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A Life Absolutely Bare? A Reflection on Resistance by Irregular Refugees against Fingerprinting as State Biopolitical Control in the European Union

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Cover Page Footnote

Acknowledgment: This paper has been adapted from a research paper originally written in French in Fall 2016 for the course French 183A: Configurations of Crisis taught by Professor Debarati Sanyal, Professor of French at the University of California, Berkeley. I would like to thank Professor Sanyal for all the support she kindly provided me with in writing the original research paper, Isabel Richter, DAAD Professor of History at UC Berkeley, for her comments and suggestions as I produced this current version, and Ms. Valentina Padula, Lecturer at UC Santa Barbara, for her comments in the conference at Claremont. Finally, I would like to thank my parents, Tiequn and Jun Zhou, for their love, encouragement and continued interests in the wellbeing of this research project. Author's Note on Pronouns: In this paper, I used man/men to mean (a) human being(s) of either sex. For simplicity, I used the pronoun he/his/him when speaking in relation to man/men.

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A Life Absolutely Bare? A Reflection on Resistance by Irregular Refugees against Fingerprinting as State Biopolitical Control in the European Union

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ABSTRACT

In a legally transitory category, irregular refugees experience a double precariousness. They risk their lives to travel across treacherous seas to Europe for a better life. However, upon the long-awaited embarkation on the European land, they are exposed once again to the precariousness of the asylum application. They are “powerless”, “with no rights” and “to be sacrificed” as Giorgio Agamben and Hannah Arendt suggested in their respective understanding of a “bare life”, *la nuda vita*. In light of the administrative difficulties in managing asylum application, the European Union introduced the “Dublin Agreement”, which stipulates mandatory biometric data collection for irregular refugees. However, the unprecedentedly high influx during the 2015 EU refugee crisis put the European legal structures in tension with humanitarian reasons, calling for a moment for critical analysis of refugee management as an institution. Facing Dublin Agreement’s biopolitical control, irregular refugees appear to be even more vulnerable, having no choice but to conform. Yet, in the documentary *Qu’ils reposent en révolte* by French film director Sylvain George, removing one’s fingerprints through self-mutilation represents an interesting ‘agency’ against the State’s control. This raises the question: is their life absolutely bare? This research paper is aimed at answering this question in a theoretical fashion. It begins by exploring the history of fingerprinting as an identification tool and by introducing the notion of a ‘bare life’. Through examining related EU Directives and member state laws, the paper first identifies conditions constituting a bare life for irregular refugees. Shifting the focus to the practice of self-mutilation as an agency for resistance, the second part of the paper examines the practical and theoretical significance of this resistance and makes recommendations with insights from psychoanalysis on returning from *hostis* to *hospes* in contemporary European refugee management.

KEYWORDS

immigration, asylum, biopolitics, fingerprinting, international law, EU law

INTRODUCTION

In a legally transitory category, irregular refugees—those who crossed borders illegally—experience a double precariousness. They risk their lives to travel across treacherous seas to Europe in hopes of a better life. However, upon the long-awaited embarkation on the European land, they are exposed once again to the precariousness of the asylum application. They are “powerless”, “with no rights” and “to be sacrificed” as Giorgio Agamben (1995) suggested in his philosophical construction of a “bare life”, *la nuda vita*. Hannah Arendt’s (1943) emotive account on Jewish statelessness also brings us to reflect on the psychological suffering this precarious condition engendered to refugees. In light of the administrative difficulties in managing asylum application, the European Union (EU) introduced the Dublin III Regulation in 2014, which stipulates mandatory biometric data collection for irregular refugees. While it has proven to be efficient for most of its history, the unprecedentedly high volume of influx during the 2015 EU refugee crisis put the European legal structures in tension with humanitarian reasons, calling for a moment for critical analysis of refugee management as an institution. Facing Dublin Agreement’s biopolitical control, irregular refugees appear to be even more vulnerable, having no choice but to conform. Yet, in the documentary *Qu’ils reposent en révolte* by French film director Sylvain George, removing one’s fingerprints through self-mutilation represents an interesting ‘agency’ against the State’s control. This raises the question: *is their life absolutely bare?*

This research paper is aimed at answering this question in a theoretical fashion. It begins by introducing the history of fingerprinting as an identification tool as well as the notion of a ‘bare life’. Through examining related EU directives and member state laws, the first part of the paper identifies conditions constituting a bare life for irregular refugees. Shifting the focus to the practice of self-mutilation as an agency for resistance, the second part of the paper examines how much genuine room for maneuver there is between refugees and the larger regulatory structure as well as, with insights from sociology and psychoanalysis, the theoretical implications of this domination–resistance dynamic.

AN EXPLANATORY NOTE ON KEY WORD CHOICE

A choice as important as it is personal to analyzing the conjuncture of asylum in Europe is the definition of ‘refugees’ and subsequently the ‘irregular refugees’. Departing from the traditional conception of ‘refugees’ as having committed some act or holding some political opinion, I choose to use a broader definition similar to that in Arendt’s (1943) *We Refugees*. Here, refugees are intended to include all people forced to uproot their life and seek protection away from their home country in another, regardless of their motives and of their intention to stay temporarily or permanently in the host country. Formally in French called *les réfugiés en situation irrégulière*, irregular refugee is a juridical status designating refugees who enter or remain in the country without permission. In common parlance, irregular refugees are often called ‘illegal refugees’ or ‘refugees without papers’. However, in French the word *illégal* denotes criminality, and at least in the French context, those refugees are not criminals. For this reason, this paper adopts the more neutral and inclusive word of ‘irregular’ to not presuppose criminality, or downplay the ‘irregularity’ of their situation. As this paper treats exclusively the case of irregular refugees, and because irregular refugees go through the same process of asylum request as asylum seekers in the EU, the

following words are used interchangeably to mean the same: refugees, irregular refugees, and asylum seekers.

A BRIEF HISTORY OF FINGERPRINTING: A BIOPOLITICS OF IDENTIFICATION

First used by Michel Foucault in a conference in Brazil in 1974, Biopolitics is intended as a modern form of power over the biological life exercised by states since the eighteenth century, which marks the beginning of a new caesura of state governance. (Foucault, 1994) Power or control over the living, Biopolitics concerns devices that enable the State¹ to rationalize governance problems posed by the population such as health, hygiene, birth, longevity, and race. Quarantine measures in public health (see p. 197 of Foucault, 1975), the war against tobacco addiction (Guigner, 2011) are both prime examples of Biopolitics. As responses to questions about the population, biopolitical devices also operate on the biological bodies of people. A measure to monitor, control and manage—it is in essence a demographic question of population change—refugees’ mobility within the EU, fingerprinting is thus one of the contemporary forms of Biopolitics, extending state power to the biology of humans.

How and when did fingerprinting enter the sphere of public management? As a forensic technique, fingerprinting is productive in that it captures the unique markers of an individual. In European history, there was a long tradition of fascination with unique bodily traits. As early as in medieval times, physicians believed that bodily marks provide “*undisguised information*” about the body (Groebner, 2007). In the 16th century, Swiss historian Valentin Groebner writes, peculiar skin marks were introduced as evidence of his identity in the famous case of imposture, Martin Guerre’s trial in Rieux. The human body was believed to hold the ultimate truth: the mouth can lie, but the body speaks the unadulterated truth. While identification had taken various form throughout early European history, its use was not widely applied. As late as the late 19th century, first-class passengers were often exempt from identification checks whereas labors, craftsmen were required to prove their identity on paper (Ibid). In modern European history, it wasn’t until early 20th century with the outbreak of World War I that mandatory identification en masse was introduced. Although photography was invented as early as in early 19th century, due to its high cost it was not popularized and remained a bourgeois leisure (Ibid). In the 20th century, photography became a more viable medium for identification. In contrast, dactylography, the impression left by human finger, required practically no advanced technology for its production and incurred little to no cost. However, when passports were introduced on a large scale in early 20th century, they featured photographs, not fingerprints. This was because, Groebner explains, in Europe fingerprinting was so strongly associated with criminality that there was widespread resistance against it. What we may take for granted today, citizenship meant “*privileged access to certain resources*”, and is thus “*irreconcilable with marks of criminological identification, fingerprints*” (Ibid).

Investigating into the stigmatization of fingerprinting, we see that this tool of identification has a long history of negative associations. Sociologist Simon Cole (2009) explains that, a British invention, fingerprinting was first used as an identification tool in British colonies in mid 19th century to administer “*a vast empire with a small corps of civil*

1 State is used with a capitalized ‘S’ to refer to government.

servants outnumbered by hostile natives.” Thus, ever since its birth was fingerprinting associated with the ‘inferior’ and the ‘ruled’. At the time, the prevailing criminal identification tool in the UK was the French Bertillonage system—a laborious anthropometric exercise that involves carefully measuring physiognomic traits such as lengths of the ear, circumference of the head, recording particular markers (e.g. tattoo, scars) and finally taking one side-view and one front-view photo of the arrested suspect (Bertillon, 1890). However, as consistency and accuracy problems arising from comparing a given two sets of Bertillonage became more troubling, in 1880 British colonial physician Henry Faulds proposed including fingerprints as part of the existing Bertillonage system. With the support from British scientist Francis Galton, also a cousin of Charles Darwin’s, a modern, scientific classification system of analyzing fingerprint was born shortly after (Cole, 2009).

How did fingerprinting then overcome the social stigmatization to become a device in civil matters? It didn’t, insofar citizens were concerned. A quick search on the inclusion of biometric data in passports indicates that it was not until much later, in the 21st century that citizens were fingerprinted on a large scale (2010 for most European countries). There was however a much more asymmetrical path for foreigners. Fingerprinting foreigners was an American invention in the late 19th century, out of a strong, racist-by-nature distrust of the ‘indistinguishable’, “*racially unfamiliar ‘hordes’ of people*” boarding the American shore (Cole, 2009). In the 1880s when racist sentiment ran high, Chinese immigrants were the first group to be fingerprinted. In Latin America, Argentina was one of the first to fingerprint newcomers from Europe (predominantly from Italy and Spain). Argentine nativists, though often of European descent, thought of Southern and Eastern European newcomers as “*racially inferior*” (Cole, 2009). In a nutshell, ever since its introduction to modern society is fingerprinting dosed with the logic of exclusion, discrimination and criminal persecution. In today’s post-colonial world, fingerprinting irregular refugees continues to serve as an instrument for actualizing the colonial logic of territorial expansion and colony management— with the colony being the very human bodies. The very history of fingerprinting makes it all the more necessary to remain vigilant of the various implications its application carries.

HOMO SACER IN LA NUDA VITA

In an emotional essay on the despair experienced by Jewish refugees persecuted by national-socialist Germany named *We Refugees*, Hannah Arendt (1943) first conceived this notion of bare life. The sentiment of “rejected”, “undesirable”, and “protected by no law or political convention” seems especially relatable and relevant today to the experience of irregular refugees. Arendt characterizes that in this legally and politically bare category, refugees are doomed to a fate worth than death – that is not knowing the purpose of life. That in extremis, suicide becomes the “*supreme guarantee of human liberty*” speaks in volume of refugees’ absolute despair and powerlessness to change the status quo: quoting Arendt (1943), “*since we cannot design the life we want, we can reject it nonetheless.*” Later, in *Imperialism*, Arendt (1968) gives shape to this idea of bareness as she writes: “*...people who had indeed lost all other qualities and specific relationship—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.*” Stripped naked to having only their biological life, these refugees are to become what are in Agamben’s words the *homo sacer*. In response to Hannah Arendt, in 1995 Italian philosopher Giorgio Agamben in the essay

We Refugees intervened in this discussion of the politico-juridical bareness of refugees and in the same year he published his work *Homo Sacer. Il potere sovrano e la nuda vida* (English version in 1998). As irregular refugees are forced or expelled to leave their home country and enter the host country without its express approval, they enter the category of ‘stateless persons’. Agamben (1995) further notes that “many refugees who technically were not stateless preferred to become so rather than to return to their homeland”, suggesting that the distinction between ‘statelessness’ and a ‘refugee’ becomes less clear-cut in our contemporary society. As a refugee is displaced from his native sovereign state to a foreign one, he loses all the sovereign protection accorded to a citizen by the native country. In the meantime, as a foreign alien without authorization, he is also not granted all the rights the host country confers on its own citizen. In other words, as a refugee, he is neither citizen of his homeland nor of the country in which he finds himself seeking refuge: he becomes truly a ‘global citizen’ who enjoys only universal rights common to all men. This double bareness in terms of legal protection constitutes the cornerstone of a ‘bare life’.

In his book *Homo Sacer*, Agamben (1998) further developed the notion of *homo sacer* as a theoretical framework intimately linked to bare life. He starts by explaining that in ancient Greece life is not a singular concept but consists of *zōē* and *bios*, whereby the former refers to the “simple natural life” and the latter to the “qualified”, political life. In the Nation-State framework that Agamben evokes, the birth of people represents the foundation of a nation² and rights are accorded to the people, provided that they are citizens. In other words, rights are attached to citizenship, not to one’s simply being human, to the biological life. The relevance of this continental tradition of distinguishing between citizens and men is clearly visible in the French *Declaration of the Rights of Man and of the Citizen* (henceforth ‘Declaration’; in fact, the title itself already makes clear of this differentiation). In a Nation-State, when a man is born, he becomes a citizen, initiating automatically the acquisition of citizen rights. However, the category of refugees engenders a rupture to this logic, resulting in a disconnect between the initial condition as a man and the subsequent condition as a citizen. Their political existence is suspended, rendered inoperative the moment they enter refuge, but their biological life continues. The German term, *Aufhebung*, seems particularly apt at capturing the tension in question: their citizenship (most of the time) is expressed, but void, thus *aufgehbt*. Caught in this ambiguous space between a man and a citizen, a refugee becomes *homo sacer*, the *sacred man*.

Borrowed from the archaic Roman law, Agamben (1998) explains, *homo sacer* is the sacred man the killing of whom shall not be punished by law. In Latin, the word *sacratio* has two layers of meaning: “unpunishability of killing and the exclusion from sacrifice (for his life belongs to God).” The existence of a *homo sacer* is thus exceptional in two senses. First, as his killing shall be relieved from punishment, the law on homicide is effectively suspended in the case of *homo sacer*. Second, by virtue of his unsacrificeability, a *homo sacer* is excluded from the divine law. The exceptionality of *homo sacer* is thus, Agamben theorizes, a form of inclusive exclusion: excluded by virtue of inclusion– he cannot be sacrificed (exclusion) because he belongs to God (inclusion) and homicide law applies to him (inclusion) in not applying (exclusion). Likewise, refugees are also subject to, this paper argues, an

² The word *nation* comes from Latin ‘*natio*’, from the verb ‘*nascor*’, to be born. Thus, the concept of nativity is central to the construction of a nation.

inclusive exclusion: they are included in the community by virtue of the possibility to apply for asylum and of the applicability of EU law to them, but also excluded for they are bare, without meaningful legal protection. Together, Arendt's and Agamben's reflection construct a particular image of refugees as *homo sacer* living a bare life: a pariah ostracized from his homeland, inclusively excluded in the host country, juridico-politically bare and powerless to change.

LEGAL CONDITIONS CONSTITUTING A BARE LIFE IN THE EUROPEAN UNION

The Dublin Convention is a convention ratified by EU member states first came into force in 1997 to coordinate asylum application in the Union. The most current version is the Dublin III Regulation (EC 604/2013) that entered into effect in 2014 to supplant the precious Dublin II. Under the new Dublin III, refugees are obligated to apply for asylum in the first EU country that they enter³. (Freshfield Bruckhaus Deringer, 2016) All refugees who entered the EU via irregular means and subsequently apprehended by the competent national authorities are to provide their fingerprints. As primary identifiers of applicants, these biometric data are entered into the European Dactyloscopy (Eurodac), a Union-level database shared between member state, so that competent national immigration authorities could determine whether they have jurisdiction over an asylum application (EU Commission, 2016). Together, both apparatuses are aimed at avoiding multiple repetitive asylum requests and streamlining the process, particularly in light of the high volume of applications. However, though *prima facie* a simple system aimed at protecting the integrity and rights of refugees seeking asylum, current procedures on fingerprinting engender several legal ambiguities and tension between national and Union laws as well as *vis à vis* international law. In this section, by examining relevant EU directives and selected member state national laws, I argue that the procedures on fingerprinting constitute conditions of a bare life for irregular refugees.

First of all, current Union-level regulations appear incapable of protecting all the rights the EU accords to refugees against encroachment by member states. It is important to first recall that paragraph 1, Article 33 of the *1951 Convention Relating to the Status of Refugees* prohibits *refoulement* – the forced return of a refugee to the “*frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*” (UNHCR, 1951). The principle of non-*refoulement* applies not only to refugees recognized by member states, but also those with indeterminate status (UNHCR, 2007). To this effect, refusal to provide one's fingerprints cannot constitute grounds for *refoulement*. Furthermore, according to article 32 and 33 of Directive (2013/32/UE), such a refusal can also not be the sole ground for the member state's judging the asylum application as “*inadmissible*” or “*unfounded*”. Finally, under paragraph 2, article 13 of the same Directive, providing one's fingerprints is not one of the enumerated “*Obligations of the Applicants.*” Klip (2011) notes that as seen in precedents, the European Court of Justice (ECJ), the highest court in matters of European Union law, follows the legal principle of *Nulla poena sine lege certa* as the “*general principle of Union law*”.

3 Well aware of the pressure frontier EU countries face, the European Commission submitted on May 4th 2016 a proposition to modify Dublin III such that it will alleviate the migration pressure faced by those hot-spot countries. However, to date the proposition is yet to be adopted.

This principle provides that there cannot be penalty without definite law that allows citizens to foresee a specific action would be punishable. To this effect, a refusal to provide one's fingerprints should theoretically remain a liberty of asylum seekers.'

Nonetheless, as per point i), paragraph 8, article 31 of the Directive, refugees who refuse to provide their fingerprints may be entered into an “*accelerated*” examination procedure, if the national law so provides. In ‘hot-spot’ countries such as France, Greece and Italy, such an accelerated procedure is usually in place. This provision represents an area of ambiguity that could endanger the protection that the Union may have initially envisaged for several reasons. First of all, the shortened examination period is accompanied by an inevitable diminution of attention dedicated to the case subject to it. Asylum cases are often highly complex, requiring a significant amount of care and time to determine the reality. Germanophone Romanian poet Paul Celan (1998) famously wrote in his poem *Aschenglorie* (“Ash-Glory”), “*Niemand / zeugt für den / Zeugen*”, no one bears witness for the witness. Through this simple construction, Celan brings to light the core theoretical problem to bearing witness– the authenticity of witness rendered. Even in a full-length asylum interview is the task of negotiating between the objective truth and veracity of the interviewee's account challenging, not to say in an accelerated procedure. As Didier Fassin (2013) observes, the past three decades shows a consistent and sizeable decrease in the rate of granting asylum, engendered by “*a profound loss of credibility of asylums*” (Daniel & Knudsen, 1995). In refusing to provide fingerprints, the refugee is likely to cause suspicion, thus inviting a more stringent evaluation.

In France, in addition to those who refuse to provide their fingerprints, the *Office français de protection des réfugiés et apatrides* (Ofpra) also subjects the following groups to an accelerated examination procedure: asylum applicants who intentionally and manifestly deceit or mislead or come from a *pays d'origine sûr* (safe country of origin) or who submit multiple demands (Ofpra, 2017). A common attribute of these three groups is the simple nature of the case that would allow the responsible officer to promptly arrive at a decision: they either involve a clear wrongdoing on the applicant's part or a simple diagnostic on the authority's part. As per Article L741-4 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*, coming from a safe country of origin precludes an applicant from benefiting asylum in France. In the case of multiple demands, it is a simple determination of which country has jurisdiction. And as for intentional deceit, the strong language (“*obviously improbable*”, “*clearly inconsistent*”, “*clearly false*”) in the Code makes determination relative easy. However, different to these cases, refusal to provide one's fingerprints does not give the reviewing authority any clear directional indication with regards to the validity of the applicant's grounds for asylum so that the reviewer could make a sound judgment in a short period of time. The refusal could be just as likely an intentional ruse to avoid Dublin III as an unintended byproduct of a traumatic experience. In this vein, an accelerated procedure seems woefully inadequate, even punitive for those refusing to provide fingerprints. According to a study conducted by Amnesty International (1997), a vast majority of dossiers processed under the accelerated procedure are determined to be “*manifestly unfounded*”, an ambiguous, potentially catch-all justification for refusal.

In synthesis, although refusal to provide finger prints per se does not constitute grounds for refolement as so intended by the EU, it can however activate an accelerated examination characterized by an elevated chance of rejecting requests for asylum.

Furthermore, while Directive (2013/32/UE) specifies several requirements for national authorities to meet in reviewing asylum requests, it does not prescribe specifications for the accelerated examination: the latter remains at the complete discretion of member states. To this effect, the possibility for refugees to not conform is much smaller in reality than on paper. In this relationship of unequal power, the refugee-asylum-seeker appears to be especially vulnerable and his protection granted by the Union law subject to encroachment by member states. The precariousness of his fate should he decide not to provide his biometric data is what makes the auspices of international human rights law miserly. When this last vestige of legal protection accorded to all men becomes symbolic, refugees are then really reduced to a bare, purely biological life.

Commonly mobilized in asylum application review, the concept of *pays tiers sûrs* (safe third countries) represents another potential legal lacuna, for its definition rests largely on the host country's interpretation. This notion of safe third countries is established in section (f), paragraph 2, article 4 of the 2005 Asylum Procedures Directive (2005/85/EC), which permits a member state to refuse admitting an asylum application if the refugee has a connection with a safe third country and that he "*can reasonably be expected to seek protection in that third country.*" Point b) and c), paragraph 2, article 33 of Directive (2013/32/UE) concur with this application of safe third country. To this effect, as there exists no common list of safe third countries, the determination rests primarily on the member state, subject to certain general requirements stipulated by the EU (European Parliament, 2018). A policy analysis from the European Council concedes that in practice there is a lot of ambiguity and inconsistency between member states' practices in determining what constitutes a safe third country and what constitutes 'sufficient connection.' Having transited via such a safe third country where the asylum seeker is 'reasonably expected' to seek protection but chose not to, can potentially constitute such grounds for ruling the application as inadmissible. While Austrian, Dutch and Bulgarian authorities, for instance, treat mere transit as insufficient connection, Hungary's admissibility requirement seems to be much tougher, barring those having transited from accessing its dossier review. See point a), section 4, article 51 of *007. évi LXXX. törvény a menedékjogról*, the Hungarian 2007 Asylum Act. In essence, the flexibility member states enjoy in this determination renders refugees seeking asylum susceptible to a wrongful determination, triggering a deterioration of the "*right to liberty and safety*" as prescribed by article 5 of the European Convention on Human Rights (ECHR). The risk can be especially elevated, when the asylum seeker refuses to provide his fingerprints and is consequently processed in the accelerated procedure. Often, individual circumstances such as sexual orientation, ethnic identity, political belief, may suggest an otherwise 'safe' third country is not safe for that applicant in question. Many of these are difficult to ascertain in an accelerated procedure, as a result of which the risk of false determination could be especially high. The EU-Turkey Action Plan Agreement reached in 2016 would mean that Turkey is a safe third country, but the ongoing political and societal instability seems to suggest otherwise for many refugees with particular personal circumstances. Should a potential transfer be in prospect, there engenders a third level of uncertainty giving rise to a triple precariousness for a refugee: the precariousness of his treacherous trip to Europe, that of the asylum application outcome in the present country, and now that of the asylum process once again but in a third country. *Anxious, disheartened yet impelled to survive, for their own and their families' sake.* At this point of analysis, Arendt's

characterization of Jewish statelessness becomes especially relatable: a fate worse than death is not knowing the purpose of life. Even centuries before Arendt, Thomas Hobbes (1991) suggested that that being unfree is to be subject to the arbitrary will of a master and Jean-Jacques Rousseau (2011) that the worst thing that could happen is seeing oneself “*at the discretion of someone else*”⁴. It is thus this subjection of one’s fate to precariousness that makes a life in refuge bare. Intended only as a transitory stage, the prolonged process of seeking asylum characterized by a lack of citizen rights and legal protection risks means nothing but a longer time in the bare life.

Finally, the last legal lacuna making international protection of refugee rights bare that this paper identifies pertains to the measures a member state may undertake in order to fingerprint apprehended irregular refugee. The tension between the member state’s need to identify the applicant and applicant’s fundamental right is a productive place to examine the strength of human rights protection— how much of the latter is negotiated away to meet member state’s need? Explicit under article 5 of the ECHR, “*the right to liberty and safety*” is one of the fundamental rights also inscribed in the United Nations Charter. Derogation in point f) permits “*the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country.*” However, this does not seem to apply to the irregular refugees who have already entered the EU without permission and are now seeking asylum.

Point b) of article 5 permits the “*lawful arrest or detention of a person for non-compliance...or in order to secure the fulfilment of any obligation prescribed by law.*” Within the meaning of this derogation, if the member state’s national law prescribes fingerprint collection as an obligation of the applicant, then deprivation of liberty can be justified, upon meeting other requirements in the Charter. Under article 9 of the Eurodac Regulation n° 603/2013, it is stated that “*non-compliance with the 72-hour time-limit shall not relieve Member States of the obligation to take and transmit the fingerprints to the Central System.*” When the Charter and the Eurodac Regulation are read together, it seems that while the Union does not explicitly name providing fingerprints as an obligation for the applicants and leaves it to member states to determine, in the same time it prescribed fingerprints collection as an **obligation** for the member states. For example, point a, paragraph 8, chapter 9 of the Swedish Alien Act *Utlänningslag (2005:716)* defines cooperation in fingerprinting collection as an **obligation** (Riksdagsförvaltningen, 2005). In this light, deprivation of liberty for fingerprints collection is *de facto* permitted by the Union, effectively hollowing out the article 5 fundamental right protection. The protection that ECHR, as well as other international human rights treaties, provides is one uniquely attached to the biological life of men for the mere sake of being men, irrespective of their political life (citizenship). It cannot prevent private actors from hurting one another, but it is aimed precisely at protecting individuals from state encroachment on their rights. It is the only protection that refugees, as men stripped of their political life, receive. And yet, as the Union ‘passes the buck’ to member states, the human rights protection it offers is also submitted to the mercy of sovereign states. To this end, refugees are reduced to *homo sacer*. Just as a *homo sacer* is included in the community, but utterly powerless and subject to the killing by any person, an irregular refugee here too is likewise completely dominated by the State, and with their

4 For Hobbes’ discussion, see *Leviathan* first published in 1651 and for Rousseau’s, see *The Discourse on the Origin of Inequality* first published in 1755.

human rights protection being symbolic, he has no choice but to conform and hope for mercy.

As Didier Fassin (2013) reflected in his essay entitled *The Precarious Truth of Asylum*, the merger of refugees into the category of asylum seekers is inherently problematic: while refugees are supposed to “*need protection without prior evaluation, the latter are still in a process of assessment of their situation.*” Should one refuse even so little as to not provide one’s fingerprints, a decision permitted by silence in Union and international law, the prospect of a hasty determination likely to result in refoulement or transfer to yet another country leaves refugees little room for maneuver but to conform. The anguish of feeling undesired, unwanted, pushed away gives rise to the psychological condition of a bare life that Arendt laments. Looking into the word ‘hospitality’, we see that it originates from Latin *hospes* (host, guest), which has a peculiar etymological connection (*parenté*) with *hostis* (stranger, enemy). The semantic contradiction suggests that a tension between providing care and suspecting had always existed within the definition of the ‘host country’, whereby ‘hosting’ involves a mediation of two opposite drives – one to ward off and one to welcome. However, what we see today is a shift in emphasis from *hospes* to *hostis*.

SELF-MUTILATION AS AGENCY FOR RESISTANCE

On the power relationship between the dominator and the dominated, Hegel’s master/slave (*Herr und Knecht*) locus classicus first formulated in 1807 in his *Phenomenology of the Spirit* offers interesting insights (Hegel, 1907). In this analogy, Hegel explains, although the servant is a servant by virtue of his forced submission, the status of the Lord depends on the recognition of his rule by the servant, thus highlighting acknowledgement as the source of the dominator’s power. A century later, Max Weber (1956) famously defined domination as “*the probability that a specific command with specific content will be obeyed by a given group of persons.*”⁵ He furthermore distinguishes domination from power by positing that the former presupposes legitimacy, which is ensured by the acceptance of the dominator by the dominated, also known as the legitimacy beliefs (*Legitimitätsglauben*) (Lüdtke, 1991). Using this framework, the imposition of compliance in fingerprinting by the State can be treated as a form of domination, for the legitimacy of the EU and of member states is recognized by refugees, which gives rise to a power relationship with refugees as the dominated and the State as the dominator.

Qu’ils reposent en révolte (“That they rest in revolt”) is a French experimental documentary film directed by Sylvain George in 2010, in which he recorded the refugee situation in Calais, France. A scene of particular interest to this paper concerns the voluntary self-mutilation by refugees. In order to circumvent the biometric control instituted by the Dublin Agreement, many burned and cut their finger with razor in hopes that this could efface their fingerprints, giving them a chance to apply for asylum in a country of their choosing. In a passionate accusation of the EU, one of the refugees said:

“*Survive. We have to survive in Europe. This is virus, HIV virus... The European missions (inaudible) have their techniques, we have our techniques to hide our*

5 German original: „Herrschaft soll heißen die Chance, für einen Befehl bestimmten Inhalts bei angebbaren Personen Gehorsam zu finden.“

*fingerprints... They are making us slaves, you know, slaves of their country by using fingerprints*⁶ (George, 2011).

The anger, victimization and sentiment of being treated as a *persona non grata* as transpired through his words provide a powerful sketch of the underpinning power structure with the state as the dominator, and refugees as the dominated. However, in the same time, the act of mutilation as an agency for resistance raises the interesting question: to what extent is their life bare?

In *An Outline of a Theory of Practice*, Pierre Bourdieu (1977) conceptualized the notion of ‘structure’ and ‘agency’. Structures refer to the set of rules that influence and limit the choices and opportunities available to agents. Agents in turn internalize the structure and produce meaning, actions that are often a variant of what the structure or the overarching rule dictates. And agency describes the capacity of individuals or institutions, via different strategies, to interpret the structures. That the term agency, as opposed to subject, is used is to underline that agents are not free autonomous actors, but bound by structures. In defiance of the imposition of fingerprinting by the state, the practice of self-mutilation can thus be construed as an agency in Bourdieu’s sense, in the form of resistance against the biopolitical control. The interesting question is thus, in this vertical power relationship, to what extent is this form of resistance against domination effective.

RESISTANCE EFFECTIVE OR IN VAIN?

From a technical perspective, this act of self-mutilation appears to be a promising manoeuvre to bypass Dublin III. As explained, the rationale behind taking fingerprints hinges on the unique and permanent nature of fingerprints. In a *Scientific American* article, Harmon (2009) explains that fingerprints development during the first trimester of pregnancy and no one is born with the same fingerprint as another. The key step in dactyloscopy involves comparing the ‘minutiae’ captured through friction ridge skin impressions: comparing continuity changes in the texture of two fingerprints allows for a determination of whether they come from the same person. The chance of success of altering one’s fingerprint depends on the type of cut inflicted. In the case of a shallow cut damaging only the epidermis, the outermost layer, the alteration is temporary and the original fingerprints reappear as the epidermis undergoes renewal. In this case, such an attempt to circumvent Dublin III is likely to be in vain, since there likely will be multiple times of retake should the first time fails. When the cut is deep that it damages the dermis layer containing dermal fibroblasts responsible for allowing the skin to recover from injury, however, the effect of the mutilation becomes permanent. Thus, from a purely scientific perspective, fingerprinting could potentially be an effective resistance.

From a regulatory perspective, research by European Union Agency for Fundamental Rights (FRA) shows that national authorities are certainly cognizant of such cases of self-mutilation. “*(L’altération des empreintes) est un véritable problème*”(alteration of fingerprints is a real problem), said Philippe Leclerc, representative of UNHCR in France (Faure, 2015). Although national authorities dispose of punitive measures in cases of alteration

6 Quote is direct transcript of what was said (originally in English). The full scene on self-mutilation starts at 41 minutes 6 seconds into the film and ends around 42 minutes 48 seconds.

of fingerprints in bad faith, they however still lack the ability to accurately distinguish an intentional self-afflicted alteration from disfiguration due to labor or accident. Many countries attempted at solving this problem with more advanced technology. According to an article on LePoint, Sweden introduced a dactylography that can reconstruct fingerprints and Germany attempted at overcoming this with repeated fingerprinting (Labbé, 2012). France was among the first to respond to this situation with regulatory changes. According to a bulletin issued by the French Ministère de l'Immigration, (2010) voluntary alteration rendering fingerprints unusable can be treated with a rejection of the asylum demand, in the same fashion as in dealing with demands based on deliberate fraud. With the word 'voluntary' being operative, the difficulty of ascertaining intent of an injury remains insurmountable, for wounds cannot speak. Coopération française pour le droit d'asile, (Cfda, 2012) furthermore signaled concerns for the arbitrary vagueness in the language of the 2010 bulletin instructing prefectural immigration authorities that:

“s'il s'avère que ses empreintes sont toujours inexploitable (après plusieurs tentatives), vous lui retirerez immédiatement son autorisation provisoire de séjour.” (if the fingerprints prove to be always unusable (after several attempts), you are to revoke immediately his temporary residence permit.)

In another administrative legal communiqué, the Conseil d'Etat set the time period for dermatoglyphic reconstruction to be only one month. First of all, these tough measures highlight once again the precarious position refugees put themselves in should they elect to commit such an alteration. Moreover, it highlights the potentiality of the State to respond arbitrarily to resistance attempts by asylum seekers, even at the risk of violating the “adequate and complete examination” that paragraph 2, article 31 of Directive (2013/32/EU) affords asylum seekers. Fortunately, after several cases, the *Cour nationale du droit d'asile* ruled that unfruitful fingerprinting after a period of reconstruction may not motivate a rejection of asylum demand. (Denis-Linton, 2011) This episode illustrates that while the state may deploy juridical countermeasures, its ability to do so can be constrained by the insurmountable difficulty to determine with absolute certainty the cause of the injury, for under French law, as well as in other civil law jurisdiction, *ei incumbit probatio qui dicit non qui negat*— the burden of the proof lies upon him who affirms not he who denies. (see the French Code for Penal Procedure, *Code de procédure pénale*) In this light, self-mutilation as an agency for resistance is not all in vain.

A larger observation to be made from the French authority's reaction to resistance is the state's tendency to privilege bodily truth in moments of an impasse. Celan's allusion to the impossibility of witnessing is especially illustrative: the witness needs a third-party witness to authenticate his witness, but there is no such a witness. What we see is thus a departure from the realm of language where dispute— as a function of language— resides to seeking bodily truth transpired by bodily wounds, for “*the body bears the ultimate truth*”, comments Fassin (2013). At that moment, a refugee truly becomes a *μάρτυς* (martyr) in the classical Greek tradition that Fassin (2012) speaks of — he who bears witness through his physical suffering. As illustrated by the impossibility experienced by states to authenticate the cause of bodily wounds, the 'objective witness' he produces in him is also a truth that is inaccessible to others in its entirety. In this case, the French court put a halt to using

‘voluntary self-mutilation’ as grounds for refusal of asylum. However, the theoretical ramifications of this (unsuccessful) turn to seeking bodily truth shall not be left unexamined. In an article entitled *The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers*, Fassin & d’Halluin (2005) observe that a result of privileging bodily truth is the erasing of refugees’ political experience. When medical assessment does become that ultimate proof, at which point it morphs into that “*tenuous thread on which hangs the entire existence—both physical and political—of the asylum seeker*” (Ibid.), how are the refugees not homo sacer living a bare life?

PROBLEMATIC LOVE OF THE VICTIMIZED— CONTROL FROM A PSYCHOANALYTICAL PERSPECTIVE

Having looked at this relationship from the perspective of the dominated, we could ask, why would the dominator want to control? An even more critical question is, how do we adjudicate the apparent contradiction with the humanitarian love for others than impelled us to extend help in the first place— “I love you but I also want to have you under my control”. The European case of refugee crisis seems to be a limiting case, in which the charitable love as a governing logic of European identity seems to lose its charm, when the many others aggregate into a symbolic image that seems more threatening than vulnerable.

New to European lands, refugees are strangers feeling foreign, as they mediate the cleavage between the true self and the new self as conditioned by the host country customs and ways of life. As thousands of those— the vast majority are those with whom ‘we’, the Europeans, do not share a culture— tramped across borders to become our ‘Neighbors’, ‘we’ feel disturbed. As philosopher Slavoj Žižek (2008) observes, the liberal tolerance of otherness, especially in Europe, is “*counterpointed by an obsessive fear of harassment.*” Immanent in the world ‘tolerance’ is an intolerance— in not intruding your space, I “*tolerate your intolerance of my over-proximity*”— and constituting this obsessive fear of harassment is a “*narcissistic subjectivity that experiences the self as vulnerable.*” (Ibid.) Is it not precisely this feeling, that the vulnerable self is now exposed to potential ‘corruption’ by the others, that reveals the prospect, the potentiality of another, ‘estranged’ self that is all latent and perceptible? Psychoanalyst Julia Kristeva (1988) writes that “*the foreigner comes in when the consciousness of my difference arises, and he disappears when we all acknowledge ourselves as foreigners.*” Estrangement is thus a relational concept emerging from feeling out of place, different. Together, Kristeva and Žižek’s teaching invites us to further appreciate that there is also a stranger in us— we are too strangers to ourselves.

Invoking Freud’s discussion of *das Heimliche*, German word for ‘the familiar’, Kristeva notes that the word also has a second layer of meaning— the secret, hidden, tenebrous. Already from a semantic perspective we see that the familiar and the unfamiliar are both immanent in the word *Heimliche*. Freud (2003) coined the term ‘Uncanny’ (*Unheimliche*) to capture this bizarre, seemingly contradictory feeling and Kristeva explains that this uncanny is nothing foreign, but long-established in our mind, estranged only by repression— the unfamiliar grows out of the familiar. In other words, it is the feeling of angst when we are reminded of a long present but repressed thought. In the Lacanian language of Other-/otherness, the disintegration of that ‘safe distance’ between I and the others produces a shock that is not in reaction to the others per se, but to how the reality appeared to/is imagined by me (reflection of the Other in other), which leads me to renegotiate my

relationship with the foreign others in a return to the mirror stage (Lacan, 1991; Lacan & Sheridan, 1998). It is this new light shed by the intrusion of the others that made me fearful of my disintegration as a whole, integrated entity, and that makes me reassess what constitutes me intersubjectively. (Lacan, 1966) It is this new thought awoken to me, that I may become someone other than the ideal me, that scares me. Facing the massive influx of refugees, 'strangers', we have the tendency to reject, to respond with *Gewalt*⁷, in this case in the form of biopolitical control, as a defense mechanism to protect the distraught self. This propensity, Kristeva explains, is provoked by uncanny, which brings to light "*our infantile desires and fears of the other – "the other of death, the other of woman, the other of uncontrollable drive."*"

With these insights, we see that we too are strangers to ourselves and when we are all strangers, no one is a stranger. Realization of alterity in ourselves thus offers an opportunity for *Aufhebung*, to sublimate refugees into Us. In praxis, this means that receiving refugees is not just about tolerating differences, but also to see coexistence with those 'different from us' as a productive opportunity to better understand our estranged selves. This may imply a departure from charitable care, an act with an inherent power structure in which the able helps the vulnerable, to a schema of two-way understanding: understanding others and ourselves. In positioning *ourselves* in an equally powerful or powerless position as those *others*, we could then really transform the antithesized, strained relationship between the state and refugees, *Us* and *Them*.

CONCLUSION – A LIFE ABSOLUTELY BARE?

Strangers as *they* are, refugees seek '*our*' help. As much as the Christian teaching of charity, *caritas*, has worked its way to becoming an important cornerstone of European identity (Habermas, 2006, 2008; Fassin, 2007), the tension between *hospes* and *hostis* never really ceased to exist as the 'We' helps the 'Others'. In times of peace when refugees submit requests for asylum as singular cases, respect for human rights is rarely a topic of debate in the Northern Hemisphere. However, in tumultuous times such as the refugee crisis we see today, not only is the system in place put under strain, but also is the humanitarian imperative so deeply embedded in the 'western Christian tradition'. Through the theoretical lens of homo sacer and bare life that Arendt and Agamben conceptualize, and using fingerprinting as a cutting point, this research paper identifies several juridical lacunae that render international human rights protections wanting. Without effective legal protection, refugees are reduced to their most basic biological being.

Then using Sylvain George's film as a point of problematization, this paper identifies self-mutilation as a potential agency for resistance that operates on refugees' body – the body of which they themselves are sovereign, in the same time the 'territory' over which the sovereign state attempts at exerting control. This refusal to provide one's fingerprints thus sublimes into a larger bodily warfare between the State and individuals. As individual refugees respond to the State's biopolitical control with their own weapons, the State also equips itself with legislative arsenal. Constrained by the innate impossibility to authenticate a statement given about a bodily injury such as mutilated fingerprints, the

⁷ *Gewalt* is the German words that encompasses power, authority and violence. It is used here for the multitude of meanings it designates.

State's quest for the absolute truth without prejudicing the integrity and impartiality of a fair examination procedure thus appears impossible. In this light, resistance by refugees in the form of self-afflicted bodily harm may be productive in some sense, making their life 'less bare'. However, in the meantime, it is a war unwinnable for either side: the destruction is ultimately born by refugees and contradicts in every sense the logic of care underpinning the whole idea of accepting refugees.

What is much needed is thus a return from *hostis* to *hospes*. And this is certainly harder in practice than on paper. With insights from psychoanalysis, taking a step back from the biopolitics of control as well as the unattainable and destructive quest for absolute bodily truth may provide a much needed moment to reflect more critically on the relationship the state sustains with refugees and on the form that our receiving of refugees takes— as charity, as care, or as a purely strategic decision. This is by no means to say that the securitarian imperative in fingerprinting or other biopolitical measures enacted in refugee management is not justified. Rather, it is to recommend a more careful renegotiation between security objectives and the humanitarian concerns otherwise not explicit at first glance. In having a fuller picture of what is at stake, we may then bear the potential of making European asylum management more bearable for both the State and refugees.

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In this paper, I used man/men to mean (a) human being(s) of either sex. For simplicity, I used the pronoun he/his/him when speaking in relation to man/men.

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