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A Right to Leave but No Right to Enter Elsewhere? Uncovering the *Finisterrae* in the Migration Regime in Human Rights

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Abstract: Hassan Al Kontar appeared in major headlines in 2018. He had left his country of origin, Syria, and refused to return when the Syrian Civil War broke out. He had emigrated a few years earlier to the United Arab Emirates, where he worked as an insurance marketing agent. His work permit expired after the start of the conflict in Syria. So did his passport. Hassan remained in the Emirates illegally, out of fear of being drafted by the army upon his return to Syria. He was then arrested and sent to Malaysia where he was given a three-month tourist visa, but impeded from leaving the airport. Hassan ended up in a legal limbo. In a world like ours, where states jurisdictions exhaust the surface of the earth and determine the relationship between the state and its legal subjects, and yet one that pledges to protect the human rights of everyone, including non-nationals, how can these legal limbos in the international human rights regime be allowed? Some think there is a paradox at play here in that international human rights law gives a person a right to leave the state where (s)he is physically present, regardless of nationality, but no matching right to enter elsewhere. Others deny this to be the case. This article is not an attempt to add yet another voice *pro et contra* the wrongfulness of the alleged state of affairs in international law. Rather it seeks to clarify the disagreement by offering a systematic problem-setting. We show what the matter under dispute consists in and which theoretical commitments are necessary to commit to in either side of this debate. We do this in three steps. First, we offer an ecumenical description of the matter under normative dispute. Second, we show that the matter under dispute is unclear concerning the *ratio materiae* of the action-class regulated by the norms in question.

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Latin American Human Rights Studies, v. 1 (2021)

Third, we draw the consequences of this circumstance for the conditions of truth of the opposing positions. It seems that the disagreement is rooted in the very description of the action-class that the norm purports to regulate: in a nutshell, while one side thinks that the action is a movement of one and the same body in space across the territorial jurisdictional lines of two state actors, the other side to the debate thinks that we are dealing with two actions, separate and separable institutional facts that refer to the individual's position vis-à-vis a state.

Keywords: Human Rights. Migration policy. Asylum law. Right to leave. Right of abode. Asymmetry. Rights. Borders**.**

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Finis terrae sed non iuribus

Introduction[3]

Hassan Al Kontar appeared in major headlines in 2018[4]. He had left his country of origin, Syria, and refused to return when the Syrian Civil War broke out. He had emigrated a few years earlier to the United Arab Emirates, where he worked as an insurance marketing agent. His work permit expired at the outbreak of the war. So did his passport. Hassan remained in the Emirates illegally, out of fear of being drafted by the army upon his return to Syria. He was arrested and sent to one of the few countries where Syrians were granted entry without visa: Malaysia. There, he was given a three-month tourist visa, but impeded from leaving the airport.

From Kuala Lumpur, he was denied boarding by airlines on the basis of his nationality until he finally made it to Cambodia. But upon his arrival to the airport, he was again refused entry, and sent back to Malaysia. Malaysia is not a

[3] The research presented in this dissertation was conducted under the auspices of the research project Civis Sum (2015-2021) sponsored by the Knut & Alice Wallenberg Foundation, KAW 2014 0133.

[4] The Washington Post, 'A Syrian Man has been trapped in the Malaysia Airport for 37 days and counting, 12/04/2018, available at https://www.washingtonpost.com/news/worldviews/wp/2018/04/12/a-syrian-man-has-been-trapped-in-the-malaysia-airport-for-37-days-and-counting/ (last accessed 16/09/2021); Newsweek, 'Syrian Man Stuck in Airport for 100 Days Applies to Go to Mars', 14 June 2018, available at https://www.newsweek.com/airport-syria-hassan-al-kontar-977531 (last accessed 16/09/2021); France24, 'Hassan Al Kontar: la fin d'un long périple', available at https://www.france24.com/fr/20181128-oeilmedias-syrie-refugies-hassan-kontar-huddesfield-jamal (last accessed 16/09/2021); El País, 'El refugiado sirio que vivió siete meses en un aeropuerto de Malasia logra asilo en Canadá', 01/12/2018, available at: https://elpais.com/internacional/2018/12/01/mundo_global/1543697526_350745.html (last accessed 16/09/2021); Publico, 'Sírio obtém asilo no Canadá após oito meses a viver em aeroporto', 27 November 2018, available at https://www.publico.pt/2018/11/27/mundo/noticia/sirio-obtem-asilo-canada-apos-8-meses-viveraeroporto-1852620 (last accessed 16/09/2021); The Guardian, 'You can feel the love: Syrian who lived in airport on new life in Canada', 7 January 2019, available at: https://www.theguardian.com/global-development/2019/jan/07/syrian-who-lived-in-airport-new-life-canada-hassan-al-kontar (last accessed 16/09/2021); BBC News, 'Hassan al-Kontar: Who is the man trapped in an airport helping now?', 11 august 2019, available at: https://www.bbc.com/news/world-middle-east-49296093 (last accessed 16/09/2021).

signatory to the 1951 Convention Relating to the Status of Refugees and hence has no convention-based obligation to recognise him as a refugee. He also applied for asylum in Cambodia but was rejected. At the Kuala Lumpur airport he slept under a stairwell, using a public toilet with no shower or towels, and was fed by the airport staff. He was promised legal aid by the United Nations High Commissioner for Refugees. A group of volunteers tried to get him to Canada and several people are said to have proposed to marry him so that he could leave Malaysia. Since nothing worked, on the 100th-day of his airport sojourn, he applied to NASA to join its mission to Mars. He was rejected. On the 1st of October 2018 he was arrested for staying in a 'forbidden area' of the airport. Most likely, it seemed, he would have been returned forcefully to Syria. The BBC claimed that several unsuccessful attempts were made to reach him through Whatsapp while he was in detention. The day of his arrest he posted several pictures of his 'life journey' since young age with the sentence: 'In hard times, you will discover that what you become during the process is more important than the aim itself.'

Assuming that what Hassan means by 'the aim itself' is entering a country that is willing to accept him, the wanderer he became, a traveller of an airport's endless corridor with no open doors, came to define him. The fact that he got stuck in an airport to which he was nevertheless permitted to fly to shocked many. It attracted the attention of the world media, invested in broadcasting the strange life of a stranded man whose very willingness to escape had condemned him to go 'nowhere'. He ended up in a legal limbo.[5]

[5] Eventually, Al Kontar was held in a detention facility for 58 days before the Canadian asylum application was expedited for him. On 26 November 2018, Al Kontar landed in Vancouver as a permanent resident of Canada. Since August 2019, Al Kontar has been organizing a refugee resettlement program called Operation Not Forgotten, sponsored by the Refugee Council of Australia and Amnesty International, which they plan to raise a total of C$3.3 million to resettle refugees stranded in Nauru and Manus Island into Canada. These refugees are from countries including Iran, Myanmar, Afghanistan, Sri Lanka, Pakistan, and Iraq, while some are stateless. On black holes or limbos in law.

What stands out at first sight is that the world that entrapped Al Kontar is a world of our own making. We have created a social and legal world where these situations are likely to recur. The question is then how did this world come about? Three features help explain Al Kontar's rather puzzling condition. First, it is a world where states jurisdictions basically exhaust the surface of the globe, with the notable exception of the high seas and a few other (almost inhabitable) locations. Second, states are the supreme authority in determining the relationship between political authority and legal subjects – which means that there is hardly anything one can do without being, as it were, under the 'legal radar' of some political authority, whether it is that of your country of origin or not. To these two features, we must, however, add a third one in tension with them; one that also helped Al Kontar out of the legal limbo. That is that states are the primary claimants to an international and universally-aspiring pledge to protect and enforce the legal positions of human beings as such, regardless of their *status civitatis*. This historical promise could be compromised if legal limbos were found to permeate the structure of the international human rights regime. But what exactly is the nature of this tension? Is there a paradox in international law at play here? Or does it consist of some form of protection gap in human rights law, a deficiency in its ability to protect right-holders before certain situations where one can leave but does not seem to be able to enter? Are such gaps the effect of a bug, like some actor's unlawful behaviour – in this case, say, the UAE which first put Hassan on a plane to Malaysia? Or, more seriously perhaps, is it a feature of a system designed to engender these legal limbos (Mann 2018)?

Some migration scholars have for long now been pointing their finger at such legal limbos and their different manifestations. For some, these limbos appear as an effect of judicial errors or as an outcome of states engaging in straightforwardly illegal actions; for others, legal limbos of this kind are a consequence of the increasingly popular policy of extraterritorial migration control;

for others still, they are an effect of detention of irregular migrants in view of deportation. In spite of the number of explanations on offer in migration studies, none pays appropriate attention to the underlying, fundamental problem of international human rights law that cases like this one truly evince: does the right to leave a state (RL) – enshrined in the *Universal Declaration of Human Rights* of 1948 (UDHR)[6] – entail or not a right to enter another state (RE)? And if it does not, in what way would such a state of affairs be considered wrong?

Hassan's case shows the Janus-faced character of nationality. In order to be accepted within the territorial jurisdiction of the state, it seems that he must be a national, recognised as stateless, refugee or in need of humanitarian protection. But the country of which he is a national would not allow him to travel anywhere — except countries that will deport him back to the country that will probably expose him to severe risks of persecution upon return. He lacks effective protection from his state of origin, yet he was prevented from filing an asylum application from where he was physically present. It may seem as a high price for escaping to an unknown place in order to flee a well-known violence. His audacity to dream about peace seems to lead him back to an unavoidable return.

As the United Nations Special Rapporteur José Inglès reminds us in an official report from 196, human rights law has long been concerned with pairing a right to leave with a right of return so as to make sure that failure in entering somewhere else would not redound in the loss of a place to be (INGLÈS, 1963, p. 9). Legally, this meant that all states were to ensure that those who leave a country

[6] The right to leave appears in many international law sources. Formulation in international legal documents typically follow its enunciation in UDHR that states that: '1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country'. The more salient formulations of the right to leave follow the UDHR verbatim. E.g. International Covenant on Civil and Political Rights (ICCPR, Art. 12, 1966), the European Convention for the Protection of Human Rights (ECHR 1950, Art. 2 of Protocol 4, 1964), the International Convention on the Rights of All Migrant Workers and Members of their Families (Art 8, 1990), the Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000).

are entitled to return to their country, so that a right of exit is always matched by a right to (re)enter. Of course, exit and entry meant here to apply to the same state: the state of nationality. Unsurprisingly, Syria, his state of nationality, at war, did not feature among Hassan's preferences. 'Preferably', as Kanger puts it, the right to leave a country would hence entail a right to enter another, but that part only went so far as to ensure a right to seek asylum elsewhere, as international migration scholarship clearly stresses (KANGER, 1984, p. 103; MILLER, 2016, p. 76-93). Hassan's predicament thus give rise to a normative dispute that this article aims to disentangle and analyse. Its purpose is thus not to solve the problem or to assume a normative position within the dispute. Rather, it is an explanatory one: we want to show what the disagreement consists in.

The inquiry presented here is not normative in kind, but descriptive. Its aim is analytical. The reason for this is that one cannot take a normative stance on something which is unclear and indeterminate, lest one incur in an unjustified judgment. No matter where one stands on other issues pertaining to moral or political philosophy, or on matters pertaining to the foundation of human rights, it is still the case that cases like Hassan's need to be better grasped in order for us to even start making sense of where the disagreement lies. We hope to contribute to the normative debate by clarifying the disagreement, sorting out, in a clearer way than previously done, what the matter under dispute consists in and which assumptions or theoretical commitments are necessary to take on board to commit to any of the competing sides concerning the normative matter of the rightfulness or wrongfulness of the alleged state of affairs.

We achieve this in three steps. First, we offer an ecumenical description of the matter under normative dispute, i.e. an outline of the matter under discussion that, as much as possible, captures the opposed positions in the literature. Second, we show that the matter under dispute is unclear concerning the *ratio materiae* of the action-class regulated by the norms in question. Third, we draw

the consequences of this circumstance for the conditions of truth of the opposing positions. It seems that the disagreement is rooted in the very description of the action-class that the norm purports to regulate: in a nutshell, it seems that while one side thinks that the action is a movement of one and the same body in space across the territorial jurisdictional lines of two state actors, the other side in the debate thinks that we are dealing with two actions, be that of the same individual, that are cast as two separate and separable institutional facts that refer to the individual's position vis-à-vis a state.

1. The Dispute in a Nutshell

The normative question that cases like that of Hassan raises is whether we should reform international human rights law because it gives a person a right to leave the state where (s)he is physically present, regardless of nationality, but no matching right to enter elsewhere. Two answers immediately come to mind: either we advocate for the *status qvo* or we claim that reform would be necessary for the right to leave not to be 'theoretical', 'illogic', 'half', 'imperfect', 'non-exercisable', 'injusticiable', 'unpracticable', 'dormant', 'hollow', 'contradictory' or alike (FAUCHILLE, 1924, p. 324; LAUTERPACHT, 1945, p. 130; MORSINK, 1999, p. 75; DEN HEIJER, 2010, p. 158; COSTELLO, 2016, p. 11).

This question, however distinctly formulated and answered, appears in a vast number of sources of different nature: texts by moral and political theorists[7], legal theorists[8], political scientists[9], international public lawyers generally and

[7] See COLE, 2020; OBERMAN, 2014; WELLMAN, 2014; FINE & YPI, 2014; STILZ, 2014; COLE & WELLMAN, 2011; COLE, 2000 & 2001; VERLINDEN, 2010; MILLER, 2010; MILLER, 2005; MORSINK, 1999; RAWLS, 1999; HENKIN, 1994; DUMMETT, 1992; BARRY & GOODIN, 1992; CARENS, 1987; WALZER, 1983; WHELAN, 1981.
[8] See FINNIS, 1992; FERRAJOLI, 2018.
[9] See BAUBÖCK, 2006; KANGER, 1981 & 1984.

migration lawyers specifically[10], international private lawyers[11], historians generally and legal historians specifically[12], IR-scholars[13], and more[14]. To date, the secondary literature on this problem is constituted by a Master-thesis written by a Dutch student (JANSSON, 2017) that does not engage in any philosophical analysis of the claims made in the debate. However, such an effort is made in the forthcoming doctoral dissertation by Guilherme Marques Pedro upon which this article draws (MARQUES PEDRO, 2022).

It must also be noted that a lot of scholarship on migration, refugees, asylum, border control and alike do not deal at all with the problem here mentioned, notwithstanding the fact that it seems to be quite central to migration governance. Examples of books where one would expect to find some mention of it, but in which it is surprisingly absent are Joseph Carens' *Ethics of Migration* from 2013 or Collier & Betts' best-seller *Refuge*. A similar observation can be made for most texts on refugeehood, like Emma Haddad's *The Refugee in International Society* from 2008 or Alexander T. Aleinikoff's pioneering book on *Immigration and Nationality Laws*. These omissions suggest two conclusions: one is a difficulty in understanding this problem. In this regard, it should be noted that while many scholars have noticed that there is (or that there is a perception that there is) some 'issue' regarding the right to leave and the right to entry in relation to international migration, that 'issue' has not been systematically treated, empirically investigated and much less theoretically analysed. The other is the belief that other concerns about migration governance would be irrelated to this one. This article shows, on the contrary, that

[10] STOYANOVA, 2020; GUILD & STOYANOVA, 2018; MORENO LAX, 2017; MARKAND, 2016; COSTELLO, 2016; KOCHENOV, 2012; MCADAM, 2011; DEN HEIJER, 2010; HARVEY & BARNIDGE, 2007; PURCELL, 2007; JUSS, 2004; GUILD, 2003; NOLL, 2003; HAILBRONNER, 1996; DOWTY, 1987 & 1988; HANNUM, 1987; NAFZIGER, 1980; AYBAY, 1977; JÄGERSKIÖLD, 1976; VASAK & LISKOFSKY, 1976; FAUCHILLE, 1924.
[11] See VONK & DE GROOT, 2016.
[12] See NEFF, 2014; KOSKENNIEMI, 2001.
[13] See ORCHARD, 2008; OSIANDER, 2001.
[14] See BEHRMAN & KENT, 2018; RYAN & MITSILEGAS, 2010.

engaging with this problem may at least clarify the terms of other discussions about theoretical challenges in migration law, which are clearly in the vicinity of, or lag behind, this one.

The normative dispute can be summed up in the following way. At least two camps oppose one another on the normative question of the wrongfulness of the alleged state of affairs in contemporary human rights law. One side claims that it is wrong that the right to leave a state (RL) — enshrined in the *Universal Declaration of Human Rights* of 1948 (UDHR) — does not entail a right to enter (RE), whereas the other side holds the contrary view, i.e. that this is not wrong. These two positions concerning the wrongfulness of the alleged state of affairs in contemporary human rights law are also often understood in relation to claims about there being some kind of 'asymmetry of rights' at hand in the alleged state of affairs. For example, it is said that 'immigration and emigration are morally asymmetrical' (WALZER, 1983, p. 40), or that 'If the human right to emigrate can be considered as generally recognised, it remains an asymmetrical right, since it is not complemented by a corresponding right to immigrate' (SCOVAZZI, 2014, p. 212).[15]

Let us first describe what all contenders to the debate agree upon so as to be able to locate disagreement more readily. Both sides agree on the following points: There are several rights regulating *ratio materiae* leave and entry of individuals into territorial jurisdictions. These can be summed up the following four rights: (1) the right to leave (RL) according to which in international and human rights law it is permitted that any person leaves any country (besides justified exceptions); (2) the right to return (RR) according to which in international and human rights law it is permitted that any citizen returns to his/her country of nationality; (3) the right to seek asylum (RA) according to which in international and human rights law it is permitted to any person having a well-grounded fear of persecution to seek asylum in any country (s)he comes into contact with; (4) the State's right to exclude (SRE)

[15] This metaphorical language will be avoided for the benefit of the reader.

according to which in international human rights law it is permitted to all states to allow entry of any person they wish. Notice that the first three legal positions are referred to the individual and the last to states. To these rights we find the corresponding obligations regulating *ratio materiae* leave and entry of individuals into territorial jurisdictions. These obligations are (1bis) it is obligatory that all states let leave any person (besides justified exceptions); (2bis) it is obligatory that the state of nationality allow all its citizens to return; (3bis) it is obligatory that the state that comes into contact with any person having a well-grounded fear of persecution assesses the possibility of permitting entry in the form of recognising asylum and a consequent right to stay as long as the grounds for this fear continues; (4bis) it is obligatory that any non-national who wants to be allowed entry into any state apply for permission to do so. Notice here that the rights and the duties vary according to the personal scope of application (*ratio personae*). These four rights and their corresponding obligations make up the alleged state of affairs in contemporary human rights law that the contenders to the normative dispute have a disagreement about.

Where the contenders take separate roads, and thus start having a disagreement, concerns which, if any, of the following propositions is true.

> *Proposition A: it is permitted that any person leaves any country (besides justified exceptions), therefore it is obligatory that all states permit entry (besides justified exceptions).*
>
> *Proposition B: it is permitted that any person leaves any country (besides justified exceptions), therefore it is obligatory that all states let leave any person (besides justified exceptions).*

Notice that both these propositions have been made. The UN General Rapporteur Mubanga-Chipoya made the first claim in a 1988 Report by the United Nations' Commission on Human Rights (CHR) – currently Human Rights Council (HRC) – on the human rights of migrants raised a general concern about the 'ability'

of migrants who had left a country 'to enter another country' (Mubanga-Chipoya 1984). The well-known legal philosopher and natural lawyer Johan Finnis made the second claim. For Finnis 'it is quite clear who has the duty correlative to the right to emigrate. It is quite unclear that (…) every other community everywhere has an equivalent duty to admit unlimited members of foreigners' (1992, p. 207).

Before entering *in medias res*, three precisions need to be made. First, the dispute is of the most general kind referring to the human rights regime regulating migration. It is the case that many people are allowed in many countries all the time, but we are talking here about what human rights law guarantees in principle. Hence, what we are looking at here is the most general case, the one which only human rights law could cover globally, regardless of domestic regulations. The general picture that scholarship gives us is that the claims of entry founded on human rights law are quite limited, while this would not be the case for claims pertaining to exit. States must allow both nationals and foreigners to leave while they are obliged to allow only the former to (re-)enter, to which the law adds five more categories of potential admission duties: (1) the duty to consider asylum applications and those for humanitarian protection; (2) the obligation not to push back people forcefully (grounded on the principle of *non-refoulement*); (3) the duty to consider the return requests of nationals and habitual residents, and (4) the duty to consider claims relating to family reunification and (5) the duty to avoid, within the boundaries of the law, to produce statelessness.

Second, the personal scope of application (*ratio personae*) of the right to leave is broad in human rights law, while this is not the case for the aforementioned entry rights. Also, note that in HR law there is no category of rights called 'right to enter' (RE). There are a variety of guises in which law expresses the permission of 'entering' any given jurisdiction: consider for instance the right to abode, the right to sojourn, to stay, to declare residence, etc. but also the right to seek asylum, the right to protection against deportation, the right to return (to one's own country), and many

more. While there is textual evidence suggesting that, in law, we do find a ‘right to leave’ so phrased, there is no equivalent ‘right to enter’. We call RE the permission to be granted access to the territorial jurisdiction of that legal order; this most commonly takes the shape of granting access to the territorial jurisdiction. Inversely, by ‘right to leave’ (RL) what is usually meant is a permission to leave the territory the jurisdiction of which one is subjected to. In human rights law, the personal scope of application of ‘rights of entry’ is therefore *not* for ‘everyone’, i.e. attributed to all persons, in contrast to the human right to leave, the personal scope of application of which is indeed ‘all persons’ (less the exceptions; e.g. felons, drafted soldiers during war). But the personal scope of application of the ‘right to enter’ is much limited, applying pretty much exclusively to nationals or would-be refugees. Without needing to rehearse the arguments of the now abundant literature of citizenship as the right to have rights (ARENDT, 1953, p. 267-302), suffice here to notice that if it were the case that human rights were to depend on nationality, the *ratio personae* of human rights would simply cease to be that declared in the Universal Declaration of 1948. Indeed, human rights are attributed to all, citizenship to the few that the State selects (KOCHENOV, 2019).

Thirdly, there are a number of background conditions that need to hold in order for the problem to even start to make sense, no matter whether one takes one position or another on it. Here are three: (1) territory is finite; (2) the earth is largely covered by state jurisdictions; (3) human migration is regulated by law. These conditions are background requirements because they constitute conditions of truth without which the premises leading up to the conclusion that RL and RE stand in some form of interaction would be necessarily false. It is important to lay out the dispute in this way so that we understand clearly what it is that leads to the conclusion that RL and RE interact strongly or not at all.

2. Delimiting the Area of Disagreement

Given how the dispute has been described above, it seems clear that, regardless of whatever else it might be about, this debate most certainly is not at its core (i) a disagreement over moral rights; nor (ii) a disagreement over what contemporary international human rights law establishes.

If it were (i), it would certainly be a 'normative' debate as the one we are claiming that this debate is, but its object would not be legal rights as enshrined in contemporary human rights law but justified expectations in interpersonal relationships, a.k.a. moral rights. Both can be normative in the sense of dealing with a prescriptive proposition (we ought or we ought not do x) but they are normative *about* something different: the x in question is legal rights in one case but not in the other. It is important to point this out because sometimes it seems to be the case that the disagreement would be about moral rights: e.g. when authors such as Walzer speaks about 'moral asymmetry' in regard to RL and RE. However, this is an incorrect impression given that, if it had been a disagreement about moral rights, and not about legal rights, the entire problem-setting would certainly not have had any reason to refer to the right to leave as it appears in the UNDHR, nor any other aspect of international legal system (e.g. right to collective self-determination, state sovereignty or alike). The very framing of the problem as a problem posed within the framework of contemporary human rights law, as opposed to any general human problem that ethics deals with, goes to show that the stake of the question must be whether or not the system constituted by human rights regime *ought to* make it obligatory that all states permit entry. To say this implies that it must evidently not be the case that states would have such an obligation as a matter of law, and indeed nothing suggests that this would be the case. 'There is little dispute over [the state's] right to limit immigration' (DOUTY, 1987, p. 14). Rather, what is suggested is that, in the current human rights regime, it is obligatory that all states let leave any person.

This is also uncontested. The question thus deals with a question *de iure condendo*: it is the case that the rationale of the contemporary human rights regime would make it the case that it *should* be made obligatory that all states permit entry? Notice that by obligatory, in this context, we mean enforceable and justiciable in court. From this specification, it should be clear that, regardless of whatever else it could be about, this disagreement does not deal with the appropriate ways to justify our expectations on the behaviour of others generally, but about the appropriate way to regulate international law more specifically. And the law is, as we know, a matter of enforced norms, not merely justified norms (the principle of efficacy *docet*). In other words, the *political* question at stake is whether or not the international human rights regime as it stands (or *melius*, as it is taken to currently stand) should be left standing in this specific way. For the advocates of 'Proposition A', it is wrong to defend the *status qvo*. For the advocates of 'Proposition B', it would be right to defend the *status qvo*. This clarification is a first step towards understanding the disputed matter in a clearer way.

A second step is taken when we indicate that the disagreement is not about (ii) either. We are not dealing with a disagreement over what contemporary international and human rights law establishes as such. It is not a legal dogmatic question that can be solved by studying the sources of law in a more careful way. This is so because the disagreement is normative or prescriptive: it is not about what the law says, but about what the law *should* say, were it coherent with its rationale (and not were it justifiable all things considered). This does not mean that it would not be valuable for a prospective solution of our normative disagreement to better understand what contemporary international human rights law establishes. It is clear to see that the legal framework sketched out above is fair rudimentary and much law – as we all know – is like the devil, in the details. It could thus be the case that what all contenders in the debate believe to be true about the state of international HR law is not true at closer inspection. Perhaps the disagreement is, in that sense,

grounded on a debatable empirical assumption about what the current state of international law requires from states, and gaining greater insight into the law would be helpful to 'dissolve' the problem as it stands. This, however, is a matter for expert international lawyers, not for legal theorists to find out. Suffice here to say that whether or not it is obligatory that all states just let leave any person or also permit entry of non-nationals is not *prima facie* answerable by mere legal dogmatic analysis but requires other methods. Hence, we know that the disagreement is not identical to (ii). So, when authors like Luigi Ferrajoli claim that 'the right to leave entails the right to enter another country' (FERRAJOLI, 2018, p. 4) they do so not in reference to what is morally justified all things considered (*optima res publica*), or what they take to be current legal practice, but in reference to what they take to be what sound legal practice should look like, given the rationale of the existing norms that make up the migration regime in human rights law. For him, as for other advocates of 'Proposition B', contemporary human rights law ought to be reformed to the effect of making the right to leave read not in isolation but in conjunction with, and as interrelated with, an exercisable right to entry elsewhere. Let us now try to understand what legal theoretical commitments are taken on board for this view to make sense.

3. Which Action? The Missing Analysis *Ratio Materiae*

As previously mentioned, the human right to leave is much less narrow than the rights of entry enshrined both in human rights law and in national legal systems, both in its personal scope and in the legal restrictions applied by states in accordance with international law. Much ink has been spilt on the different ranges of the personal scope of application of the right to leave, the right to seek asylum and the right to return and it stands beyond dispute that their personal scope of application is not identical.

Typically, the dispute is couched in terms of diverging *ratio personae*. There would be a human right to leave without a human right to enter, but what the asymmetry would really be about is not whether international law admits a legal right to leave a country, or whether it recognises a right to enter another country than one's own, nor whether there is a moral right to exit a country or whether there is a moral right to enter another country than one's own, but rather the 'asymmetry' would be about the different levels of restrictedness that each right would carry. To be clear, as a matter of fact, there is a legal right to leave in human rights law and international law just as much as there is a legal right to return to the country of nationality, the personal scope of application of which is restricted to nationals, whereas that would not be the case in the first of the two rights. But it is rather the narrowness of the latter vis-à-vis the former that leads many analysts to claim that there is an 'asymmetry': while all persons — with few exceptions (e.g. imprisoned felons, individuals under mandatory quarantine or military service, drafted during wars etc.) — are allowed to leave *any* country *regardless* of nationality, all persons are not allowed to enter any county of their choosing; and only citizens enjoy, in principle, the right to enter their country of nationality, which most typically is one or two at most (more numerous multiple citizenships is still a rare phenomenon).

When compared to the great attention that the question of the rights' *ratio personae* has attracted, it is surprising to notice how little attention has been directed towards determination of the material scope of application. Very little is said in the literature on this matter. Generally, authors speak interchangeably of immigration and emigration, right to leave and right to immigrate or right to settle; some are clearer and refer to 'the entry of an individual into the territory', yet others speak in even more general terms of a 'freedom of movement'. All this is very vague. More importantly, this way of describing the action-class that the different rights refer to obfuscates the fundamental distinction between the empirical fact of a body

moving in space and the institutional fact that law registers and that does not always entertain biunivocal relations with the former.

Let us here remember that law typically concerns what we today usually call institutional facts, where a function is attributed to something that does not have this function in virtue of its empirical properties (SEARLE, 1995; SEUMAS, 2019). The statuses or legal positions determined by the rights in question are institutional facts. Status or legal position is a concept of which we may offer an empirical explanation, even if it is not itself an empirical concept. Philosophers say that we exercise 'our deontic power' by creating different forms of statuses (BENTHAM, 2002, XVI; AUSTIN, 2002, XLI). Once we realise that this is the case and that the legal positions that the rights give access to are not natural kinds, we are better positioned to appreciate how law constitutes things that, in ordinary language, are conceived to be given entities of a natural kind. This includes key notions in this context such as entering, transiting, residence, habitual dwelling, nationality etc. It is thus important to distinguish the undeniably empirical dimension of, say, presence on territory (an empirical concept) from its normative cousins 'entrant', 'residence', 'stay', 'sojourn', 'abode', 'domicile', etc. None of the latter, found in the law, refer to empirical facts, but rather all are institutional facts determined by particular constitutive rules that are set up in the law and that could have been different, being the setting up of a constitutive rule a question of convention, rather than of empirical necessity (this does not mean that empirical features may not be used as a ground for triggering a determinate status, but that is another matter). Not to grasp the difference of the two dimensions would be to confuse fact and norm; to confuse the language of the law with its object of regulation – a mortal sin for a jurist. Having due consideration of this fact, we first notice that the action-class that RL and RE refers to is typically described in way that confuse the empirical-factual level and the institutional-factual level: e.g. whenever emigration is treated as synonymous with RL. Also, there is quite some confusion

added by the fact that exit or entry sometimes are referred to the territory and the jurisdiction. Finally, it is not obvious in international law that a state ceases to be responsible for persons located beyond its territorial jurisdiction (STOYANOVA, 2020). Hence, we notice that in the matter under dispute it is quite unclear exactly what counts as constituting the *ratio materiae* of the action-class regulated by the norms in question.

Why was Hassan Al Kontar's situation so surprising? Leaving a space always entails entering another. From the point of view of the phenomenology of the action itself, the implication between exit and entry is hence necessary, even when, after leaving, we end up legally speaking *nowhere*. This relation hardly comes across as contingent even when we think of sites of transition as not worthy of being called spaces, but corridors, channels, non-places, liminal spaces or imaginary sites. 'Nowhere' denotes, in this context, not so much a place that does not exist (a.k.a. utopia), but rather the fact that its location is not known. So the 'nowheres' of our contemporary imagination are more like *'unknownwheres*' (in a cognitive sense), that is, whereabouts not known rather than nowheres in any literal or ontological sense. On the descriptive level of the empirical action then, exiting implies entering. But on the legal level, one state (that of provenience) is only held to register 'exit', not also 'entry', which can be 'seen' only by another State.

Some theorists have noticed this circumstance, but referred to it in perhaps not very clear ways. Benhabib, for instance, sees the problem as arising both from a putative lack of duty-bearers, but also from the fact that the action appears, so to speak, divided in two: leaving and entering. In her analysis of the UDHR, she noticed how:

> these rights have no specific addressees and they do not appear to anchor specific obligations on the part of second and third parties to comply with them. Despite the crossborder character of these rights [to enter another country than one's own, to seek asylum and to have a nationality, not to be deprived of one's nationality arbitrarily], the

> Declaration upholds the sovereignty of individual states. Thus a series of internal contradictions between universal human rights and territorial sovereignty are built into the logic of the most comprehensive international law documents in our world (BENHABIB, 2004, p. 11).

But institutional spaces – e.g. jurisdictions or other socially construed spaces – do not function quite the same way as empirical space. Is it necessary that we find ourselves immediately located in a country when we leave another? Does one state's territorial jurisdiction start exactly where the other ends? Can there be overlaps or simply voids in the ways humans organise space socially, politically and legally? Perhaps the 'normative spaces', i.e. institutional facts of 'jurisdictions' we have created, no matter how much based on an analogy with the empirical concept of physical space, do not function in an equivalent manner (NOLL, 2016). Many authors assert that from the viewpoint of international law, leaving a country, in the sense of exiting its jurisdiction, certainly does not mean entering another one. And they also insist that the normative characterisation of the type of permission allowing exit from a country is not matched by any equivalent permission allowing entry into another. It is this unclarity concerning if any entitlement follows from, or otherwise interacts with, the person's right to exit a country in international law, and which entitlements this could be that has led to a polemic around possible forms of interaction between leaving entitlements and entry claims.

What added to Hassan's troubled fate here is the dual nature of the 'social fact' of the 'action' that we usually call 'international migration', and which means leaving the jurisdiction of a state and entering that of another one, no matter how rapidly or frequently. Here, 'social fact' refers to the term used in sociology to indicate what philosophers call 'institutional facts' *à la* John Searle, as distinguished from 'brute facts' *à la* Elisabeth Anscombe. An aspect that is striking about Hassan's case is that the *unity of this empirical action*, i.e. moving across borders or leaving and entering, has to do with the interacting of at least *two other actors* (which in this

case are sovereign states and hence also legal authorities) and this explains why the same empirical action is framed by law in terms of two legal positions, not one: on the one hand, a legal norm protecting 'exit'; on the other, a legal norm protecting 'entry'. This is so also because of how the world is organised in terms of states jurisdictions that exhaust the surface of the earth and monopolise the relation of power between a state and a legal subject. Thus, leaving one state entails entering *another*.

Note how the logic behind the law is, in this case at least, different from that informing the empirical fact of 'roaming around the Earth's surface' in the way modern natural lawyers typically thought about 'freedom of movement' and in the way most subjects of law – i.e. we – most often (and acritically) tend to think about freedom of movement within the domestic realm of states where limits to free movement are often less cumbersome than the hinders we find on international borders in many respects. Yet the fact that internal movement, i.e. within states, is unrestricted or uncontrolled does not mean that the institutional fact of, say, moving from the jurisdiction of one sub-national entity to another, is the same as or equals to the empirical fact of moving in space. The empirical fact of moving is 'blocked' by physical hinders or impediments (e.g. the shore, the mountain, the river, or inhospitable places), while the 'institutional fact' of moving – i.e. changing one's jurisdiction of pertinence – is blocked by institutional (here: legal) hinders; as we have seen in the case of the current pandemic, many states restricted internal movement as well (e.g. from one region to another). The fact that to do so they used legal instruments (e.g. bill in parliament, presidential decree etc.) and not physical instruments (erected a wall, dug a channel etc.) proves that, also domestically, a territory is divided into jurisdictions.

To add to the complication here it should be stressed that the legal right to seek asylum does not in itself constitute a legal right of entry, albeit it may result in leave to remain. On the contrary, it is *dependent on* entry. So, it is the former that

must include the latter — not the other way around — as a matter of law and not just of moral desirability. As Hirsch and Bell argue, there is a '*de facto* implicit right' to enter that must be prior to the right to seek asylum if the latter is to be meaningful at all. The right to seek asylum must presuppose, in some form, a legal right of entry for all persons. If one wanted to be rigorous in the formulation of the norms, one could imagine such a presupposition being enshrined in international law as a separate norm. Even if this were not the case, the right to at least a certain form of 'entry', i.e., that which is necessary for successfully filing an asylum application, can be seen as a legal requirement that is required for the right to asylum to make sense. Their claim about an (oxymoronic) '*de facto* right of entry' must hence be unpacked so that we can understand how it guides us back to our original problem, namely that of the ways in which the right to leave can be understood as interacting with (some version of a) right to 'entry' in international law — and which characterises the standstill facing Hassan at Kuala Lumpur.

While refugee status and temporarily protected status do grant asylum and protection seekers a 'right of entry' of sorts — in the sense of being allowed into society conditionally, it ensures that one is not *refoulé,* not returned, deported or expulsed. This does not mean that a person may leave *to* a state once her asylum request has been approved. Rather, the asylum-seeker must already find herself in the territory of the (potential) country-of-refuge in order to initiate her request for asylum (or in parts thereof that have not been declared inapt for filing the application of asylum). We must hence dwell on the precise meaning of 'entering' if we are to understand the full picture being drawn here.

The distinction between the empirical fact of 'entering' by crossing the border of a state — that is, being territorially present — and 'entering' into the jurisdiction or, figuratively speaking, 'entering' society in the sense of enjoying legal protection within it, is crucial. For refugees, from the point of view of the law, 'entering' means that you are allowed into the jurisdiction under a given legal status;

for future incomers who are ‘not yet here’, however, requesting such status requires the person to have already entered into the territory before requesting the status to be recognised/declared. One can neither see his/her asylum request approved before accessing the jurisdiction (typically by entering the territory), nor before leaving the territory of provenience.

When looked at from the side of entry, therefore, the problem is all the more tragic: it is not just that the legal right to leave is not (usually interpreted as) followed by a legal right of entry elsewhere; it is also that the only right of entry available in international law, is itself, both *legally* and *practically,* contingent upon entry. Even if Hassan eventually managed to flag his refugee eligibility as a victim of persecution at home — as a Syrian national — he still had to enter the territory of that state to which he submitted his request, namely Canada in his case. The upshot here is that even the legal grounds for leaving that are part of the very definition of refugeehood fail to account for the legal precondition of territorial presence. So, one cannot become a refugee without entering the country of (potential) refuge as much as one cannot enter that country without previously having gone through the anxiety of leaving without knowing *whereto*. This is nothing that is in itself necessary: it is a contingent fact of how lawmakers designed the system. They could have decided that entry into the jurisdiction would not be dependent upon entry into the territory, like the US system for using lottery to distribute immigration permits, or they could have decided that the extraterritorial location of the embassy would be fit for filing asylum requests. But that is currently not the case and therefore we should not assume that entry means physical presence.

4. In Search of Truth-Makers: Analysis of the Basic Propositions

Legal language is sometimes confusing because the terms do not mean what they mean in ordinary life and, in this disagreement, we seem to be witnessing this kind of unclarity pertaining to the action-class ruled by the norms under discussion (RL and RE). It seems that the disagreement is rooted in the very description of the action-class that the norm purports to regulate: simply put, while one side thinks that the action refers to an empirical fact (movement in space), the other side to the debate thinks it refers to an institutional fact (change in legal position vis-à-vis a state).

In order to make this clear, let us first suppose that ‘leave’ and ‘entry’ do not refer to empirical facts at all, but only to institutional facts defined in law to the effect that leave may very well occur irrespective of whether entry occurs. Under this assumption it becomes clear to see that Proposition A runs into problems. It states that ‘it is permitted that any person leaves any country (besides justified exceptions), therefore it is obligatory that all states permit entry (besides justified exceptions)’. If it were true that leave may very well occur irrespective of whether entry occurs, Proposition A would be a *non sequitur*. However, Proposition B would not incur in the same problem since it only submits that ‘it is permitted that any person leaves any country (besides justified exceptions), therefore it is obligatory that all states let leave any person (besides justified exceptions)’. So, in the contention between Finnis and Mubanga-Chipoya, so to say, Finnis makes the kill – but this is so only under the assumption that ‘leave’ and ‘entry’ are not meant to mimic the empirical facts of leaving and entering in the sense that leave can occur without entry.

Let us now suppose the contrary, namely that ‘leave’ and ‘entry’ do refer to the empirical facts that we know from ordinary language; or rather, more precisely, that ‘leave’ and ‘entry’, in the meaning they appear to have in the law, are institutional facts that necessarily mimic the empirical facts by the same name, to the effect that leave cannot occur without there being entry elsewhere. In sum, if leave and entry are taken to refer to one and the same movement of a body in space, then

Proposition A could be true and Proposition B would run into trouble. Under this assumption, it becomes clear that Proposition A would no longer be a *non sequitur*: leave could not occur without entry, hence the possibility that allowing entry could be needed. It remains to be seen *where* entry occurs; but in principle it could occur anywhere, except in the state that is left behind; hence it would be justified to have an obligation upon all states to guarantee entry somewhere. Proposition B would, on the other hand, run into trouble under this assumption. However, it would not be a *non sequitur* properly speaking since the obligation of the state from which the person wishes to leave would still be obliged to let leave. The problem of Proposition B, under this assumption, is rather that it would offer a necessary, albeit insufficient, condition for the realisation of the RL.

For this analysis to hold two further empirical conditions would need to be met: (a) that all space is occupied by contiguous territorial jurisdictions and (b) that all jurisdictions uphold the state's right to exclude, i.e. according to which in international human rights law it is permitted to all states to allow entry of any person they wish. If any one of these two empirical conditions were not met, even under this more phenomenologically tainted assumption concerning the interpretation of the material scope of application of the rights in question, Proposition A would not be true.

In conclusion, we may say that the truth-makers of the opposing propositions in the normative dispute we are analysing seem to relate to the understanding of the material scope of application of the rights. A truth-maker of Proposition A is that leave cannot occur without entry, which would be the case if we think of leave and entry as constituted in the same way as the empirical facts of leaving and entering, where clearly a body that "leaves" space x, by necessity, "enters" another space y, due to the law of impenetrability of bodies in physics, and unless the body is not somehow disintegrated. A truth-maker of Proposition B is that leave can occur without entry, which would be the case if we think of leave and entry

as institutional facts that do not need to follow, replicate or mimic the logic of the empirical facts we call by the same name.

Conclusions

In Roman times Cape Finisterre was believed to be an ending point of the known world. The story this article started out with – Hassan Al Kontar's story – was one of 'end' of the known legal world: Hassan ended up in a legal limbo, physically stuck at an airport, legally suspended between territorial jurisdictions. Ever since the right to leave was first positivised into a legal right in international law, voices have been raised, concerned with the lack of a matching right to enter elsewhere, equivalent in its personal scope of application. The disagreement between those who see a paradox at play in the contemporary migration regime of human rights and those who deny this to be the case runs like a carsic river through decades of reflections on human rights, yet has still warranted surprisingly little scholarly attention. This article starts to fill that void by offering an analysis of the disagreement with a view to uncover the assumptions made by the different contenders in the debate concerning the material scope of application of the rights in question. We offered a systematic problem-setting of the dispute. It was summed up in two propositions (Proposition A and B) that we analysed and found that the truth-makers of the opposing propositions in the normative dispute relates to the understanding of the material scope of application of the rights in question. A truth-maker of Proposition A is that leave cannot occur without entry, which would be the case if we think of leave and entry as constituted in the same way as the empirical facts of leaving and entering, where a body that leaves a given space, by necessity, enters another. A truth-maker of Proposition B is that leave can occur without entry, which would be the case if we think of leave and entry in terms of institutional facts

determined by the law that do not need to replicate the workings of the homonymous empirical facts. These findings form the first step in uncovering the end of the known legal world; we hope to have contributed to a clearer understanding of the disagreement and to have shown some of the perhaps too hastily made assumptions it relies on and some of the theoretical costs involved in embracing either side of this dispute. This article has made evident that, for the problem to be solved, it is necessary to put a greater effort into examining the constitutive parts of the problem and scrutinising the assumptions hidden therein. Legal limbos or black holes of this kind merit to be taken more seriously; not merely as objects of curiosity for the concerned citizens to bear witness of their normative affiliations, but as object of thought to which we should apply the analytical scalpel in order to discern what we may do better from what we need to leave as it is.

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