The 15th December 2016 the Grand Chamber of the European Court of Human Rights (ECtHR) handed down its judgement in the case of *Khlaifia and Others v. Italy*. The judgement concerns the detention of undocumented immigrants at the Italian borders and their subsequent expulsion from Italy to Tunisia. Whilst the facts of the case took place in the immediate aftermath of the Arab Spring in 2011, the case is evocative of the so-called "refugee crisis" and the predicaments of millions of third-State nationals seeking to cross the European borders.

Transformations in contemporary configurations of sovereignty, citizenship and rights have made many scholars argue that we are closer to a post-national citizenship characterized primarily by the erosion of the national identity as the distinctive form of belonging and the generalization to non-nationals of rights which were initially attributed only to members of the polity (Soysal, 1994). According to this approach, the institutionalization of human rights on the international level and the undermining of national sovereignty are indicative of the shifting of the basis of the entitlement of rights from nationality to universal personhood (Cohen, 1999). While this vision has proven rather pertinent in analysing changes in contemporary membership formations, it fails to capture the shortcomings of the universal human rights regime and the inherent tensions between the status of aliens and nationals-citizens. The fate of the people, referred to indistinctively as "asylum seekers", "refugees", "undocumented" or "illegal immigrants" in contemporary's public discourse, is inextricably linked to the paradox and the perplexities of the contemporary "*human rights regime*". Whereas the institutionalization and global expansion of human rights norms in the post-war era and the codification of the right to asylum constitute major advancements regarding the protection of the human person, the contemporary "refugee crisis" demonstrates that the problem of "*rightlessness*" can be still present in the so-called "*age of rights*" (Henkin, 1990).

In fact, the problems encountered by different categories of immigrants and refugees can partially be attributed to an implementation deficit, "*a discrepancy between formal rights and their praxis*" (Soysal, 1994). However, the difficulties of these groups in claiming some basic rights do not only result from external factors, but also reveal the limits of these norms. These groups, as Seyla Benhabib argues: "*exist at the limits of all rights regimes and reveal the blind spot in the system of rights, where the rule of law flows into its opposite: the state of exception and the ever-present danger of violence*" (Benhabib, 2004).

Drawing on the notion of "*the right to have rights*", the phrase initiated by Hannah Arendt in her attempts to reconsider human rights in terms of a right to citizenship and humanity (Arendt, 1973) and the creative reading of Arendt's critique of human rights by Ayten Gündogdu (Gündogdu, 2015), the present study aims to explore how the European responses to the current "*refugee crisis*", based on strong inclusion-exclusion mechanisms which in their turn erode the human rights of refugees and asylum seekers, can be pertinent for capturing and analysing the notion of European citizenship and its future developments.

In the next two sections, it will be argued that the restrictive policies regarding the managing of the refugee crisis by the European Union needs to be directly associated with the shortcomings of the institution of European citizenship and its failure to contribute to the creation of a European demos. In this regard, the current failure of European citizenship to fulfil a universalistic ambition and to provide the foundation for a cosmopolitan political project cannot be considered without taking into account the shortcomings and inherent paradoxes of the human rights regime. In this respect, the failures in the European conception of citizenship are interrelated, though not interdependent, with the failures of the human rights regime, as it stands. In the third section, the paradoxes of the human rights regime and the question of rightlessness will be discussed, in order to show how this regime partakes in and exemplifies this failure. It is argued in the last part of this paper, that in order to reinvent the notion and content of European citizenship, we need to reconsider human rights. Rethinking human rights in terms of political practices is important in order to reinvent the notion of citizenship, as a foundation of a truly cosmopolitan polity, where human rights can be recognized to new subjects.

European Citizenship in a Post-National Context

European citizenship is one of the unaccomplished political projects of the European Union, seeking to give a popular legitimization to its construction and perpetuation. Having the protection of the person and human rights in the heart of its conception, European citizenship is primarily conceived as a legal relationship between the individual European citizen and the membership of the European polity. Without disregarding the connection between an individual and its nation State, which in fact constitutes a presupposition for the acquisition of European citizenship, the institution of the European citizenship aims at superseding both nationality and nationally confined citizenship, as the only forms of

belonging in a polity.

The emergence of a "post-national" citizenship, according to some authoritative doctrines, is the result of transformations in the relationship between citizenship and the national State. European citizenship participates in this transformation, as it provides for a space where equal rights are recognized to European citizens irrespective of their nationality. In this context, while European citizenship was at its very beginning associated with internal mobility of labour and the creation of an internal market, progressively, it reflected concerns about the transformation of the single market into a People's Europe.

The institution of European citizenship is to a considerable degree shaped by the tension between the two opposing dynamics, intergovernmentalism and supranationalism, the two major trends which dominate the policy and discourse on the subject (Kostakopoulou, 2007). The process carries with it fundamental ambiguities, contradictions, and tensions. The weakening of traditional state prerogatives with regard to the entry and residence of economically active or economically self-sufficient community nationals has been, in this respect, accompanied by the reinforcement of the dichotomy between citizens and aliens, be they resident third country nationals, migrants, asylum seekers or refugees. Processes of equalization thus coexist with processes of exclusion, and the relativization of the Member States' borders is accompanied by the strengthening of the external frontiers of the Union and the relocation of migration controls to third countries (Kostakopoulou, 2007). The gap between "third country nationals with valid permits" and illegal migrants constitutes a direct challenge to the European citizenship's cosmopolitan ambitions. This gap has to be directly associated with the restrictive asylum policies, which often fail to conform with the standards of the Geneva Conventions, the construction of a "space of Freedom, Security and Justice", the criminalization of illegal immigration and the current rise of a nationalistic public discourse, as manifested in the rise of far-right political parties in Europe.

The external control of the borders of the European Union and their closure, the refusal to provide safe and legal routes for third country nationals in need of international protection are closely linked to the conditions under which the European identity is shaped and conceived. Consequently, the fight against illegal immigration raises the question of the symbolic borders determining the conditions of participation in a given political order. The fight against illegal immigration, which has been one of the goals of the creation of a "Space

of Freedom, Security and Justice", has fuelled the restrictive policies of the Union as regards the current "refugee crisis". These policies have to be considered in the context of the broader procedure of the European integration and the shaping of a sense of belonging in the European Union as the foundation of the citizenship for the members of the European polity. In this perspective, the strategies applied by the European States reveal how Europe is constructing the figure of the "Other" and its own identity (Duez, 2008). As Etienne Tassin has rightly pointed out, *"far from being a 'collateral damage' of European unification, illegal immigration could on the contrary be the heart of the problem"* for it is impossible to accept *"that this is nothing but a border police matter that would leave unscathed the unique logic according to which political Europe is structured"* (Tassin, 2007).

In this regard, it is argued that the response provided by European institutions and States to the current immigration and refugee crisis is indicative of the shortcomings of the European citizenship and the European identity, the limits and contradictions of the human rights regime, the failure of the European demos as it stands and its cosmopolitan ambitions. The failure of the European Union to implement more inclusive policies and to provide a legal status conferring basic rights to undocumented immigrants or asylum seekers is a sign manifesting the disability of the European elites and institutions to conceive the project of European citizenship as a process of eroding identity boundaries and of creating a space where "universal rights" are applied. However, it can also be argued that the current crisis could constitute an opportunity to reconsider the concept of European citizenship and contribute to its transformation. If citizenship can be read as a historical process, European citizenship can also be seen as a laboratory of shaping new policies of belonging, thus extending some basic rights to non-members of the European polity and strengthening the "participation to collective self-government".

Refugee Crisis and European Responses

Throughout Europe there are many migrants, primarily rejected asylum seekers, who live in a state of protracted legal and social limbo without any long-term prospects. About 60 000 refugees are stranded in Greece, where 26 400 are children, mostly Syrian, according to current estimations. The mass influx of displaced people, refugees, asylum seekers and immigrants has pushed the European foundations to its limits. The Member States have replied with border closings, erection of fences, racist and xenophobic reactions, and have

reclaimed their sovereignty (Kapartziani, Papathanasiou, 2016).

Asylum seekers and migrants in Greece and other European countries face multiple human rights violations, including obstacles in accessing adequate protection, and reception conditions that are well below international human rights standards. The situation is particularly dire for people, such as pregnant women, female heads of households, unaccompanied children, people with disabilities, and the elderly.

Despite common, binding EU asylum standards, inadequate implementation and enforcement mean that there are deep disparities among EU member states with respect to procedures, reception conditions, and treatment of asylum seekers. These disparities are at the root of the distortions in the EU asylum system and explain many of the tensions and divisions among EU member states when it comes to addressing migration and asylum challenges (Human Rights Watch, November 2016).

The European policies in this respect reveal the fragility of human rights on which the European construction has been founded and shows that national considerations are central to how the European identity is generally conceived. However, the restrictive policies of the European Union manifest also the shortcomings of the universal human rights regime. Within this regime, the claims of undocumented immigrants, and even asylum seekers or refugees regarding access to basic rights, cannot be accommodated easily. In this respect, it would be pertinent to examine the case law of the European Court of human rights, one of the most prominent institutions in the field of protection of human rights in Europe. Reading the case law in the light of H. Arendt's considerations on "statelessness" and "rightlessness" can help us understand the inherent paradox of human rights and the uncertainties of its current normative and moral foundations.

The Paradox of Human Rights and the Question of Rightlessness

The multiplication of "waiting zones", "hot spots" and other similar sites within the context of contemporary immigration controls reveals the challenging problems that various categories of migrants encounter as they claim and exercise human rights. I will try to approach these problems by turning to one of the key arguments in Hanna Arendt's reflection on statelessness in the first half of the 20th century: *"The stateless found*

themselves in a 'fundamental situation of rightlessness'", Arendt claims, *"as they lost not
only their citizenship rights but also their human rights. In the absence of a political
community that could recognize and guarantee their rights, the stateless were deprived of
legal personhood as well as a right to action, opinion and speech"* (Arendt, 1973).

As Güdongdu notes, from an Arendtian perspective, personhood, or the artificial mask
provided by law, is important, as it allows public appearance without the pervasive fear of
arbitrary violence and enables rights' claims to be articulated (Arendt, 1990). Without this
mask, one is relegated to a certain form of civil and social death. However, legal personhood
remains an artifact and not an inherent essence. It is therefore necessary to attend how it
can be effectively unmade or undermined in certain conditions. Possibilities of qualifying
and evading personhood are nowhere more visible than in the cases of asylum and
immigration, due to the centrality of the principle of territorial sovereignty to the ordering
of the international system. Given these possibilities, "rightlessness" must be reconsidered
as a critical concept that can alert us to various practices that undermine the legal
personhood of migrants. Rightlessness in this regard is thus conceived not as the absolute
loss of rights but instead as a fundamental condition denoting the precarious legal, political,
and human standing of migrants (Güdongdu, 2015).

I propose to analyse the limits and exclusions of the existing inscriptions of personhood in
human rights law by examining the recent case of the ECtHR referred to in the beginning of
this paper. The case is about detention at the Italian borders (including the island of
Lampedusa) of aliens, namely undocumented immigrants, and their expulsion from Italy to
Tunisia. Whilst the events took place in 2011, in the immediate aftermath of the Arab
Spring, the issues raised before the Court by the applicants and the principles outlined by
the judgement appear relevant to the current "refugee crisis" and its management by the
European Union institutions and member States. The case concerns the arrival of the
applicants, three Tunisian migrants, on the island of Lampedusa, their initial placement in a
reception centre and subsequent confinement on two ships moored in Palermo harbour,
followed by their removal to Tunisia in accordance with a simplified procedure under an
agreement between Italy and Tunisia of April 2011. The applicants were complaining about
the conditions of their detention, a violation of the right to personal liberty, as well as a
violation of the prohibition of collective expulsions.

It is to the credit of the Court that the judgement corroborates its position on the value of personal liberty, by reminding States that legal certainty is a crucial principle when it comes to a deprivation of liberty, and it cannot be set aside "*even in the context of a migration crisis*" (§106). However, the Court found that the conditions in the Lampedusa reception centre did not amount to inhuman or degrading treatment. In this context, the ECtHR reiterated that an increasing influx of migrants cannot, *per se*, absolve a State of its obligation under Article 3, but conducted, so to say, a "*reality check*" of the situation suffered by the applicants *vis-à-vis* the actual situation in which Italy found itself due to the migratory pressure at the time of the Arab Spring (Venturi, 2017).

The Grand Chamber affirmed, firstly, that "*it would certainly be artificial*" not to consider that the undeniable hurdles faced by the applicants originated from a situation of extreme difficulty confronting the Italian authorities at the relevant time. Secondly, the Court observed that the applicants were not asylum seekers and therefore, they "*did not have the specific vulnerability inherent in that status*" (§194). Conversely, the Grand Chamber recalled that the applicants were in a weakened physical and psychological condition when held at the centre, due to the dangerous sea crossing (§194). Nevertheless, according to its view, the applicants did not bear the burden of traumatic experiences that had justified the vulnerability approach adopted in a previous case *MSS v. Belgium and Greece*. Furthermore, the Grand Chamber also pointed out that the applicants did not belong to any of the categories traditionally regarded as vulnerable, but they were young males without any particular health issue.

These arguments seem to corroborate the ECtHR's nuanced approach to the notion of vulnerability, which, on the one hand, is inherent in all asylum seekers while, on the other hand, is attached to certain individuals because of specific conditions that put them in a more disadvantaged position. Besides, the Grand Chamber's reasoning seems to give a hint on what vulnerability is not: being a healthy, young man, albeit with irregular status (Venturi, 2017). In any event, the utility of the notion of "vulnerability" in the Court's case-law can also be criticized, because the legal status of the refugees and asylum seekers in contemporary international law is already founded, primarily, on their "vulnerable" status. The notion can also be considered responsible for introducing further differentiations of the status of non-nationals, be they refugees, illegal immigrants or asylum seekers.

As to the violation of Article 4 of Protocol 4 to the ECHR, concerning the prohibition of collective expulsion, the Grand Chamber found no violation. In the Court's view, the *"relatively simple and standardized nature"* of the refusal of entry orders which were merely based on the applicants' nationality due to the bilateral agreement in force between Tunisia and Italy, could be explained by the fact that the applicants did not allege any fear of being returned or any other legal impediment. In the ECtHR's opinion, Article 4 of Protocol 4 does not warrant an unfettered right to an individual interview, but only the effective possibility to submit arguments against deportation. As the applicants had this possibility, but they did not raise any argument to challenge their expulsion, the latter did not qualify as *"collective"* in nature.

The judgement of the Court seems to grant States a large margin of action when dealing with irregular migrants. The judgement gives rise to many conclusions. As some scholars have argued, human rights are ambivalent, they have both *"jurisgenerative"* and *"jurispathic"* dimensions (Cover, 1984). We become aware of the *"jurisgenerative"* dimension of law when existing rights are *"reposited, resignified, and reappropriated by new and excluded groups"*, as Seyla Benhabib notes (Benahbib, 2006). But it is equally important to look at how human rights law gives rise to *"jurispathic"* processes when its norms are invoked to affirm the sovereign right to detain or deport rejected asylum seekers and undocumented immigrants. The *Khlaifia* case shows that the Court recognizes some rights to undocumented migrants, thus extending personhood to migrants, but also upholds the principle of territorial sovereignty that enables a state to expel these migrants, a practice amounting to the unmaking of that personhood.

The judgement also demonstrates that the body has become a crucial site for claiming rights, giving rise to what Didier Fassin aptly calls *"biolegitimacy"* (Fassin, 2005). It is in the suffering body of the migrant, refugee or asylum seeker that States, courts and refugee advocates will look for some irrefutable truths. The status of the vulnerability as a bodily narrative becomes central also in the reasoning of the Court. The attempt to adjudicate rights claims based on suffering bodies, risks eroding the personhood of migrants who, like the ones in the *Khlaifia* case, cannot prove any particular suffering (Gündogdu, 2015).

The notion of "vulnerability" closely connected to the suffering body of the migrant points to another arbitrary rule faced by migrants. This new rule is directly related to the

compassionate humanitarianism, which can be described as the fact that States, courts and rights advocates turn to compassion to make decisions about suffering. This "new moral economy" risks unmaking the equal personhood of migrants, rendering the rights dependent on a capricious moral sentiment (Gündogdu, 2015). As a result, we are not too far away from Arendt's argument that the stateless find themselves in a fundamental condition of rightlessness because of their dependence on goodwill or generosity of others (Arendt, 1973). The Court in *Khlaifia* case reproduces the humanitarian tendency to depict refugees as a vulnerable category, and draw as a consequence a distinction with other categories of migrants who are placed outside the realm of vulnerability. But that move places the dichotomies at the intersection between a moral economy centred on compassion and an administrative rationality directed at the management of vulnerable populations. Thus, from an Arendtian perspective the Court ends up subjecting the rights of migrants to arbitrary decisions about the conditions under which a human body can be considered as suffering and worth of protection (Gündogdu, 2015).

The judgement of the European Court is indicative of the tensions inherent to the contemporary human rights regime and its connection to the notion of State sovereignty. The case also underlines the dangers of "subjecting" the implementation of human rights on moral considerations that can prove to be highly relative or arbitrary. In the next chapter, it is argued that the current "refugee crisis" points primarily to a crisis of human rights within Europe and beyond, implying a need for a reconfiguration of citizenship beyond the nation-state framework and the notion of sovereignty. In this regard, we need to rethink of human rights in the light of a "reinvented" citizenship. The European citizenship, as the first historical precedent with cosmopolitan aspirations, could provide a space for experimentation of this new form of belonging to a truly universalistic human rights regime.

Forming a European Citizenship: The Failure of a Cosmopolitan Ambition or a Chance for the Future of Europe?

How can we overcome the inherent tensions and paradoxes of the human rights regimes and reflect accordingly on the future of citizenship in Europe? Has the notion of European citizenship the potential of reinventing the European polity where equal rights are offered to all? Is the concept of EU citizenship still appropriate today? How can European Citizenship respond adequately to the current challenges and fulfil the cosmopolitan dimension it has?

It is here argued that in the current refugee crisis, the institution of European citizenship could have provided a basis for a unique experience, consisting in stretching social and political bonds beyond national boundaries and permitting the creation of a new, more inclusive political community. However, EU citizenship in its current form needs to be superseded.

Dora Kostakopoulou develops a "*constructive approach*" to citizenship, as a promise held by the European Union citizenship (Kostakopoulou, 2007). One crucial feature of "*constructive citizenship*" is that it postulates a vision of inclusion and equal democratic participation in a community where difference is valued and appreciated and not simply tolerated. Such a conception of citizenship embodies a novel and more flexible conception of demos: it separates demos from ethnic and cultural commonalities and reconfigures it as a political process of participatory enactment. According to this vision, European citizenship should carry with it an ethical responsibility: the responsibility to be nourished by institutions, practices, rules and ideas embodying a commitment to social transformation, democratic reform and respect for the Other.

Etienne Balibar proposes to create new modalities and new perspectives of accession to citizenship, which can even transform its definition. He cites for example the generalization of the *jus soli* in the whole European Union. According to this scholar, it is urgent for the European Union to act in order to respond to the humanitarian crisis at its borders. An ideological change is in this regard necessary. As Balibar notes: "*We can say that Europe will either be realized by revolutionizing its vision of the world and its societal choices or it will be destroyed by denying realities and by holding onto the fetishes of the past*" (Balibar, 2015).

In this regard, it has also been stressed that it would be more in keeping with the nature of the European entity to relaunch the movement for the "denationalization of rights". This would benefit European citizens, but also those who do not belong to the "inner" nations and it would progressively transform Europe into the place where a "universality of rights" is achieved, founded in a fractional loosening of the bond woven between nationality and citizenship (Lacroix, 2010). In this sense, granting equal rights to illegal immigrants and asylum seekers, mainly by attributing to them the right to belong to the EU political community is essential for reimagining the symbolic and ideological boundaries of the

"European polity" and its "cosmopolitan dimension".

In her turn, inspired by Arendt, Ayten Güdogdu, proposes an original reading of her *"right to have rights"*. According to this reading the puzzling formulation of a *"right to have rights"* can be read as an invitation to rethink human rights in terms of political practices of founding. The author is further drawing on the term introduced by Etienne Balibar *"equaliberty"* (égaliberté) (Balibar, 2010), which foregrounds the inextricable connection between equality and freedom in modern democracy, affirms a universal access to politics, and animates struggles that contest exclusions from rights and citizenship. This reading highlights that the *"right to have rights"* marks a new beginning radically interrupting the existing regime of human rights and introducing *"a hiatus between the end of the old order and the beginning of the new"* (Arendt, 1990).

This approach also underlines that the contemporary institutional mechanisms concerning the protection of human rights cannot always respond to new problems of rightlessness. It also highlights that human rights are not simply normative constrains on an established constitutional order but owe their origins as well as their ongoing preservation to political action (Güdogdu, 2015).

The struggles for the rights of the so-called *"illegal immigrants"* or the *"sans papier"* in France, as well as the vague of solidarity raised in Greece and everywhere in Europe in support of the refugees trying to escape from war and suffering reveal that human rights are not simply normative constraints regulating an existing political and legal order but also political inventions that can constitute a new order, bring to view new subjects of rights, and reconfigure existing relations between rights, citizenship and humanity (Güdogdu, 2015). Understood in these terms, human rights have an "insurrectional" dimension, to use Etienne Balibar's term, because they can turn against the constituted political and normative order for the purposes of founding a new one (Balibar, 2004).

The insurrectional dimension of human rights, configured in the political struggles, changes the boundaries of our political and normative universe, as it introduces us to new subjects who were formerly not recognized as human beings entitled to rights. This point shares similarities with Seyla Benhabib's proposal to understand human rights in terms of *"democratic iterations"* that involve practices of contesting and redefining existing

prescriptions of rights (Benhabib, 2004). These struggles reveal that human rights understood as a "*right to have rights*" ultimately depend on a type of citizenship enacted by those who do not have a legitimate standing and yet who thrust themselves into the public spaces from which they are excluded. This paradoxical kind of citizenship involves practices of claiming rights that one is not entitled to according to prevailing legal and normative frameworks (Güdogdu, 2015). The political practices of founding and refounding are important not only for establishing the universal validity of human rights but also for reinventing and reaffirming citizenship, also in the context of the European Union, in the face of global transformations that continue to dilute it.

Inspired by the revolutionary heritage of the 18th century human rights declarations, Arendt's "right to have rights" emphasizes the ineluctable historicity of human rights. These rights as products of historical contingency are also founded on the universal validity of the principle of "equality and liberty" (Claude Lefort), animating the struggles that have inspired the modern human rights declarations. In order to move beyond the deficiencies of the contemporary human rights regime, we need to reevaluate the revolutionary dimension of human rights, by considering them as an ongoing achievement that can challenge their instituted configurations, as well as those of citizenship. Enacting those rights presupposes thus a form of active political participation and action. Taking into account that illegal immigrants or asylum seekers have not a recognized legal standing within the instituted polity, political action takes necessarily the form of a political struggle contesting the established limits of citizenship and conditions of acceding to basic rights. A form of political solidarity by the members of the polity is also essential in this respect. Such practices of political action can contribute to the transformation of the practices of belonging, so that people, as the undocumented immigrants, who do not enjoy any rights or who have only limited rights in Europe, can aspire to a place in the European demos and to an extended human rights regime.

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The responses of the European states to the current refugee crisis, as well as the responses of the institutionalized mechanisms in the field of the protection of human rights, such as the ECtHR, reveal the deficiencies of the system and the fragility of the human rights values on which the idea of the European demos is founded. Rethinking human rights in terms of

political practices can help us reinvent the European citizenship, an institution with a cosmopolitan ambition. In an Arendtian framework, the struggles of new subjects challenging current configurations of human rights and citizenship can open the way to a truly cosmopolitan polity.

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