General

The Human Condition of Being Undeportable

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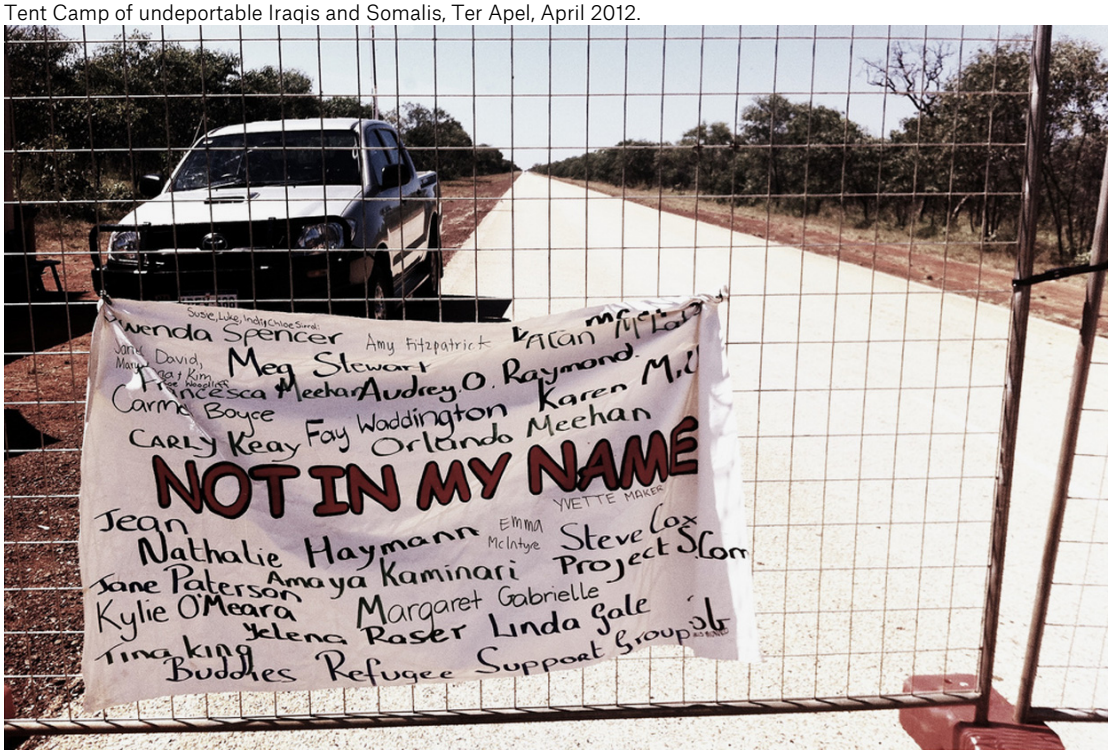
Philosopher Marieke Borren explores the phenomenon of the undeportability of "illegal aliens". She argues that their undeportability results from fundamental legal and political tensions – the "paradox" of politics and democracy or a "rights gap" in international law. She also discusses the question of claiming collective agency of undeportable illegal aliens in light of these tensions, gaps and paradoxes.

The "Right to Have Rights" Abyss and the "We's" of Collective Action

Since the beginning of 2012, Dutch society has seen an explosion of collective political action by irregular ("illegal") aliens. Self-established tent camps in Ter Apel, The Hague and Osdorp, the Vluchtkerk (subsequently Vluchtflat, Vluchtkantoor / Vluchtschans, Vluchtgevangenis and the Vluchtgarage) and self-run organisations like We Are Here[1] have taken form, and detention centres have seen the interred protest treatment with collective hunger and thirst strikes. This activism has had the effect of stirring up public and political debate on Dutch asylum policy (including detention and deportation) and of drawing attention to a phenomenon hitherto unknown to most citizens: non-deportation or undeportability. Both deportability and undeportability should be seen against the background of policies regarding labour migrants, asylum seekers and refugees which take return (repatriation), deterrence and reduction of asylum applications as its objectives.[2]

Olympe de Gouges: “No one is to be disquieted for his very basic opinions; woman has the right to mount the scaffold; she must equally have the right to mount the rostrum.” (Déclaration des droits de la femme et de la citoyenne, 1791, art. 10).

Tent Camp of undeportable Iraqis and Somalis, Ter Apel, April 2012.



More recently, a new, accelerated asylum procedure has been introduced, which has resulted in the rejection of 60 percent of all asylum applications.[3] Deportation is the "enforced and authorised removal of non-citizens from state territory."[4] In the Netherlands, deportation is established in the Vreemdelingenwet *[wetten.overheid.nl - Aliens Act (in Dutch)]* (Aliens Act) 2000 [5]: a non-citizen is deportable if she stays on Dutch territory illegally (has no legal residency), and has not left the Netherlands of her own accord within a particular prescribed time limit (article 63 Vw). Illegal residence, in turn, is defined as failing to meet the requirements for lawful residence stipulated in article 8 Vw. Deportable aliens may be detained on the basis of an administrative measure in order to prevent them from hiding in illegality to evade deportation (article 58 and 59 Vw).

Yet despite the intensified legal and administrative efforts to deport aliens, there is a wide gap between deportability and actual deportation. In the Netherlands, for instance, about 50–70 percent of all deportable aliens are actually non-deportable: an estimated 50,000 aliens according to Amnesty International. Non-deportation, or undeportability, is the practice of, first, detention of an alien, on the basis of an administrative measure, for the purpose of deportation. Next, the court eventually decides that the alien is to be dismissed from detention if the prospect of deportation in due time is lacking because the alien does not avail of the proper identity or travel documents. This may have various reasons, such as: non-cooperation (negligence or plain refusal) by the deportable's "country of origin"; by omitting to issue the required travel documents (a so-called *laissez-passer*); statelessness (including statelessness due to the demise of the alien's country of origin after her departure) as a consequence of which the alien has no nationality and hence no identity and travel documents at all; or the alien's own non-cooperation by destroying her identity documents, etc. Yet, while the alien can no longer be held in custody, she still cannot claim accommodation, because she has no right of residence here. As a consequence, she is put out on the streets ("*klinkeren*"), and usually routinely re-detained in due time. This group of aliens includes failed asylum seekers and aliens without residency who have never entered any asylum procedure at all. In short, undeportability is the condition of those illegal aliens who are liable to be deported, though simultaneously cannot be so.

In this paper, I will explore the under-theorised phenomenon of undeportability. I will argue that it results from fundamental legal and political tensions, or what could be called the "paradox" of politics and democracy or a "rights gap" in international law. In the second part of this paper, I will discuss the question of claiming collective agency of undeportable illegal aliens in light of these tensions, gaps and paradoxes. But first, let me explain why the structural tensions easily escape attention.

"Undeportability Is a Choice": The Personal and the Political

Undeportability involves at least a triangular relationship between the government of the alien's "home country", the government of the "host country" and the alien herself (and / or her network of relatives, friends and advocacy groups). These parties have different roles and powers (to act and to refrain from acting), and their relationship may differ from case to case and shift over time.

In current public debate and policymaking, we see a tendency to enlarge the role and agency of one party in this triangle: the deportable alien. Politicians, officials and many citizens agree upon an interpretation of undeportability as (mainly) the effect of the deportable alien's own actions, i.e., her willingness to cooperate with state authorities of the host country in order to enable her own deportation. Based upon this view, undeportability is a choice, the persistence, duration or termination of which is contingent upon the willingness and actions of the deportable alien herself. In fact, it is seen as a temporary condition by definition, i.e., as pertaining to the interval between the authorities' decision to deport and the time it takes the illegal alien to succeed in obtaining travel documents. Only if detention and undeportability continue despite the individual's efforts to accomplish her own deportation, is a second party in the triangular relation of undeportability taken into account: the "country of origin". In the dominant public and political discourse on detention, deportation and non-deportation, the state of the host country is not seen as party in the construction of undeportability, but only in its opposite: deportation.

The upshot of this analysis is to point out the tendency to individualise the problem of undeportability. Hence the widespread acceptance of the idea that undeportability is a choice. My point is not to deny aliens' agency, but to show how this individualisation serves to obscure fundamental political and legal tensions which inform the triangular relation of undeportability (not to mention gross global material inequalities). This logic of individualisation calls to mind the argument underlying the famous slogan of second-wave feminism: "the personal is political". This slogan meant to challenge the reduction of the depressing social situation many women in the US and in Europe found themselves into a personal problem, and instead aimed to show that this situation reflected structural

unequal gender relations. Many second-wave feminists argued that the individualisation of collective, symbolic or structural problems actually serves to justify, reproduce and eventually reinforce patriarchal gender relations. They advocated collective action by making visible (public) what was formerly invisible (private). [6] The analogy between the marginal situation of women (at least as it was felt in the US and in Europe in the 1960s and 1970s) and undeportable illegal aliens may be helpful in yet another respect, pertaining to the issue of collective emancipation. In her famous book *The Second Sex* (1949), Simone de Beauvoir discussed the reasons for the individualisation of women's collective submission. She thought women's emancipation (in 1949 that is) lagged behind that of other marginalised and oppressed groups, such as workers, Jews and Afro-Americans because women did not organise on the basis of a collective identity, that is, had never said "we" and hence had never claimed collective agency vis-à-vis men. Unlike other oppressed groups, Beauvoir argued, women's oppression has no clearly defined past. Hence their inferior alterity has gained a semblance of immutability and naturalness, that is, has been naturalised into a static essence: the "myth of woman". The fact that women themselves had in Beauvoir's view never truly engaged in a struggle for subjectivity has reinforced the myth of the absolute, that is, ahistorical and immutable nature of women's submission. A second reason, Beauvoir thought, was women's division along socioeconomic, racial and cultural lines – "unlike the proletariat, they have no solidarity of labour or interests . . . they live dispersed among men" – which may explain the lack of "we-saying", a sense of mutual solidarity. [7], p. 8.]

This is where I believe the analogy between the emancipation of women, respectively undeportable illegal aliens, should end. Unlike most women, illegal aliens are as a principle non-citizens in the state on whose territory they are residing. Although Beauvoir seems to be right that the appeal to some "we" (or "we-saying") is required as the basis of collective action on the part of excluded groups, it is not immediately clear which "we" could advance the cause of undeportable aliens best, for example the "we" of "We are all human beings", "We are here", "We are all illegals", "Not in our names", etc.

Before proceeding with the question of collective agency of undeportable aliens, I will explore the fundamental political and legal tensions involved in the phenomenon of undeportability.

1. Undeportability, the Rights Gap and the Paradox of Politics

As said before, the logic of individualisation works to obscure the legal-political impasse or stalemate the undeportable find themselves in. Scholars in legal theory have noted that the predicament of statelessness reveals a "rights gap" or "protection gap" in international law: a fundamental lack in the effectuation and protection of particular people's human rights to the extent that these are contingent upon national citizenship.[8] I believe that the situation of many undeportable illegal aliens is not fundamentally different from the situation of the stateless to the extent that both effectively lack state protection. This is indicated by the low "success" rates of the Dienst Terugkeer en Vertrek (Dutch Repatriation and Departure Service) in actually obtaining requested laissez-passers from the aliens' "home country" which are needed for deportation – 25 percent in 2009, even less in 2010. [9] The observation of a protection gap in legal theory seems to correspond with the emergence over the last decade of a rich scholarship on the paradoxical nature of politics and democracy, within highly divergent paradigms in political philosophy, such as deliberative democracy (Seyla Benhabib and Jürgen Habermas among others) and agonistic pluralism (most notably the work of Bonnie Honig), etc.[10] It is no accident, I believe, that this scholarship has emerged in the context of debates on transnational migration, current transformations of the nation-state and cosmopolitanism. Phenomena and practices such as restrictive migration policies, irregularisation of immigration, enhanced border surveillance, detention and deportation are considered some of the most pressing symptoms of this paradox.

The Human Condition of Undeportability

The first political philosopher to diagnose and analyse the rights gap has been Hannah Arendt. In her 1951 book *The Origins of Totalitarianism*, she gave a detailed account of the emergence of statelessness as a mass phenomenon in Europe after WW I. She argued that this gap is opened up by the fundamental tension within the nation-state, between a universalistic and inclusive principle on the one hand and a particularistic and exclusive one on the other. This chapter has become the object of a wealth of comments and interpretations recently and has been discussed in debates on such conditions as refugeehood, statelessness, illegality, up to any marginalised or minority condition.[11] Yet, it has been rarely noticed in Arendt scholarship that she called attention to a particular aspect of statelessness, namely undeportability, i.e., the condition of people, for whom "there (is) no country on earth in which they (enjoy) the right to residence." For them, any attempt at repatriation by host countries fails, for "neither the country of origin nor any other (agrees) to accept the stateless person."[12], p. 276.] It is exactly this condition of undeportability, I will argue, that is neglected in debates on the paradoxes of politics and democracy I just mentioned. As a consequence, the critical lesson of Arendt's account of the rights gap and the implications for collective agency is missed. I will argue that Arendt's most concise formulation of this rights gap, that is, her answer to the question of what it actually is that is lacking in the protection of the undeportable, is "the right to have rights". This means I will argue against influential interpretations of this elusive and much-debated notion, especially those by Benhabib and agonistic democratic theorist Bonnie Honig, that "the right to have rights" is actually a notion indicating a deficit. Yet, it also testifies to a problematic – disempowering – methodic nationalism as well.

Arendt's work is helpful in identifying a number of features that are key to the condition of statelessness and undeportability in general. First, the loss of one's "place in the world", i.e., the loss of one's membership in a political community – any political community. The undeportable alien is an *apatride* (homeless person). Second, as a homeless person, the illegal alien is thrown back on her "natural givenness", "mere organic life" or the "abstract nakedness of being (merely) human" and reduced to a mere member of the species homo sapiens. The Italian legal philosopher Giorgio Agamben *[www.onlineopen.org/beyond-human-rights]* has recently called this feature of unqualified human existence "bare life": the naked

fact that we all have been born as human beings.[13] Such a person lacks that which makes someone's life a qualified, properly human life, namely (the capacity for) speech and action in concert with others in a common world. Undeportable aliens are still human beings. Indeed, they are nothing but human and that gets one nowhere in this world. In an autobiographical essay written in 1943, Arendt wrote: "(B)eing a Jew does not give any legal status in this world. If we should start telling the truth that we are nothing but Jews it would mean we expose ourselves to the fate of human beings who, unprotected by any specific law or political convention, are nothing but human beings."[14] In Arendt's view, the principle of inalienable human dignity which is given at birth simply because we are human beings is a fiction, and an empty, meaningless fiction at that, or even a pious lie that absolves us from taking political responsibility.

Third and finally, being without a home, and reduced to bare life, the undeportable is completely rightless: she is deprived of both her civil rights and her human rights, and the latter exactly because she has no civil rights. Eventually, her condition boils down to a lack of the "right to have rights", a notion I will explain below.

The Aporia of Undeportability

Arendt argued that the undeportable are caught in a contradiction: the contradiction between (the norms of) human rights on the one hand and those of citizenship on the other. More particularly, she considered it an aporia, since she thought the contradiction was irresolvable as a matter of principle. She pointed to a structural conflict in the very heart of the concept of the modern nation-state, between the liberal principle of legal equality on the one hand and the democratic principle of popular sovereignty or national self-determination on the other. Due to the latter, the nation-state turns out to be unable and unwilling to take aliens, including those without a nationality whatsoever, as legal persons, and as such undermines the first principle.[15]

Human rights are supposed to apply to all human beings, independent from one's citizenship and residence status, i.e., one's situation at birth. This is the legacy of modern natural law theory, in particular John Locke's *Second Treatise* (1689). According to these theorists, human beings are bearers of inalienable rights, simply by virtue of being born as human beings. Nature – in the double sense of human nature and life itself, including our being subject to nativity, vulnerability and mortality thus constitutes the foundation of inalienable, i.e., pre-political, human rights. Locke has exerted a profound influence on both the American Declaration of Independence and, partly mediated through the former, on the French *Déclaration des droits de l'homme et du citoyen*. The legacy of the naturalism of both human rights declarations is also clearly visible in the Preamble and 1st article of the Universal Declaration of Human Rights *[un.org - Read the Universal Declaration of Human Rights]* (1946). Contemporary liberal philosophers such as Amartya Sen and Martha Nussbaum, typically base their justification of human rights on some essential feature of the human being or moral principles that supposedly exist independently of human political affairs.

However, by virtue of their sovereignty (that is: democratic self-determination), nation-states as a principle include particular people by granting them citizenship, namely their own citizens on their territories – and exclude others, namely aliens. As such, the principle of national sovereignty undermines the principle of universal rights. In recent years, this conflict has been framed in terms of a tension between liberal and democratic currents or traditions within liberal democracy, between equality and liberty, law and politics, etc. in short: the paradox of politics mentioned previously.

The relationship of human rights and national sovereignty does not only constitute an irresolvable contradiction, Arendt argued, but also and simultaneously a relation of interdependence, which makes the problem even more intractable. For the human rights regime is dependent upon the cooperation and consent of sovereign nation-states. Human

rights are realised in and through the nation-state, that is, nation-states are the entities that set them up in the first place and to date are the prime agents responsible for interpreting, enforcing and protecting human rights, allegedly the rights of human beings qua human beings, whether citizens or not. [16]

In Arendt's view, this interdependence of human rights and sovereignty points to two convergences – first, to the convergence of human rights and civil rights. Arendt demonstrates that this state of affairs can be traced back to the prehistory of the discourse of human rights. Our current discourses and practices respectively of civil and human rights simultaneously came into being in the wake of the French Revolution as they were articulated in the 1789 declaration of human rights. This led to the unwitting identification of human rights and civil rights from the very start. As a consequence, the supposedly universalistic identity/category of being human, that is, the "man" of the "rights of man", converged with the particularistic identity of being citizen.

A second convergence pertains to the identification of citizenship and nationality, or nativity, as I would call it. The concept of the modern nation-state ties citizenship to the arbitrary conditions of one's birth (*natio*), be it in a specific territory (*jus soli*) or to a specific ancestor (*jus sanguinis*). The fact that even formal UNHCR documents use these notions interchangeably, testifies to the strength of this identification to the point that it has been naturalised, that is, has become a matter of fact, and is no longer noticed any more. As a consequence, a political category, "citizenship", is grounded in an organic one – birth, i.e., nativity. Being-citizen thus converges with being-national. Nationality – though not citizenship per se! – is exclusive, arbitrary and restrictive as a matter of course, for it is grounded in natural, immutable properties one can do nothing about. Although coming from a very different tradition in political and legal theory – political liberalism – legal scholar Ayelet Shachar has indeed recently demonstrated convincingly that the "civic" principle of *jus soli* and the "ethnic" principle of *jus sanguini*s share a crucial feature: both make the transfer of citizenship dependent on birth circumstances, in the first case where, in the latter to whom one happened to be born. Whence the felicitous title of her book: *The Birthright Lottery* (2009).

The implication of the simultaneous contradiction and interdependency of human rights and citizenship is a particular circularity of legal-political belonging. One already has to belong to the nation to be eligible to claim the civil rights pertaining to that belonging, and subsequently be able to claim human rights. This circularity, I think, is key to understanding the rights or protection gap in international law, and the paradox of politics. Those without nationality do not enjoy citizenship, and those without citizenship cannot lay claim to allegedly "inalienable", "natural" human rights. In other words, human rights, Arendt argues, can only be protected through civil rights, which can only be claimed by nationals. The undeportable is the symptomatic figure for the concealed contradictions, circularity and their breakdown. [17]

The convergences of nationality and citizenship, and of citizenship and human rights, imply that the ideal of human rights is thoroughly imbued with a naturalist and nationalist, and therefore exclusive, restrictive, arbitrary and deterministic logic, which gives the lie to its supposed universalism. The high-minded ideals of universal human rights turn out to conceal a false inclusivism. For legal citizens, the convergences of man, citizen and national are unproblematic, to the point that they will not even notice them, because the convergences are naturalised and concealed. The problem only becomes visible the moment aliens turn up who do not dispose of a nationality whatsoever, either de jure or de facto. For since political organisation in modernity is fully monopolised by the nation-state system, Arendt thought, those without a nationality have nowhere to turn. Geographically, the nation-state system operates as a comprehensive and all-embracing global system, a *globus*. On second thought, though, it is a closed economy with a leak in it. The nation-state system produces its own outside, through which a residual group of people, those without effective nationality, are excluded inevitably and irreversibly. Arendt contends that

the camp is the sole space left in this system for those who pass through the leak. Hence, there is a bitter irony to the spectacle of self-established tent camps of undeportable aliens and the Vluchtgevangenis ("refugee prison") since 2012, etc.

The Abyss of the Right to Have Rights

This state of affairs, Arendt thought, points to a fundamental lack in the discourse of human rights, namely its incapacity to ground itself: the protection gap in international law mentioned above. This missing ground is, I hold, what Arendt calls "the right to have rights", which is "the right to belong to some kind of political community at all".[18] This "right to have rights" is therefore not a universal human right; it is not even, I believe, a utopian notion or a regulative ideal. On the contrary, I claim that the right to have rights is a negative phrase, pointing to a deficit or an abyss by invoking a ground or foundation which neither does nor can possibly exist. Hence, the notion of the right to have rights testifies to Arendt's non-foundationalist approach of human rights and citizenship. This right to have rights didn't factually exist as a formal, positive right in Arendt's time, nor in ours. Neither in Arendt's view could it ever exist as a matter of principle, for there is no escape from the circularity of nationality, citizenship and being a subject of human rights. Which institution should guarantee them? In an international body such as the UN – indeed, United *Nations* as the name indicates – member states are both party and judge in cases of human rights violations. Such an institution would have to be truly transnational, an independent third party or arbiter, standing over and above sovereign nation-states, to control and enforce sovereign states' compliance with human rights norms. However, it is highly unlikely (and perhaps undesirable) given the paradoxes of the nation-state (and liberal democracy) that states would agree to renounce national sovereignty.

2. Undeportability and Collective Agency

This brings me to the second question, regarding the claims for collective agency by, or for, undeportable aliens. The circle of legal-political belonging thus seems to be a vicious one in Arendt's account. Any further institutionalisation of international law or human rights law only ends up displacing the circularity of legal-political belonging and repeating it on a higher level. Arendt was very pessimistic over whether the rights gap could ever be filled under conditions of the nation-state system. She thus ends on a dark note: the contradictions of human rights, citizenship and nationality are irresolvable and its circularities vicious. Exactly because they lack the right to have rights, the undeportable are deprived of the possibility to change their situation of rightlessness through collective action. Arendt's pessimism may point to a static and deterministic conception of the legal-political order, more precisely a nationalist conception. For despite her denouncement of political nationalism, that is, of a legal-political discourse that justifies itself in terms of naturalistic (ethnic) foundations of belonging, Arendt's critique of human rights is implicitly marked by a methodic or theoretical nationalism:[19] the nation-state, despite its naturalist ideology and the tragic consequences it has for de jure or de facto stateless people is the given unit of analysis in Arendt's perspective of the legal and political order.[20] She starts from the assumption that the nation-state constitutes the framework within which every politically and legally relevant aspect of subjectivity and agency is shaped: humanity (i.e., the "human" of human rights, including one's very intelligibility as human and typically human ways of being-alive), democratic citizenship and the very notion of "legality", indeed. Therefore, she could not but conclude that being-human (in a qualified full sense) and being-citizen coincide. This static, deterministic and nationalist conception of the legal and political order strikes me as odd, given the fact that Arendt is otherwise famous for her philosophical dedication to new beginnings, natality and contingency.[21] and *On Revolution* (New York: Viking Press, 2006 (1963].]

Political theorist Seyla Benhabib is much more optimistic than Arendt. In her view, the "right to have rights" entails a universal human right to have civil rights. It would invoke the moral claim – a Kantian-style moral imperative – that everyone is entitled to positive rights and state protection, by virtue of the principle of universal moral reciprocity: "We are all human beings". By extending international law, humanity will eventually succeed in filling the rights gap, she believes. In claiming so, Benhabib ignores the important historical lesson Arendt taught us about statelessness. Particularly striking is her neglect of the condition of undeportability due to the rights gap that fundamentally separates citizens and non-citizens (i.e., aliens).

Here I think Honig's Arendtian-inspired reflections on, what she calls, the "paradoxes of law and politics" in the present European context might offer a promising way out.[22] Although Honig herself doesn't present it that way, her account could be seen as a corrective to both Arendt's pessimism and Benhabib's misguided optimism, exactly by employing Arendt's insistence on beginning, contingency and the indispensability of civic action-in-concert. In Honig's rendering of the paradox of politics, it points to the intertwinement or "chicken-or-egg issue" of rights and politics: the latter meaning (collective) democratic action or agency. In the case of immigrants, this paradox means that "we need rights because we cannot trust the political communities to which we belong to treat us with dignity and respect; however, we depend for our rights upon those very same political communities."[23] Like Arendt, Honig argues that there is no way out of this paradox, and no way out of the need of belonging to some legal-political order. So there will never be a final, once and for all legal solution to the rights gap into which aliens tumble, as for example Benhabib argues. Every legal-political order, however universalistic, inclusive or egalitarian its aspirations, inevitably produces its own remainders – those who do not belong. These remainders – and the related rights gap – cannot be remedied by an extension of (existing) rights – for example international or cosmopolitan law – alone. Law needs the supplement of politics, that is, of democratic civic action. Honig favors a political, that is, democratic, over a legal or juridical approach to the problems associated with the rights gap. She calls for democratic actors, particularly immigrants, to reclaim collective agency in particular by "taking" or "making" rights, in line with Jacques Rancière's view on "the rights of those who have no rights".[24] Those groups who have no right to enter the public arena as legitimate actors – primarily, in his examples, women and workers (the proletariat) – should act as if they are already part of the "we" of the people, and act as if they already have those rights they formally cannot claim, rather than wait for these rights to be given them (without being sure these rights will ever be granted). Rancière describes such practices of claiming collective agency as "making visible what had (formerly) no business being seen, and mak(ing) heard a discourse where once there was only place for noise."[25] By privileging formal, institutional legal change (national and international institutions), we might become pessimistic and overlook hopeful political activism, such as the self-established tent camps of undeportable aliens, Honig suggests. In her view, the paradox of rights and politics is potentially productive.

The slogan "We are here!" could serve as an excellent example or illustration of this type of emancipatory collective action. This motto could potentially fuel a politics of visibility, intent on transforming the natural invisibility of *homo sacer* that individual illegal aliens benefit from maintaining, into public visibility of illegal aliens as a group. However, I still doubt if this slogan is appropriate relative to the problem at hand. Let me explain my doubts by returning to Honig and Rancière. Their call for democratic civic action is refreshing, hopeful and empowering if compared to Arendt's rather dark and pessimistic perspective of the predicament of the undeportable. Still, their account raises a serious concern. It might be helpful in the case of legal immigrants, however, calling for illegal, particularly undeportable, to "make" or "take" rights is misguided in my view. Although Honig and Rancière both discuss Arendt's notion of the right to have rights as well, I am

not sure if they take its lesson serious enough. Honig interprets the right to have rights as an unconditional moral right to have positive – i.e., conditional – rights.[26] Like Benhabib, Honig ignores the condition of undeportability; it is not simply the rights of undeportable aliens that are denied or violated, but moreover their very access to the sphere in which rights could be claimed in the first place. They are truly outlaws because they are not only deprived of civil rights and human rights, but of the very "right to have rights". The claiming, making or taking of new rights seems ultimately seems the privilege of those who already have civil rights, that is, of citizens (however marginalized or second or third class), i.e., those who already belong to the people.[27] Indeed, the examples Honig – and Benhabib as well, for that matter – discusses are all about "immigrants" or "foreigners" in general, and implicitly of "documented" or "regular" migrants (with some sort of citizenship status) at that. However, it is a very specific group of aliens the undeportable and undocumented, not migrants or foreigners in general that expose the very rights gap, i.e., the problem of lacking a right to have rights. Those without any recourse to citizenship do not simply have a weak voice, but no voice at all; they do not simply fail in "making heard a discourse," but do not even produce "noise", to use Rancière's phrase. I am not sure if, under this particular condition of rightlessness, the "We" of "We are here!" is not simply *homo sacer*.

This suggests a negative answer to the question of the possibility for reclaiming collective agency by undeportable undocumented aliens ("We illegals") and its potential for improving their situation, in the light of the rights gap. The failure of recent experiments in undocumented democratic activism in the Netherlands might be accidental, but could very well be symptomatic for this deficit, the right to have rights.

I have established here some doubt that the undeportable themselves can even start to engage in the democratic work of tackling the rights gap because of the groundlessness of rights. If I am right in noting that the taking or making rights is indeed the privilege of citizens and the undeportable as non-citizens are devoid of collective agency, then the conclusion seems to be inevitable: another "we" is to be called upon if "we" wish to advance the cause of undeportable aliens best. And action by citizens belonging to the very polity from which illegal aliens are radically excluded is required. I'm not sure though, if this is desirable, or under which conditions, or in which form. I see roughly two different framings of citizens' action.

The first is suggested by Jacques Rancière in relation to oppressed colonial subjects (Algerians) and is based upon citizens' "disidentification" with "we the people" ("Not in our names") and identification with non-citizens ("We are all illegals").[28] However, I'm quite sure we are not all illegals, since those belonging to the people and those who don't are separated by a legal gap – the right to have rights – and therefore experience the world and their home in it in a fundamentally different way.

A second framing of citizens' action could be "representative" action on behalf of, or in the names of, illegal aliens ("them illegals"). Maybe those who do belong to the nation should speak and act, vicariously, on behalf of those who don't. But doesn't this step again suspend potentially indefinitely the collective agency of the undeportable, and make them dependent on the arbitrary favour and mercy of well-meaning citizens, or even worse, of citizens who instrumentalise the predicament of the undeportable to raise attention for their own concerns? This confronts us with the very challenging question, both theoretically and politically: How to think and act beyond the nation-state?

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Footnotes

1. For more information visit www.wijzijnhier.org.
2. In fact, the logic of restriction may be inherent in the very practice of policymaking itself. In a recent historical investigation of the Dutch asylum procedure between 1945 and 1994, historian Tycho Walaardt concludes: "Asylum policies have been drafted mainly to reject asylum seekers and to deter potential applicants," *Geruisloos inwilligen. Argumentatie en speelruimte in de Nederlandse asielprocedure, 1945–1994* (Hilversum: Verloren, 2012), translation by author.
3. See Human Rights Watch, "Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy," *Report* 15, no. 3 (9 April 2003). Cf. EU Return Directive (directive 2008 / 115 / EC).
4. Emanuela Paoletti, "Deportation, Non-deportability and Ideas of Membership," working paper, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, Oxford, 2010, p. 5. <
5. Vreemdelingenwet 2000, hereafter: Vw.
6. Carol Hanisch, "The Personal is Political," in *Notes From the Second Year: Women's Liberation*, ed. Shulamith Firestone and Anne Koedt (New York: Radical Feminists, 1970), pp. 76–78.
7. Simone de Beauvoir, *The Second Sex* (London: Vintage, 2011 [1949]), p. 8.
8. Cf. former Dutch Minister of Justice and Minister of Interior Ernst Hirsch Ballin, himself born to Jewish-German refugees, in his inaugural speech as Professor in Human Rights (2011). Cf. Laura Ellen van Waas, *Nationality Matters. Statelessness under International Law* (Intersentia, 2008).
9. Annual Reports 2009 and 2010, Supervisory Commission on Repatriation.
10. See Seyla Benhabib and Robert Post, eds., *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006); Margaret Canovan, *Nationhood and Political Theory* (Cheltenham: Edward Elgar, 1996) and "Sleeping Dogs, Prowling Cats and Soaring Doves: Three Paradoxes in the Political Theory of Nationhood," *Political Studies* 49 (2001): pp. 203–215; Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000); Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009); Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?," *Political Theory* 29, no. 6 (2001): pp. 766–781; Emilios Christodoulidis, "The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse," *The King's College Law Journal* 12, no. 1 (2001): pp. 111–133; and many others.
11. Including Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge, UK: Cambridge University Press, 2004); Bonnie Honig, *Emergency Politics*; Monika Krause, "Undocumented Migrants. An Arendtian Perspective," *European Journal of Political Theory* 7, no. 3 (2008): pp. 331–348; Jacques Rancière, "Who is the Subject of the Rights of Man?," *South Atlantic Quarterly* 103, no. 2 / 3 (2004): pp. 297–310; Patricia Owens, "Hannah Arendt, Violence, and the Inescapable Fact of Humanity," in *Hannah Arendt and International Relations: Reading across the Lines*, ed. Anthony F. Lang Jr. and John Williams (New York: Palgrave Macmillan, 2005), pp. 41–65; Marieke Borren "Arendt's Politics of In / Visibility. On Stateless Refugees and Undocumented Aliens," *Ethical Perspectives* 15, no. 2 (2008): pp. 213–237.
12. Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken, 2004 [1951]), p. 276.
13. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998.
14. Hannah Arendt, *The Jewish writings*, ed. Jerôme Kohn and Ron H. Feldman (New York: Schocken, 2007), p. 273.
15. I have elaborated the reconstruction in this section elsewhere in the following texts: "Wie en waar is de onuitzetbare? Een Arendtiaans perspectief," *Tijdschrift voor Humanistiek* 12, no. 50 / 51 (2008): pp. 62–77; chapter 7 of my dissertation from University of Amsterdam, "Amor Mundi: Hannah Arendt's Political Phenomenology of World"

(Amsterdam: F&N Eigen Beheer, 2010), dare.uva.nl; and "Arendt's Politics of In/Visibility. On Stateless Refugees and Undocumented Aliens," *Ethical Perspectives* 15, no. 2 (2012): pp. 213–237.
16. Seyla Benhabib and Robert Post, eds., *Another Cosmopolitanism*, p. 31; Margaret Canovan, "Sleeping Dogs, Prowling Cats and Soaring Doves: Three Paradoxes in the Political Theory of Nationhood," p. 211 and *The People* (Cambridge, UK: Polity, 2005, p. 60.
17. Hannah Arendt, *Origins of Totalitarianism*, p. 290.
18. Hannah Arendt, *Origins of Totalitarianism*, pp. 296–297.
19. See Ulrich Beck, *Der kosmopolitische Blick* (Frankfurt: Suhrkamp, 2004.
20. Arguing in an Arendtian fashion, Margaret Canovan makes this methodic nationalism explicit in *Nationhood and Political Theory* and "Sleeping Dogs, Prowling Cats and Soaring Doves: Three Paradoxes in the Political Theory of Nationhood."
21. See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998 [1958]) and *On Revolution* (New York: Viking Press, 2006 [1963]).
22. Bonnie Honig, *Emergency Politics*, chapter 5.
23. Bonnie Honig, *Emergency Politics*, p. 117.
24. See Bonnie Honig, *Emergency Politics* as well as her text *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001) and Jacques Rancière, "Who is the Subject of the Rights of Man?," *South Atlantic Quarterly* 103, no. 2/3 (2004): p. 302.
25. Jacques Rancière, *Dis-agreement: Politics and Philosophy* (Minneapolis: University of Minnesota Press, 1999) p. 30.
26. Bonnie Honig, *Emergency Politics*, pp. 116–117.
27. Sofia Näsström, "The Legitimacy of the People," *Political Theory* 35, no. 5 (2007): pp. 624–658, p. 649.
28. Jacques Rancière, *Dis-agreement*, p. 139.

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