single human for the sake of their existence, and stress how human beings cannot possibly expect to receive protection for their rights due only to their “bare humanity” (Arendt, 1985), and the need for political membership in order to acquire the most basic right on which any other can be grounded, “the right to have rights” (chapter II).

The thesis concludes with an example of how these problems are present in real life human rights crises examining some aspects of the 2015 refugee crises in Europe (chapter III). Contrary to what human rights organizations argue when regarding the events of the summer of 2015 as an issue of human rights being violated, I will contend that these initially apparent violations of human rights underscore the deeper problems and contradictions that human rights carry within themselves that I have discussed in this thesis.

I. A Distortion of the Political

The Interwar period in Germany (1919-1939) was a fertile ground for thinking about the nature and the role of the state in public life, as the Weimar Republic underwent siege by radical forces and ended with Adolf Hitler becoming chancellor and proclaiming the Third Reich in 1933, thus closing this brief democratic experiment in Germany's history. Hailing from a realist tradition that stressed the role of the state as guarantor of the survival of the polity that included Niccolò Machiavelli and Thomas Hobbes, the German jurist Carl Schmitt (1888-1985) became interested early on in the underlying forces that preexist, underlie, and configure the structure of the state. A successful jurist already before this period, his *Political Theology* (1922) introduced his conception of the role the sovereign should play in a democracy, on which I will rely to articulate a possible critique to the notion of the universality of human rights. This paved the ground for his successive critique of parliamentary democracy with *Crisis of Parliamentary Democracy* (1923) and his most famous work *The Concept of the Political* (1927). I will also draw from the distinction between friend/enemy in the realm of the political that he developed in this last essay. With the dawn of the Nazi regime, he joined the party and reached prominent positions in the German academia thanks to his political positioning, eventually being perceived as the *Crown Jurist* of the Nazi Germany (Vinx, 2016). He was eventually sidelined in 1936 due to internecine struggles within the party, though he kept loudly supporting the regime (Sherrat, 2012), and was shunned from the academia after the war. However controversial, his critique of liberalism has witnessed renewed interest in the academic world since the 1990's, and most of his pre-1930's work is being rediscovered.

Two key concepts in the thought of Carl Schmitt bear particular relevance to our discussion of the problem of the universality of human rights: that of *the political*, and his depiction of the sovereign. A look into how either of these concepts is affected by the notion of universal human rights would shed some light into how the latter may potentially become an obstacle to the proper running of the state, and even to its survival. We will now examine how these concepts could work.

Schmitt circumscribes the political as one of the essential realms of human activity marked –though not exhausted– by the distinction between friend and

enemy (Schmitt, 2007, p. 26). All actions and motivations within this realm could ultimately be reduced to this distinction. An enemy in these terms is not someone with merely opposing interests or opinions –“a debating adversary” (Schmitt, 2007, p. 28)–, but those with whom the nature of our antagonism can potentially and ultimately reach the point of physical annihilation. The enemy for Schmitt is an “other” with whom we establish a relationship of mutual negation, someone who intends to negate our own way of life and thus must be repelled as an existential threat. Whether this enemy is also morally evil, ugly, or an economic rival or not is irrelevant to this definition –although, should any of these domains become so intense as to be able to group men along the distinction friend/enemy, they would be in effect acquiring a political quality (Schmitt, 2007, p. 36). What marks a relationship as political is its potential –its constant tension– to escalate the friend-enemy distinction to its maximum consequences –the physical eradication of either side, war as an “existential negation of the enemy” (Schmitt, 2007, p. 33)–, and the behaviors this possibility determines. Schmitt is very clear that this is no symbolic relationship, but a concrete and existential one:

“The specific political distinction to which political actions and motives can be reduced is that of friend and enemy. This provides a definition in the sense of a criterion and not as an exhaustive definition.” (Schmitt, 2007, p. 26).

And, for good measure, Schmitt actually refers to a “real possibility” of killing enemies:

The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing. War follows from enmity. War is the existential negation of the enemy. It is the most extreme consequence of enmity. It does not have to be common, normal, something ideal, or desirable. But it must nevertheless remain a real possibility for as long as the concept of the enemy remains valid. (Schmitt, 2007, p. 33)

The political is also a public distinction originally possible between peoples fighting an external enemy –which in turn would give rise to their consciousness as a people–, but also potentially an internal distinction between political parties within a state. It is not a personal distinction, but one brought about by group relations: “A private person has no political enemies” (Schmitt, 2007, p. 51). In this case, the conflict threatens the integrity of the political entity, putting it at risk of dissolution through fragmentation, or termination *qua* political.

It is for this reason that, in order to preserve the integrity of the polity at all cost

(Schmitt, 2005, p. 6), a sovereign needs to exist. The “highest power” in a state is to Schmitt “he who decides on the exception” (Schmitt, 2005, p.5). The sovereign is conceived as an indivisible and underlying pre-legal power that steps into action in those concrete cases where the existence of the state is threatened by a situation where the law flounders. Its defining prerogative is suspending the legal order, and determining when such a circumstance takes place and how it is to be resolved:

(...) not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire legal order. In such situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind (Schmitt, 2005, p. 12).

An important element underlying Schmitt’s idea of the political and the sovereign that cannot be ignored before discussing how the universality of human rights affects these concepts is his view of the state as a factuality of power passed on through generations that preexists the emergence of law. He often insists in understanding different “sociological” aspects of the state (Schmitt, 2005, p. 22). With this he means no less that men, in essence, are ruled by other men, and not by “spiritual forces (...) emanating from men’s sense of right” (Schmitt, 2005, p. 22). Sovereign power is categorically concrete in its manifestations, and cannot be reduced to a system of division of powers and checks and balances come the moment of the decision on the exception; as well as “the connection of actual power with the legally highest power [being] the fundamental problem of the concept of sovereignty” (Schmitt, 2005, p. 18). There needs to be concrete people making concrete decisions on the legal order when the time comes. This will conform the substrate of his further critique to liberalism –and his discussion of dictatorship– as a system incapable of making decisions and falling into paralysis due to its multiple legal safeguards when the time to act comes. Though not at all alien to our discussion, this critique is beyond the scope of this thesis.

The universality of human rights as a suspension of the friend/enemy distinction

I consider that the universality of human rights, in imposing a blanket limitation on what can be done to an enemy, poses a direct challenge to both Schmittian concepts of the political and the sovereign. The political becomes diluted in the universal equality of all men –an indistinctness that bars the ascertainment of friends and enemies in the Schmittian sense–, and the almost deletion of the possibility of ultimately reaching the stage of physical confrontation with enemies deprives it of its source of energy. At the same time, the sovereign can no longer resort to unrestrained power in order to save the polity from those threatening its existence, but is now bound by an external higher sovereign that is indifferent to the fate of the state. This last element is particularly noxious, since the ability to use power unrestrained –of determining “the exception”– is a defining attribute of being sovereign. Human rights, *qua* limitation of authority, present the sovereign with the existential contradiction of not being able to fully act as sovereign.

In particular, the UDHR states in its article 3 that “everyone has the right to life, liberty and security of person.” (See Appendix 1). This overarching right was later rephrased in the ICCPR as: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”, and later developed in the *General Comments* as impossible to subject to any derogation. The focus of this right then might appear as not on an absolute right to life, but on an absolute right not to have it taken arbitrarily¹⁰. The comments and the convention also impose a “supreme duty” on states to “prevent wars”. It circumscribes this right to the national legal order, one supposedly based upon international human rights law, thus entering in a sort of recursive cycle. This right leaves a degree of flexibility for the state of war, where it coexists and coapplies together with international humanitarian law.

Focusing on the political, we could consider that restricting to the point of remoteness the possibility of eventually resorting to physically eliminating the enemy consubstantial to the universality of human rights¹¹ deactivates the realm of the

¹⁰ With all the practical problems a situation of institutional uncertainty or combat poses to this requirement.

¹¹ It could be argued that the ban on killing is not a feature of the universality of human rights –as

political in taking away the tension such possibility creates. This tension is what constitutes the realm of the political, keeping its participants constantly aware of the real possibility of a deadly escalation and thus constantly motivated to avert it, and trying to anticipate possible risks. The possibility, the threat, of a situation being liable to eventually reaching the point of physical destruction must be present –must be consciously considered, if not taken as a permanent given– for the political to exist. A world without this distinction is a world without politics, Schmitt will remind us (Schmitt, 2007, pp. 53-54). Once the political ceases to be an existential matter, it becomes guided and tainted by the distinctions that define other realms of human activity, i.e. good and evil (morality), beautiful and ugly (aesthetics) or profitable and unprofitable (economics). Once the political is deactivated, it ceases to serve its main purpose of recognizing and protecting the polity from its enemies. This presents an existential matter, since there is no escape from the political; enemies need to be marked as such in order to be watched and their potentially harmful actions preempted, or else a people who has lost this ability will “vanish from the world” as a political entity –and thus as a people¹²–, one aware of itself as distinct and capable of

we are set to explore– *per se* but one particular content of the Universal Declaration of Human Rights of 1948, and that thus, this argument should not belong in a critique of the universality of human rights.

However, the opposite of the right to life being universal would be that not everyone is entitled to this right, which would leave the interpretation on who is fit to bear it or not to the legal systems of the states (as they actually do in states where death penalty, frowned upon but tolerated by the Conventions, exists). However, being this right the most basic existential precondition for a human being to enjoy any right –and no other rights being able to be enjoyed without this precondition–, stating the right to life is not universal would rend moot any other predication of universality for any other right. Thus, the right to life is a necessary part of the very notion of the universality of human rights, since no right can be universal unless the right to life is upheld. Whether someone is entitled or not to any right touches directly upon another declared feature of human rights: their *inalienability*, that is that they cannot be taken away from their bearers (each and every individual belonging to humanity), though they can be regulated or limited. Now, defining the right to life as both *inalienable* and subject to limitations (i.e. when the sovereign determines an exception) in a declaration of human rights, would be in itself oxymoronic, for the right to life, unlike other rights that can be regulated more or less accordingly to circumstances, is one that admits no regulation: it can either be enjoyed or radically curtailed –as one is either dead or alive, but cannot be in an intermediate state–, but not be regulated and, simultaneously, retain its universally inalienable quality (for the moment an individual is deemed not to have it, this right ceases to be universal). If a right is alienable it also means is liable to not being universal the very moment it is *alienated* from someone. The right to life being then unlimited by nature becomes inalienable, and thus universal in full. The right to life is necessarily contained in the universality of human rights also through its non-negotiable regulation that turns into necessary inalienability. This is part due to the fact that this right is stating a human quality rather than predicating a claim upon it, and it is actually a negative right.

¹² Schmitt brings the examples of the French nobility before the revolution “sentimentalizing” about the “virtue of the masses” and that “man is good by nature”; or of the Russian nobility romanticizing the Russian peasant in the eve of the revolution. As history proved, these two groups (French and Russian peasantry) would prove themselves to be pure Schmittian enemies to an aristocracy that

asserting and defending its existence.

If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear. (Schmitt, 2007, p. 53)

I must insist that Schmitt is very careful to stress that an enemy is someone with whom *potentially* the existential incompatibility of our interests *could* escalate to the point of physical elimination. The real value for the state of the Schmittian friend/enemy distinction does not lie in the moment hostilities break, but in the ability of the polity –or the *political* grouping in question– to foresee such possibilities when dealing with a group different from itself. The utility of this distinction is that of compelling the polity to ruthlessly ask itself the question of whether they are entering in a *political* relationship with another group –i.e. one where their respective interests could *potentially* escalate into physical incompatibility; in assessing their respective interests and acting preemptively in order to avoid such damaging outcome. Should this be the case, the polity would then be able to recognize such risks.

In a Schmittian framework, I consider human rights would then become utterly political in the sense that they present a threat to the tension necessary for the domain of the political to work and to perform its existential function of preserving the polity. Human rights impede the friend-enemy distinction in putting limits to a hostile action that would then *deter a political* enemy. In doing so, they take away the motivation –the mutual deterrence– to avoid the supreme damage of war –for once the possibility of killing is made remote, there are hardly any enemies in the purest sense– and will dilute the domain of politics into other domains (economy, religion, culture, art...). At the same time, hindering the ability of a political entity to discriminate between friend and enemy will threaten its disappearance, for losing the will to acknowledge the existence of an enemy does not make the enemy go away.

As he pointed that the general concept of humanity excludes that of an enemy – since no distinction can be made within it, all humans being the same and deserving a similar minimum treatment that cannot be forfeited in advance–, Schmitt would go as far as to accuse this concept of being an ideological tool for “imperialist expansion”

allowed the values of other domains (aestheticism, Christian charity...) to taint their perception of the political nature of their relation, and thus prevented them from taking enough measures or restricting their own action in order to avoid their fate.

(Schmitt, 2007, p. 54), a critique echoed by contemporary attacks on human rights policies –usually from those forced to abide to them– arguing that they are nothing but political actions disguised as humanitarian interventions¹³; a Schmittian could interpret this to mean these interventions are aimed at preventing a polity from recognizing or acting against its enemies. A closer look at those arguments shows they usually involve a state or a warring faction precisely using their survival as a reason to violate the human rights of those marked as enemies. The Schmittian view of the political then leads directly to a *raison d'état* incompatible with any limits to the action of the state. However, Schmitt also criticizes wars in the name of humanity¹⁴ as an excuse to behave inhumanely:

“To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.” (Schmitt, 2007, p. 54)

An usurped sovereign

Human rights also present a strong contradiction for the state in that they pervert the role of the sovereign. The Schmittian sovereign is meant to exist beyond the legal order, which it can suspend when he judges it necessary to preserve the survival of the state, while maintaining his authority. However, human rights claim to reside in a legal order –one that is universal– that is inescapable to the sovereign in that it cannot be suspended in principle because human dignity, understood as an *inalienable* feature of being human, cannot be suspended. However, international human rights law does allow for suspending most of the human rights regime with a few core exceptions¹⁵. More concretely, the ICCPR states that, among others, the rights to life, freedom from torture and undignified treatment, freedom from slavery, and that of having a juridical person with minimum guarantees are non-derogable

¹³ The case of NATO bombings on Serbia in 1999, where overwhelming air power was used to bring to a halt the killing and displacement of Albanians by the Serbian army in its counterinsurgency campaign against Albanian guerrillas is a clear-cut case of such a military intervention in the name of human rights. And yet, Serbian nationalists did argue –in a fully Schmittian way– they were acting upon armed enemies –they had reached the point of hostilities and their existential interests appeared as mutually incompatible– and preserving the unity of their polity. And the subsequent loss of Kosovo in the aftermath of the campaign could be seen as proof of the truth of these claims as well as of the Serbian failure to do this.

¹⁴ Or “humanitarian wars”, as they have bloomed in the decades following the Soviet collapse.

¹⁵ Which would appear to signal a bow to the needs of the sovereign.

even in times of risk for “ In time of public emergency *which threatens the life of the nation*” (the emphasis is mine) (*International Covenant... 1966*). To these, the prohibition of typical forms of discrimination is added (race, sex, language, religion...). The *General Comments* establish further strict limits on the ability to derogate these rights and adds the obligation to notify the Human Rights Committee of the UN as well as all other signatory parts to the agreement (*General Comments*, pp. 235-239) in order to assess:

in particular (...) whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. (*General Comments*, 239)

Schmitt (2005, p.1) defines the sovereign as “he who decides on the exception”, to the point that he rejects Max Weber’s attribution to the state of the monopoly of violence as sufficient, but instead:

Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most dearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law. (Schmitt, 2005, p. 13)

In violating this sovereign attribute of deciding when the legal order is suspended –in their claim of exemption to sovereign suspension–, human rights give rise to a severe challenge to the authority of the sovereign –and usually in extremely delicate moments in which the sovereign is attempting to materialize itself in defense of the survival of the polity– that risks derailing the “order in the juristic sense” that the presence of the latter ensures even once the legal order has been suspended; and thus risking chaos and the disintegration of the polity. This “order in the juristic sense” is how Schmitt (2005, p. 12) described the preservation of the material fiction of the state when a state of exception is invoked. Once the legal order is suspended by the sovereign, it might seem like a state of lawlessness would ensue, and that the restraint it commanded is gone; but the very tangible presence of the state, the “juristic sense” that its raw power instills in all those under its domain, remains.

Human rights law presents itself as being above the sovereign, placing –as we have seen– a claim to survey how its suspension is carried out, and implicitly reserving the right to contest it. Moreover, this limitation to the ability of the sovereign “to decide on the exception”, grants all members of the polity the ability to challenge the authority of this “juristic sense” –raw state power– that remains in a state of exception; to instill a claim of rebellion against the sovereign decision empowering every individual with a set of rights that cannot be subjected to exception. All this, we should not forget, at an extremely delicate time of emergency when –we should assume– the sovereign calls for the state of exception in order to protect the very existence of the polity. Human rights thus present themselves as an obstacle to this end in posing an added burden to a sovereign that needs to act with urgency, and even negating its defining role as the decider on the exception.

Moreover, the ban over the physical elimination of the enemy –until undesirable and very unlikely circumstances concur– presents an added problem. Human rights are clear in heavily restricting the possibility or physically destroying the enemy, but they by no means preclude the possibility of the enemy choosing to ignore these restrictions and destroying us in the meantime: the life of the political enemy needs to be respected, but we have no guarantee at all that our enemy will respect ours, other than their supposed willingness to respect our human rights. However, should they define us as an *enemy* –and we should expect them to proceed this way–, it is not the safest course of action to expect them to respect our rights –and indeed the fact that we find ourselves in an existential conflict means they too should define us as enemy, thus giving rise to their need of eventually eliminating us physically. The stakes being so high, it should not come as a surprise that so few choose to risk a virtuous death upholding the rights of their enemies in an open conflict. Human rights could be said to present an incomplete command –one with no guarantees of reciprocity– to respect the life of an enemy in most circumstances –to, in a sense, stop regarding him as such– while not guaranteeing that our own rights will be respected. In banning killing in such an incomplete manner¹⁶, human rights are not only derailing the necessary tension for the political to function –and thus, i.e., to bring about a satisfactory peace settlement– but they are threatening the sovereign and the survival of the state by placing an impossible dilemma upon the sovereign: either

¹⁶ The international community can only act through compliance from each state; but it is the quality of a sovereign to suspend the national juridical order that includes abeyance to international agreements.

inhibit itself as such and abide by human rights –thus ceasing to be fully *sovereign* in its ability to “decide on the exception”–, or either risk physical destruction. Moreover, the inability of human rights to guarantee that compliance with them is not a potentially lethal disadvantage while still challenging the ability of the sovereign to decide on the exception and how to carry it out, gives rise to a power vacuum within those states respecting them in a situation of conflict that further threatens the ability of the state to survive¹⁷. In sum, the effect of human rights upon the political and the sovereign –which we could call a *suspension of the political*– directly impinge on the basic ability of the state –and even all political actors– for self-preservation, thus presenting an existential threat to those inhabiting the political.

A valuable approach

I believe a Schmittian approach to the universality of human rights renders some valuable insights that can be applied to the assessment of how to apply international law or formulate national policies. I consider the notion of the *political* particularly valuable when it comes to understanding intergroup relations because it calls our attention to the raw interests of the parts and cautions us to consider whether there might be foreign elements to this analysis guiding the behaviour of the parts involved. The ability to establish a reasoned friend/enemy distinction could render valuable analysis, help to prevent future conflicts and act as a reminder of the main interests of a given society. I consider the popularization of what is normally called “human rights talk” counterproductive, for it tends to bring together ideas, concepts and arguments from the domains of morality and arts into the Schmittian *political*. The ideological triumph of human rights spearheaded by human rights organizations has tainted with morality the domain of the *political*, hindering the ability of contemporary Western societies to consider their core political interests. Identifying an enemy in the Schmittian sense does not mean to become immediately hostile to it, but to watch it. Behaviour towards an enemy can be exquisite, humane, polite, generous and even friendly: “The enemy in the political sense need not be hated

¹⁷ A concrete scenario for this could be imagined in a conflict facing a party respecting human rights with another who doesn't, at clear disadvantage in practical terms for the former.

personally, and in the private sphere only does it make sense to love one's enemy, i.e., one's adversary" (Schmitt, 2007, p. 29). The point Schmitt tries to make is that of focusing on an intellectual analysis on the most likely *objective* interests of different groups¹⁸. This motivation, taken in the right civic spirit could even contribute to a regeneration of politics. For this to be possible, I believe human rights should be reassessed in the conscience of the public, not as derived from a notion of human dignity of quasi-mystical status, but as what they are: international agreements of immense merit aimed at securing minimum conditions of wellbeing that we have agreed to find desirable for our moral progress.

Moreover I believe the notion of the *political* can shed light upon a common contemporary grievance on the growing emptiness of politics, losing its aim and becoming enmeshed in, among others, culture wars, the tide of "identity politics", moral outrage or simple non-issues derived from the sphere of entertainment. The *political*, as unpalatable as it might seem draws our attention to the liminal nature of what binds a human society existentially: the need to protect their common interests from those of others who may negate them. A human society is much more than that, but it is built upon the minimum need to ultimately guarantee the safety of its members and the integrity of what keeps them as a group capable of articulating its own sovereign interests. A matter for further study could be how precisely contemporary populist movements have garnered support precisely rescuing the distinction friend/enemy, and have enjoyed complete freedom to twist it in their favour, for no force of other political sign appears to have even attempted to dispute their self-appointed monopoly over the concept.

Human rights restrain the action of the state sovereign towards its own people, in preventing all sorts of arbitrary deadly behaviour, and that is a good thing, as there is a vast array of examples attesting to the perils of conceding unrestrained power to any state actor (i.e. the 1970's in Latin America). After all, that was the guiding goal of the 1948 declaration: protecting the most vulnerable from abuse by the state.

But I think that, in criticizing how state behaviour is to be scrutinized in its compliance with human rights standards, the notion of the sovereign does bear interesting fruit. Firstly, it underscores the need to assess who and where is the sovereign and whether it is actually acting as a sovereign, i.e. attempting to ensure the survival of the polity. This analysis takes us well beyond an accumulation of

¹⁸ A thought that could be summed up in the distinction realist/idealist in international relations.

individual instances of violations of human rights, and reminds us that a viable state is also a precondition for the enjoyment of these rights¹⁹ –which is indirectly recognized in article 29 of the UDHR. Surely the rights of every individual, particularly in times of emergency, are to be the priority. But this should not make us lose sight of the need to preserve a framework capable of doing so. And, secondly, clearly bearing in mind what the role of a sovereign is might also act as warning as to when a sovereign might not be behaving as such, but acting outside the domain of the political. Of course this is taken into account today in contemporary analysis, but I believe considering the notion of a sovereign acting on a political domain can add depth to our contemporary analysis of issues where human rights are involved.

* * *

Thus, after reviewing Schmitt's concepts of the political and the sovereign, we end with two disrupting effects of the idea of the universality of human rights, emanating from its deep political consequences. On one side, universal human rights threaten to dismantle the realm of the political, which is both the driving force and the threat warning system of a political entity. On the other, they set limits and enable the questioning of the authority of the sovereign usually in moments of extreme peril to the survival of the polity, and so furthering the existential challenge to the state they already pose.

¹⁹ As the relatively recent –and unforgivably mindless– destruction of the Iraqi state by the US in the Second Iraq War (2003-2011) painfully reminds us.

II. A Paradoxical Right to Have Rights

After examining how Schmitt's concepts of the political and the sovereign are disrupted by the universality of human rights, we now turn to how Hannah Arendt's paradox of human rights, whose effects she proposed to counter with *the right to have rights*, poses a different sort of critique to this concept. It is one still grounded in the fact that human rights ultimately come to be within the framework of the nation-state, thus making them unenforceable should the state refuse to do so. This would invalidate their declared universality and inalienability. Although her thought differs notably from Schmitt's, they both agree in pointing out that the law becomes superseded by sovereign authority (either the sovereign itself in the case of Schmitt, or the national authority in the case of Arendt) when it comes to a claim to human rights that is not in the interest of the state. While Schmitt adopts the perspective of the sovereign and the political, Arendt strikes to the core of the issue asking how can human rights be inalienable and universal when their actualization depends on the will of the states. The striking similarities between the refugee crises that took place during the interwar period in Europe, and the present plight of the 65.6 million displaced people in the world today (United Nations, n.d.) merit that we pay close attention to Arendt's critique of human rights in an attempt to understand how and why human rights still fail to be guaranteed in such dramatic cases today, when their enforcement is most needed. We will also examine how her critique still poses a problem to the notion of the universality of human rights.

Hannah Arendt (1906-1975) grounded her critique to human rights on her personal experience as a Jewish German refugee and subsequently stateless person between fleeing Nazi Germany in 1933 and her final escape to the US in 1941. She would not regain a nationality until becoming an American citizen in 1951. Her work for Jewish refugee organizations during that period allowed her to witness first-hand the persecution and mistreatment by European governments of those who had been deprived of membership of a political community –a state– to protect them during the 1930s.

Her critique begins in the ninth chapter of *The Origins of Totalitarianism* (Arendt, 1985), where she condenses the consequences of the Minority Treaties signed after World War I that placed in the hands of the League of Nations the

responsibility for guaranteeing the basic rights of the national minorities that found themselves under the authority of a nation state run by another titular, ethnic group after the collapse of the Austro-Hungarian, Russian, and the Ottoman empires at the end of the conflict. The Minority Treaties meant that 30 million people in Europe came to live under governments who were not directly or legally obliged to protect their fundamental rights. Moreover, encouraged by the logic of monoethnicity behind the creation of national states, these governments sought in the beginning every excuse to expel these minorities, and resorted later to massive policies of denaturalization, creating a constant flow of stateless people that eroded the meagre mechanisms, namely granting asylum status, that European states had in place in order to deal with what up to then had been an exceptional case.

Ironically, the direct protection of the League of Nations over these people was deemed “a temporary enforcement of human rights necessary as a compromise and exception” (Arendt, 1985, p. 276) since the *older* Western European countries considered it necessary to apply extraordinary protections to fundamental rights only in those newly created countries that lacked a tradition of protecting them. This created one of the many paradoxes Arendt saw in the stubborn rhetoric of the Rights of Man²⁰ during the 1930s –despite overwhelming evidence of their dysfunction–, and one that encapsulates the essential parts of her critique. The problem can be approached from a Schmittian perspective. The new nation-states were sovereign in their territories; the League of Nations, charged with ensuring the fundamental rights of the minorities, was not. As a result, the stateless and refugees were placed in the care of a non-existing sovereign as such (the League of Nations), but under the authority of another²¹ who had every interest in getting rid of them, since their presence represented precisely a challenge to its sovereignty –the stateless of a different ethnicity who would not be integrated into the nation. Moreover, their presence as stateless immediately violated the logic of *the political* as we have seen in the previous chapter: those who do not belong to the nation or to the body politic cannot be anything else but potential and even eventual enemies²². The increasingly

²⁰ Throughout her discussion of the historical origins of human rights, Arendt will refer to them as they were declared in the French Declaration of the Rights of Man and Citizen from 1789. I have kept her terminology when referring to her work, stressing only the part “and Citizen” when I consider it relevant to the argument.

²¹ The national governments of the newly-created *ethnic* states in Central and Eastern Europe who regarded those national minorities with growing suspicion.

²² Even more when minorities organized themselves in a Congress of Organized National Groups

hostile treatment refugees and stateless received throughout the 1930s –and until the final fate of many, if not most, at the hands of the Nazis– bears witness to this.

Masses of people who had become “undesirables” or “the scum of the earth” for most European governments roamed Europe. Their situation degenerated into a constant parading through different countries who would expel them into one another, setting in motion a growing series of contradictions Arendt saw in the midst of the structure of the nation-state, and indeed “a deadly sickness” (Arendt, 1985, p. 290). On one side, it created sizeable groups of people in every state to whom the laws of the land did not apply. However, nation-states are grounded on the equality of all under the law, otherwise the law becomes a system of privileges for some against which these states claimed to have risen in their foundational and legitimizing narratives. The bigger the presence of people outside the pale of law, the starker these contradictions became, and the more appealing the temptation for police forces in democratic countries to start behaving similarly to their counterparts in totalitarian systems, as they indeed ended up doing (Arendt, 1985, p. 288). On the other, the failure of nation states to guarantee the rights of all their residents further undermined in practice the notion of fundamental rights, to the point of totalitarian regimes in Europe using the sorry appearance and general state of refugees as a rhetorical device to discredit *de facto* the notion of human rights (Arendt, 1985, p. 269).

For the stateless, this situation created contradictions too. According to the Rights of Man and Citizen (1789), they had *inalienable* rights that had to be upheld; however, since they could not claim any citizenship, they could simply not address their claim to anyone. Their inalienable rights could very well exist, and yet no one who could do something about them had any interest in whether they were being upheld or not. The stateless themselves were aware of this, and many clung to their previous citizenships at every turn in an attempt to retain at least the fiction of a legal persona that would qualify as bearer of these rights. They were placed in the paradoxical situation of being better off in terms of having their rights respected as criminals in prison (depositaries of the rights to due process and decent treatment) than as mere stateless (Arendt, 1985, p. 286).

Underlying this situation, Arendt saw a problem at the very heart of the foundation of modern nation-states: “the fact that the French Revolution had

in European States, a transnational body attempting to defend their interests (Arendt, 1985, p. 274)

combined the declaration of the Rights of Man with national sovereignty” (Arendt, 1985, p. 272), and made them mutually dependent.

A flaw in the structure of the nation-state

Arendt considers that the proclamations of the Rights of Man in the end of the 18th century were meant to establish (a) the emancipation of Man from God and any of its representatives in the Old Regime; and thus (b) implied the new need to protect individuals from “the new sovereignty of the state and new arbitrariness of society” when they could no longer be sure of their rights to “equality before God as Christians”.

Since the Rights of Man were proclaimed to be "inalienable," irreducible to and undeducible from other rights or laws, no authority was invoked for their establishment; Man himself was their source as well as their ultimate goal. No special law, moreover, was deemed necessary to protect them because all laws were supposed to rest upon them. Man appeared as the only sovereign in matters of law as the people was proclaimed the only sovereign in matters of government. The people's sovereignty (different from that of the prince) was not proclaimed by the grace of God but in the name of Man, so that it seemed only natural that the "inalienable" rights of man would find their guarantee and become an inalienable part of the right of the people to sovereign self-government. (Arendt, 1985, p. 291)

The main “paradox” appeared to lie in the fact that the declarations referred to an “abstract” human being who seemed to exist nowhere. As such, it was indefensible and, certainly not a stateless person. It did however rest upon a subtler flaw in the structure of the nation state.

Until the French and American proclamations of the Rights of Man and throughout the Old Regime, decency of treatment to an individual had been socially sanctioned through religion (the notion of Christian treatment and Christianity) and custom (norms of hospitality). But with the forces of religion gone, and those of custom upended by an accelerating social change set in motion by increasing industrialization and the upheaval brought about by the development of new and conflicting political identities, the individual found himself under complete uncertainty as to how and why to expect decent treatment from others. The proclamations of the Rights of Man came to replace the assurances derived from God’s central role as the ultimate source of authority (and morality) with “Man

himself as their source *as well as their ultimate goal*" (my emphasis) (Arendt, 1985, p. 291). Since Man was the only source of law now, and all individual guarantees rested upon this remaining so, the mere fact that the people remained as sovereign would by itself guarantee the Rights of Man. Note that it is precisely this last move, the assumption that the guaranteeing of individual rights (and thus of an individual existence worth protecting) would naturally (and *inalienably*) happen as long as *the people* became and remained sovereign (for it was also assumed that *the people* could not possibly go against itself; or at least not against *its own* people), that *de facto* replaced the individual as the original bearer of rights in the declarations of the Rights of Man with the nation as both the source and goal of these rights. The Rights of Man ceased being inalienable when confronted with the Rights of Nations. The individual is indeed sovereign, but only when it legislates and acts as such conforming to a people; the individual must then disappear –merge into a people– in order to be sovereign –to have his sovereignty secured–, which does not necessarily rule out the possibility of a real disappearance as well as that of his rights. This way, what was originally meant to protect individuals from abuse, became a tool to protect the *nation* (Schmitt might as well say *the sovereign*²³) from the encroachments of individuals. The individual, though apparently fully protected, had become completely helpless in the face of the *nation* it had come to constitute, in a perversion of the apparent logic underneath the Rights of Man.

The whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seemed to be able to insure them. As mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually became self-evident that the people, and not the individual, was the image of man. (...) In other words, man had hardly appeared as a completely emancipated, completely isolated being who carried his dignity within himself without reference to some larger encompassing order, when he disappeared again into a member of a people. (Arendt, 1985, p. 291).

It is there that the paradox Arendt saw lies. In the nation displacing the individual

²³ Both Arendt and Schmitt share the view that democracy can only be possible within an homogenous nation-state (Brunkhorst, 1996). And, indeed, as we have seen, Schmitt cannot conceive a *political* sphere that is not homogenous at least in its capacity to recognize an enemy that would negate her. Arendt, in turn, considers "The alien is a frightening symbol of the fact of difference as such, of individuality as such, and indicates those realms in which man cannot change and cannot act and in which, therefore, he has a distinct tendency to destroy" (Arendt, p. 299), and thus his presence is one that generates a desire for violence incompatible with a unified political body.

as both the source and the goal of the Rights of Man (those rights being nothing more than a device to ultimately protect the nation-state under the guise of the sovereignty of the people, and neither of the individual nor to ultimately protect him), man as the bearer of rights had become *a means to an end*, an instrument that could be sacrificed in the service of the national interest. It turned out that those rights were inalienable as long as one remained a member of a sovereign people, but that same membership (as Arendt illustrates with the plight of the stateless and the refugees, and the case of massive denationalizations during the interwar period) could itself be withdrawn by the nation should it deem it necessary; and of course those assumed rights were completely out of the pale of law –thus becoming nothing, since rights as an enforceable reality cannot exist outside of a juridical order– when it came to an individual who did not belong to any right-guaranteeing nation. Simply put: the structure of the nation-state simply precludes in practice the actualization of any individual rights that would trump its (sovereign) interests. This membership of the state of a sovereign nation (one where individual rights are a means to the survival of the nation and so are upheld, and only of the individual as a way to ensure the existence of members of a nation as they configure the nation, and necessarily for his survival) becomes, however and deeply paradoxically, nothing more and nothing less than the very first need the individual has in this world, and thus subject to be protected as a right. It is what Arendt would then summarize as *the right to have rights*.

The right to have rights

The loss of these rights would then entail more than the loss of the right to entry in a register of citizenship and the very serious and practical implications this administrative act carries within. As the world is currently structured through nation-states and their networks of bilateral and multilateral agreements, lacking membership to any of these nations means lacking membership from all of them, which automatically places the stateless in a precarious position everywhere in the world. Arendt will remind us that unlike in previous times, when it was possible to find asylum in other places, there will be no rest for the stateless, who will always be at the mercy of the will of their hosting state.

Moreover, the loss of citizenship cannot be compared to the loss of any given civil right. It could be argued that civil rights can be violated and even taken away, but nevertheless this does not expel their bearer from the domain that makes possible for him to lay claim to them (and even have the situation reversed). The problem of the rightless is not oppression but lacking someone who would oppress them. Having been severed from a political community, they have been severed from mattering to anyone else (Arendt, 1985, p. 295). This “mattering” is more than a feeling of solitude, but has a deeper existential implication:

The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived of human rights. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion. Privileges in some cases, injustices in most, blessings and doom are meted out to them according to accident and without any relation whatsoever to what they do, did, or may do. (Arendt, p. 296)

When Arendt stresses the essential relevance of the loss of the capacity for action, she is pointing at one of the basic elements for a shared human life that are distinctly human, as she would discuss later on in *The Human Condition* (Arendt, 1998). The loss of what she calls for the first time a “human right” (Arendt, 1985, p. 297) – unquestionably stressing the literality of the fact that only humans can have it as it is having it that makes us human–, mean the loss of the relevance of speech, and thus our inability to establish any possible human relationship with others. She would go back to Aristotle’s conception of man as a political animal to stress to which point the loss of the ability of an individual to materialize himself as a political subject through the articulation of political speech –as being able to affect others around us, as relevant to others– would entail sheer and literal dehumanization, the reduction of a human being to “the abstract nakedness of being human and nothing but human” (Arendt, 1985, p. 297), to becoming a talking human body in the best of cases.

Belonging to a political community that attests to the rest of humanity our relevance for others –our political capacity– and thus the acknowledgment of this by everyone else becomes then the most basic hallmark of human dignity that a human

being can bear; for it is indeed our feature of being acknowledged –and thus, treated– as human by others that makes us human in the end. Being treated as human may not mean to be treated well, to have our civil rights respected, or any other pleasant or dignifying treatment. It simply means to be acknowledged as existing among people, as being susceptible of carrying out actions that would be meaningful, understandable, and relevant to those around us. In the very end, it means that potential receptors of our faculty of speech would consider us relevant sources of such; the very distinctive feature that separates humans from animals. The *right to have rights* becomes then the very first and foremost human right; one that makes us, constitute us as, human as much as demands protection of this fact by others through acknowledgement. All other rights –i.e. liberty, equality, and fraternity– can be predicated only and only if this first *right*, or condition, is upheld.

No declaration of the Rights of Man could account for this right for as long as this sort of declarations are necessarily enmeshed within the nation-state, generally as founding documents. The flaw in the structure of the nation-state, as we have seen above, prevents any attempt on national sovereignty and necessarily drives the stateless into the paradox of lacking anyone to uphold their *inalienable* rights. This fact would lead Arendt to recall and agree with Edmund Burke’s critique of the Rights of Man as a mere “abstraction” that carry no political weight, as compared to those “inherited” “Rights of the Englishman” that had been wrestled by the people from political authority through a historical process that actually configures them politically as who they are. Burke, a contemporary of the great revolutions of the 18th century, considered that reinventing a list of sorts of all these rights was simply a mistake, and he worried that proclaiming them as *universal* would disguise their true origin as conquests taken from rulers (Moyn, 2012, p. 19). In this way, the rights of the people are effectively guaranteed through historically acquired political balance, something far more real than universal declarations with a presumed universally binding effect, that lacked this concrete legitimizing –and thus legally arguable–element.

It could be argued, as Hauke Brunkhorst does (Brunkhorst, 1996), that the French republic declared after the Revolution (as well as most contemporary democracies) did not contain an ethnic element in its constitution, and was instituted over the rule of law, transforming human rights from moral claims into foundational elements of their positive law. This would mean that there is no reason to consider a

state of these characteristics could see a threat to its sovereignty in the upholding of its very constituent principles. However, I consider that this critique does not address the core of Arendt's reasoning when she stresses that rights are granted to an individual through his membership –independently of whether this is based on ethnicity or not– of a people constituted into a nation-state. Her reasoning does not preclude this membership being acquired juridically or assumed as given through an ethnic dictum (which would anyway need to be carried out through some sort of juridical process). The paradox Arendt pointed out remains in (1) the fact that an individual *is granted* rights that are considered *inalienable*, since you cannot be granted what must already be a constituent part of who you are in its *inalienability*²⁴; and (2) the fact that the individual must become part of a plural entity (the nation-state) in order to have rights as an individual. Both elements underscore the *de-facto* dependence of the individual of his membership in the state in order to have his rights guaranteed.

A perplexity that remains

Arendt (1985, p. 290) placed the concepts we have just discussed under a paragraph called *The Perplexities of the Rights of Man*. When she first published *The Origins of Totalitarianism* in 1951 (Arendt, 1985), the United Nations Universal Declaration of Human Rights had been passed in December 1948 and global history did not offer much ground for hope in their practical implementation. Although she did not reconsider her critique, Arendt could not foresee the preeminence that human rights would develop in the international order, as well as their future and powerful moral and political connotations in the minds of the human race. Almost every state on Earth has ratified many if not all of the 18 human rights treaties passed by the United Nations since 1948, and many other international agreements (i.e. different conventions and protocols on the treatment of refugees in 1951 and 1967). International non-governmental human rights organizations carry a strong moral voice in denouncing abuses worldwide, and the moral force of human rights is rarely (though increasingly) questioned. In agreement with Michael Ignatieff, this

²⁴ The very etymology of the word *inalienable* bars this possibility; it means literally “something that cannot be made *other*”, from Latin “*alius*”, other or another.

can be summarized in a certain utopianism –if not Messianism– among contemporary human rights activists that consider human rights a moral language on a superior plane than politics (Ignatieff, 2000, p. 300).

However, we can still perceive powerful reminders of the extent to which Arendt's paradox of human rights remains to be solved. A very explicit but often overlooked one is the behaviour of the United States in this field. Having ratified only 5 of the 18 international covenants of human rights (OCHR, 2018), American exceptionalism stands out in the sense that it appears to confer more value to the rights its citizens derive from their own Constitution than from the 1948 declaration (Ignatieff, 2000). And yet, we can spot the Arendtian paradox immediately when we realize that today:

In most liberal democracies, citizens look first to their domestic rights and remedies, and only when these are exhausted or denied do they turn to human rights conventions and international bodies. National groups who do not have states of their own—Kurds, Kosovar Albanians, and Tamils—certainly make use of human rights language to denounce their oppression, but for ultimate remedy they seek statehood for themselves and the right to create a framework of political and legal protection for their people. (Ignatieff, 2000, p. 296)

This is an unmistakable sign of implicit acknowledgement of the Arendtian paradox that, no matter how *inalienable* –and universal– human rights are, even in a time where they have become something close to a standard for measuring the fairness of any given claim, those who are supposed to be protected by them continue seeking statehood²⁵. Interestingly enough, when ethnic conflict has reappeared, *constitutionalism*, overcoming the ethnic logic of the unitarian nation-state, has been seen as the solution (Ignatieff, 2000, p. 308). This simply betrays the fact that human rights, stuck as they are in a world of nation-states mindful of their sovereign rights and suspicious of any attempt to curtail it, are still regarded with a pragmatic eye not just by the states –knowing how relative and delayed are the consequences are for states who violate human rights– but more importantly by those who are supposed to benefit from them. Arendt's paradox has been mitigated through international and political cooperation, but not given a satisfactory answer. This creates the risk of human rights becoming less important depending on the political priorities of the moment and eventually losing momentum and becoming stagnant in the face of economic crises and the growth of inequalities. This does not mean the denigration of the very positive track record of human rights for improving the

²⁵ Ignatieff (2000) will go on to point at the state of Israel as the paradigm of this attitude.

conditions of millions throughout the world since 1948. And neither does it imply that human rights need be derogated. However, it does suggest that the current fictional discourse of the innate nature of human rights should be questioned and replaced by a language liable to moral discussion centered around the common task of building a common core of agreed human needs to be satisfied. I am aware that human rights *are* exactly this, but it is again the problem of defining dignity in an actionable way that we encountered in the introduction that make them liable to political manipulation by any party involved in their protection or violation. In the end, the fact that Arendt's paradox has not been addressed in full presents challenges in the argument for the universality of human rights, as the aftermath of the refugee crisis of 2015 in Europe has shown.

* * *

If Schmitt focuses on the sovereign and the distinction between friends and enemies within a *political* domain as a means for the polity to configure itself –an approach that sees any meddling to this vital processes as interference–, Arendt casts light on the implications of belonging to a state, on the role of citizenship. Although through a different path, she reaches a similar conclusion as Schmitt: the nature of the nation-state forbids any command coming from outside of itself that affects the distinction between citizen as a bearer of rights and non-citizen; between bearers of rights a non-bearers of rights within the polity. Arendt so a possible *right to have rights* as the only essential right reflecting an essential human need to be acknowledged by others in order to exists politically.

III. Not Merely a Matter of Rights

Having examined some concepts casting a critique on the notion of the universality of human rights, I will now proceed to examine how the application of these concepts to concrete human rights issues may contribute to a better understanding of what is at stake during human rights crises. In this this chapter III, I will present some elements of the 2015 migrant crisis in order to show how these concepts may fare in practice.

What has been known as the 2015 Migrant Crisis, was actually an exacerbation of an already ongoing humanitarian crisis where the war in Syria would push more and more people to seek asylum in Europe, having registered a steady increase of first-time applications since the beginning of the conflict in 2011 (Eurostat, 2018). This would compound with people fleeing other long-standing conflicts such as Afghanistan and Iraq –indeed, most applicants came from these three countries. Following Eurostat, what made the summer of 2015 particularly harsh was the sudden increase of people arriving to Europe; if 2014 had seen at least 626,960 people arriving in Europe with this intent, 2015 brought a minimum total of 1,322,825 asylum seekers (Eurostat, 2018). This sudden massive influx of people by sea and land caught European authorities –of both destination and transit countries– unprepared to deal with their needs and applications. The benign Mediterranean summer would see the bulk of these people arriving mostly into Greek and Italian territory, and continuing in many cases by foot on the way to the countries whose asylum policies were deemed the most generous: Sweden and Germany. In particular, the more dangerous Central Mediterranean route gave way to an Eastern-Balkan route due to the latter involving a shorter –thus safer– sea path (ICMPD, 2018). I have relied on the account of the highlights prepared by the International Center for Migration and Policy Development (ICMPD, 2016), and on a well sourced timeline compiled in the Wikipedia²⁶ (Wikipedia, 2018, May 09) for selecting a few events that took place during the crisis whose implications I will analyze below. I do not intend at all to be exhaustive, nor to provide a full account of

²⁶ Any reservations regarding the usage of this particular material should be put to rest should we look at it as a collection of references to mainstream media, such as the BBC, The Guardian, Deutsche Welle, and other widely respected media organizations. In any event, for every even I quote, I refer to the original source cited in the Wikipedia, and not to it. In this particular case, this happens to be the most complete timeline of the crisis available online.

the crisis. The cited works provide a very complete account as well as references for further understanding of the context. However, a final remark before our discussion is in order; the sheer human drama of the still ongoing crisis we will be discussing should not be underrated. More than 3,000 people perished at sea only in 2015, and hundreds of thousands faced uncertainty and rejection roaming through Europe with their families, while many are still unaccounted and remain vulnerable to organized crime (Rankin, 2016, May 19). It is indeed this dire situation of severe uprootedness and vulnerability that human rights aim to mitigate and prevent.

The return of the sovereign

One of the most striking images emerging when reading the accounts of the crisis was how frequently borders –manned by border guards and even riot police– were overpowered by masses of asylum seekers who were crossing national sovereign borders illegally. This is not necessarily forbidden by the Refugee Convention (*Convention and Protocol Relating to the Status of Refugees*, 1951), that acknowledges the possibility that an asylum claimant might have to enter the country illegally before being able to request asylum (article 31). It happened in the Macedonian border between August 20-22nd, when the small Balkan country of 2 million closed the border after having been taking in more than 3,000 people daily (BBC, 2015, August 22). Moreover, the country declared a state of emergency during those days. This resulted in clashes where Macedonian police had to resort to tear gas²⁷. Hungary would follow in declaring a state of emergency in two counties later in September (BBC, 2015, September 15) after changing its law to bring criminal charges to anyone crossing the border illegally under penalty of prison or deportation. Such action directly contradicts the Refugee Convention on the issue of not returning anyone to the country of origin against their will. The following day, clashes at the same spot with asylum seekers left 20 police officers and an unaccounted number of asylum seekers wounded (BBC, 2015, September 16). Earlier that month, the Hungarian state found itself clashing with thousands of asylum seekers camping in front the Keleri railway station in Budapest demanding to be let through into Austria. After four days, with the acquiescence of Vienna, Hungary

²⁷ During 2016, more clashes would take place with the more than 11,000 refugees still then camped at neighbouring Idomeni (The Guardian, 2016, April 10).

provided transport to the border (BBC, 2015, September, 05). Events of a similar nature took place in the Slovenian border with Croatia, forcing the former to call in its army in order to avoid seeing its border overrun again. These three countries also ended up erecting fences in their borders, Hungary covering 175 kilometres of its frontiers with Serbia and Croatia.

The most obvious conclusion from these events is that a sovereign has discerned a situation where, following Schmitt's discussion, the integrity of the polity is at risk. And, in order to thwart danger, the sovereign state resorts to the exception and the use of violence. The rights in opposition here are those of the sovereign to determine the exception at will –being that, as we have seen, its sovereign prerogative– and those of asylum seekers to seek asylum, and even to not be held responsible if they cross borders illegally in order to claim it. There is hardly a clearer sign of a distressed sovereign than governments declaring a state of exception and erecting fences on their borders.

Should we frame these events only as a matter of human rights, we would end up with an incomplete picture of the situation. True enough, human rights are meant to protect the most vulnerable part, and that is most unlikely to be the state. However, considering the rationale of the sovereign –small countries seeing their borders overrun– Schmitt's argument can be helpful in foreseeing situations in which a state might decide to stop honoring its human rights commitments. In the European case, states did foresee the inability of small border countries (Macedonia, Croatia, Slovenia) to cope with masses of asylum seekers, but acted too slowly due their sovereign integrity not being foreseeably at risk. It would only be when border states would allow asylum seekers to go through that the central European states would react. In any case, the underlying moral question in this situation remains: to what extent should a sovereign sacrifice its interests for the good of others alien to its polity, which takes us to Arendt's paradox further below.

A political that never went away

A more salient feature of the 2015 crisis is the role of the distinction of the friend-enemy that conforms to the Schmittian domain of the *political*. This is well exemplified not only in the different obstacles thrown at the path of asylum seekers – wherever a border is set, those outside them are the *others* by force–, but by the

political consequences it had. The strengthening of European populism that took place right after the dramatic events of 2015 (The Economist, 2015, December 10) is grounded on these parties using an explicit Schmittian distinction, one that is perhaps too literal. However, the core of Schmitt's notion of enemy lies in the incompatibility of interests with the enemy and their potential to escalate into open conflict, and not necessarily on ill intent.

Through multiple instances of chaos that peppered the asylum seekers' march to the heart of Europe, populist and racist parties received ample audiovisual material to build a demonized picture of the asylum seeker²⁸, one that, judging from their portrayed behaviour had completely incompatible interests with the common European citizen. If their biased representation of reality proved effective in stoking enmity towards the refugee, it was because they were alone in doing this. Mainstream European parties were too busy scrambling to find a solution according to international human rights law. The urgency of finding means to sustain hundreds of thousands of people out in the open compounded with pressure from the public, who were influenced by human rights organizations campaigning for the rights of refugees to asylum. And it is precisely here that the domain of the political is becoming tainted by other domains, in this case by the moral domain. The considerations over the inalienable right to a minimum standard of *dignity* for asylum seekers and the moral imperative to satisfy it overshadowed the discussion over what were the interests of this group in contraposition to those of the individual nation-states. The unpalatable though fair questions of whether EU states could or even were required to sustain the needs of asylum seekers who are choosing certain countries over others to formulate their request, of how many could a state reasonably sustain, and what amount of resources were fair to allocate to this task were left for later²⁹. Populist parties presented themselves as the only parties posing the tough questions that, formally, considered the interests of the polity in the face of the interests of the alien, a clear friend-enemy distinction.

It might be objected that this is an easy critique to make in hindsight. However, had the distinction of the friend-enemy which defines the domain of the political

²⁸ One that was built on an explicit and politicized notion of religion confronting Islam and Christendom.

²⁹ And were nevertheless tackled through a much criticized agreement with Turkey, as well a hardening of national asylum laws to extremes sometimes in contradiction with the Refugee Convention, as, i.e. the Hungarian laws.

been kept clearly in mind by mainstream parties and by governments, and had this domain not been tainted by moral considerations beforehand, this truly *political* question on the interests of asylum seekers and the states might have appeared as a clear, even obvious, matter. Answering this question needed not be a way of cutting down a state's commitment to human rights and taking care of the asylum seekers, but a tool for clarity and foresight, as, i.e. to assess the resources and existing legal frameworks already in place in order to cope with the humanitarian crisis. The value of assessing the possibility that we find ourselves in front a situation that can be defined in *political* terms, lies in the clarity it brings when setting priorities: the interest of an *enemy* is incompatible with ours, but compromise need not be impossible (particularly when the stage of war is not in sight). However, in order for this to be possible, the peremptory morality inherent within the notion of human dignity, has to be kept separate from the political analysis. Moreover, tying the definition of the national interest to a moral notion such as human rights, although reassuring, might prove to be self-deluding because the survival of a polity might involve violating human rights in a time of crisis. Moreover, moral notions are a clouding element in assessing the friend-enemy distinction. This does not mean human rights lose preeminence, but that the fundamental interest of the polity must not be excluded from our calculations³⁰.

Who enforces the right to have rights?

One striking occurrence during the crisis was the behaviour of the Czech government, who demanded from those being detained in its territory to cover for the expenses they were generating in the state with any valuable they carried, to the sum of \$10 per day. Detentions could be up to 90 days (Calamur, 2015, October 22). This is clearly an unreasonable –and cruel– demand to impose on someone walking thousands of kilometres to request asylum. And it indeed contravenes the Convention on Refugees. However, this demand is still present in the Czech Asylum

³⁰ One further example of the confusion brought about by not keeping a conceptually pure domain of the political the analysis of a situation could be the claim, by no other than the NATO Supreme Commander in Europe, that Russia had weaponized the refugee crisis (Deutsche Welle, March 2). Again, formulating this analysis need not imply denying fundamental rights to asylum seekers, but, foresight, planning, and a proportionate response. The political, the dimension where the distinction friend-enemy operates, is a stubborn reality that may choose to ignore at our own peril.

Act (Act on Asylum, 1999), section 78d-1, and the press has not informed of any international consequence of effect beyond a condemnation by the UN and criticism from human rights organizations, all of them useless for those asylum seekers who were strip-searched for valuables to pay for the cost of their –forced– detention. Indeed this provision appeared to inspire a similar one the Danish government in January 2016 (Dearden, 2016, January 26), topped with an added call to end the 1951 refugee convention (Kingsley, 2016, January 12).

What these examples reflect is Arendt’s paradox of human rights in concrete action. A smirking Czech official could ask an asylum seeker while strip-searching him “where are your human rights now?”. For those asylum seekers who found themselves under the authority of the Czech government would be completely helpless to even utter a credible claim. Deprived of any sort of diplomatic protection –and thus an enforceable legal status– by their condition of escapees, and sunk to the lowest of statuses possible –that which Arendt would call “bare humanity” (Arendt, 1985, p. 297), they found themselves in the midst of the paradox of being in possession of *universal, inherent, and inalienable* human rights about which those with power over them, and in charge of enforcing them, could care less. This situation was clearly caused by what we could call institutional disaffection. The Czech government, as a member of the European Union, is committed to human rights. And yet, as all other members of the European Union, it is uninterested in dealing with the refugee crisis and craves to get rid of all asylum seekers altogether. European governments spent a good part of 2015 scheming ways of deflecting the flow of refugees, sharing the burden of their upkeep, and even be able to *relocate* them to Turkey in complex legal arrangements to reform the effects of the counterproductive Dublin Regulation³¹.

It might appear that merely stating the lingering presence of Arendt’s paradox might not bring much clarity to the issue. But just as the concept of the political can prove itself valuable when it comes to better understanding a situation, Arendt’s paradox of human rights can compel us to look for more guarantees when it comes to combatting institutional disaffection. At least within a European framework, one of these, i.e., could consist in assigning responsibility for every asylum claimant to more

³¹ The current European framework for determining which state is to be responsible for a refugee claim. It places a disproportionate burden on those countries along the European external border, since the rules mandate it is the *first* state to which an asylum claimant arrives who will have to process the request.

than one state; the recipient state would carry itself as always. But then, in order to break the paradox, a *guardian* state would step in sending personnel to follow closely the case of every asylum seeker whose care has been assigned. As a result of this, an *orphaned* asylum seeker in terms of state, becomes adopted for the purposes of protection by another state devoting concrete material resources to carrying out this task. It would never be the same as that same state taking care of its own citizens, but it could be implemented with more guarantees, resulting in more protecting from abuse for the asylum seeker. What is important about his idea is that hails from having present the reality of Arendt's paradox as the driving force of our thinking about human rights. I believe this proves a more fertile ground when it comes to deal with cold unsavory facts than the recourse to an intangible human dignity.

In essence, all three elements discussed –the role of the sovereign, the distinction friend-enemy, and Arendt's paradox of human rights– can bring tangible benefits to some of the contradictions which particular nation-states when faced with asylum seekers echoing the proclaimed universality of human rights and claiming their right to asylum as proclaimed in article 14 of the UNDHR: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

Conclusion

In this thesis, I have drawn from the work of Carl Schmitt and Hannah Arendt in order to underscore two different sets of problems derived from the notion of the universality of human rights. Both critiques share a concern about the effects the language of the universality of human rights can have when it comes to assessing a situation where these rights are in crisis. I have used examples from the 2015 European migrant crisis to show how these concepts would fare in practice.

In particular, I have used the Schmittian notions of the *political* and the sovereign to underscore how the universality of human rights has counterproductive effects on the ability of states to determine those groups that might pursue opposing interests to theirs –*enemies* in a Schmittian sense–, and cloud the understanding of a state as to determining what measures it should adopt in order to have its interests prevail. The ability of a state to enact those measures can also be affected due to the constraints on the sovereign the universality of human rights imposes by definition.

I have shown how the paradox of human rights that Arendt formulated in 1951 and grounded in the innate logic of the nation-state can still be detected in the behaviour of nation-states in the midst of a crisis. More importantly, I have suggested a possible solution to the problems raised by this contradiction in the nature of human rights.

The main purpose of this thesis is to present theoretical concepts –the sovereign, the *political*, the paradox of human rights, and the *right to have rights*– and frame them in a way that can be used to address the contradictions that are raised by the universality of human rights. I believe these concepts provide an unusual clarity to any situation where human rights are violated that involves a state actor. The amount of practical examples I have provided is clearly insufficient, and a deeper look at the practice of international human rights law will likely show that something very similar –and yet insufficient in a fundamental sense– to the concerns I have raised is actually taken into account to a certain degree in the practice of human rights law. However, I would contend that the value of these concepts lies in the way they question what I consider an hegemonic narrative of the universality of human rights. I find it counterproductive for it deprives the public of the tools to think independently about human rights without the dogmatic crutches of the universality

of human dignity. I believe this leads to misconceptions on the possibilities and limits of human rights –exemplified in the issue of the *inflation of human rights*³² I have chose not to address in the body of this thesis–, and to their eventual discredit. I consider the contemporary wave of populism a worrisome example of the later, one that, as I have contended, can be understood in Schmittian terms. A further harmful consequence of these misconceptions is the pressure the public may then exert on states derived from unreasonable expectations as to what states should do in regards to human rights.

This thesis can barely scratch the surface of the “unfinished business” Glendon (1999) described when referring to the task of setting the foundations of contemporary human rights. However, I believe it does point to a possible avenue of criticism that could render a positive improvement in the defense of the common spirit all declarations of human rights share.

³² The trend observed by some authors of the constant growth in the number of rights that are considered a *human* prerogative, sometimes to the point of absurd as exemplified by Milan Kundnera’s Brigitte claiming her right to parking in Paris was a human right, cited by Clapham (2015).

Abstract

Two Problems Surrounding the Universality of Human Rights

This thesis points at two main issues in the concept of the universality of human rights. First, the obstacles it poses to the notions of the sovereign and *the political* as defined by Carl Schmitt. Second, the paradox of human rights formulated by Hannah Arendt remains unsolved, since the contradiction at its heart has not changed since its formulation. The third chapter attempts to illustrate how these theoretical concepts are relevant for our understanding of human rights crises involving state actors analyzing some of the events that took place during the 2015 migrant crisis in Europe. The thesis concludes pointing at the need to end the misconceptions derived from the idea of the universality of human rights in the mind of the public.

Title in Estonian: Kaks probleemi inimõiguste universaalsusega

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Appendix 1: Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and

obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either

alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free

development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in

the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of

meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Appendix 2: Declaration of the Rights of Man - 1789

Approved by the National Assembly of France, August 26, 1789

The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected, and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all. Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen:

Articles:

1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

3. The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.

4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the

same rights. These limits can only be determined by law.

5. Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.

6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

7. No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order, shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense.

8. The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense.

9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.

10. No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

11. The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

12. The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be intrusted.

13. A common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion to their means.

14. All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.

15. Society has the right to require of every public agent an account of his administration.

16. A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.

17. Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.

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