THE FLYING DUTCHMAN ASYMMETRY

the conflict of natural rights in the history of migration law

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INTRODUCTION

One of the most striking features of the contemporary debates in migration law and international legal and political theory more broadly is the focus on the relation between the rights and the duties that are involved in transnational migration. From the right of free movement or asylum to the duty of hospitality and rescue, the spectrum of rights and duties, as well as the relations and correlations that obtain among them, seems endless. However, some scholars’ concern in framing the phenomenon of migration in theoretical and legal terms as well as the challenges that it poses to international law, state sovereignty and rights has led them to look closer at the relation between the right of emigration and the right of immigration in both legal theory and legal practice. The ways in which the right of emigration and immigration are related - and there are many who defend the view that they are not\(^1\) - are the main object of this paper\(^2\). Their correlativity - or lack thereof - is, it is argued here, symptomatic of the wider challenge that has confronted human rights law since their first inception in the Universal Declaration of 1948, if not before. That challenge consists of the relation between human rights - taken as moral claims - and legal rights - as their actualisation, codification and enforcement by political authorities and legal systems.

In this paper I explain how the now-called asymmetry is about this broader tension between law and morality. The hypothesis laid out in this paper is that what lies at the core of their troubled relationship has to do with a conflict of natural rights which has never been settled in the histories of both legal and political philosophy. My starting point is that while migration rights - namely the right to leave and the right to enter a state - have been theorised in the history of international law and political thought in light of a cosmopolitan (human and natural) right to mobility across the globe, the rights of states to bar immigration is instead seen as a positive artifice, and \textit{unnatural} manmade creation that violates what would otherwise be the natural state of affairs. This paper historicises this division between a natural right of free movement - on which the so-called ‘asymmetry thesis’ rests - and the supposedly positive right to rule of sovereign states. But as in most cases of intellectual history, the history of philosophy is on its own also a type of philosophical argument. Hence, my historical overview highlights the notions of ‘right’ being employed by authors in their discussion of migration rights, as they seem to inform their views on migration law more generally - especially regarding the question as to wether the correlativity is a legal, a moral or a political problem. Different accounts and usages of rights provide for different theories of migration rights. They make all the difference for the scope and reach of both exit and entry rights in each author or theory, and this paper concludes

\footnote{As will become clear in the paper, I am referring mostly to communitarians and those who, without claiming that label, stand for a human right of emigration without any concern for a right of immigration.}

\footnote{This paper takes a very parsimonious view of migration rights: when referring to emigration and immigration I am referring specifically to the right to enter a sovereign state and the right to leave it. The understanding of both rights is therefore minimal in the sense that they refer to the movements of exit and entry only - and not to other actions, interests or freedoms that are protected by alternative clusters of migrants’ rights - such as the right to seek asylum or the right to health.}
that the categorisation of the problem as an ‘asymmetry’ has so far only made its way in moral theory, not in legal scholarship.

This paper is divided in two sections. The first section revisits several approaches to the correlativity between emigration and immigration rights up to the drafting of the Universal Declaration of Human Rights in the 40s. This part looks at both theoretical literature and international legal documents so as to revise instances of conceptual or theoretical relations between the two rights - which however only appear explicitly stated as a theoretical problem in the first half of the 20th century. I highlight what some authors already anticipated as a tension in the codification of rights, namely, that of turning rights that legal and political philosophy had theorised as ‘natural’ - that is as ontologically preceding both state and law - into the positive law of a binding declaration of legal rights.

The second section deals with more concrete account of what Daniel Loewe calls the ‘asymmetry thesis’ following Maurice Cranston and Michael Walzer, who originally framed the correlativity as a moral problem and first coined it as an ‘asymmetry’ (Loewe 2009). I divided the paper in these two sections because the approach to our object of study differed significantly from the looser and more superficial approaches before the UDHR to the more systematic accounts that started to appear in 70s up until the first decade of the 21st century. Regarding this last part, however, I conclude by arguing that, at least in the history of legal and political theory, there are as many theoretical grounds in the natural law tradition to claim there should be a perfect correspondence between a right of emigration and a right of immigration as there are to claim that the state has a ‘natural right’ to bar immigration and hence rely on an asymmetry of rights. Before exploring these issues some methodological remarks are in order so as to tease out the object of my enquiry more clearly.

First, the main theme of this paper is inextricably related to the debate between cosmopolitans and communitarians about whether the states’ system that rules the world should be one of relatively open borders or fairly closed ones. This proximity, however, will only come out at the end of the paper as not all themes of that debate come under our more specific topic. Where appropriate, I will nonetheless refer to this debate as it might bring about some of the most striking features of exit and entry rights. Both the open borders debate and the boundary problem debate are about what constitutes or ought to constitute a political community; whether it should be opened to the recognition of the rights of immigrants and emigrants; if it should extend beyond the sovereign state so as to include all, or a greater number of, human beings as members; and whether it has the legitimate authority to bar immigrants or should, instead, offer them legal status such as that of citizenship. But these debates miss a very important feature of

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3 I will use UDHR to refer to the Universal Declaration of 1948.
the arguments at play in each of them: that is what is being meant by exit right and entry right and how exactly they are related at least in theory. This is what is at stake in this paper.

Second, this paper considers those theorists and theories in which, however indirectly, the right of emigration is defined, sustained and explored together with a right of immigration. The terms I use to map the connection between the two rights are those of ‘correlation’ or ‘correlativity’ as they are used by rights theorists to refer to the internal workings of specific clusters of rights. I revisit instances of weak correlation as much as of a strong correlation. By weak correlation I mean a minimal relation where both rights appear to be related in a very loose and unspecified way, as in the case of the classical Dutch thinker, Hugo Grotius or other cases of free movement theorists. By strong correlation I refer to instances where both rights seem, in the view of the authors considered, to either depend on each other, imply each other or require each other - either morally or conceptually (or both). So far, no author has claimed a strong correlativity between exit and entry rights in a legal sense, but from a moral perspective all advocates of free mobility rights are in favour of ‘symmetry’, including the most recent cases of Philip Cole and Rainer Bauböck. What is relevant for our purposes here is to understand how the right to leave and the right have historically been approached as either a compound or cluster of rights or as separate. I show how this methodological option already commits specific authors or traditions to certain theoretical and moral commitments as to the separation between law and morals; the idea that ‘human rights’ should be conceived as ‘natural rights’; and how the rights of the sovereign state are to be conceptualised vis-a-vis individual rights.

Thirdly, and in spite of the title of this paper, I refrain from employing most of the concepts that theorists who stand for some form of relation between exit and entry rights use when addressing these rights. Indeed, most, if not all, theorists who characterised the exit and entry rights as being related - no matter how or why - are political theorists. Most of them do refer to the relation between the two rights in terms of ‘symmetry’ (or ‘asymmetry’). But the framing of the problem in one or the other way already carries the sort of theoretical baggage that a paper cannot presuppose if it wants to revisit the problem with some critical distance. In turn, this suggests that the very posing of a problem - regardless of any solution provided - cannot be taken as a neutral one and we should therefore be weary of the ways authors refer to it, while leaving open the possibility that there is no such correlation to start with. Hence, posing the problem in terms of ‘(co)dependence’, ‘(in)consistency’, ‘(in)completeness’, ‘indivisibility’ - let

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5 As this paper shows, all of these debates resonate among each other. The positions held about the boundary problem are usually aligned with the views undertaken in the open-border debate and in the correlativity between exit and entry rights. Hence, this paper shows that the specific formulation of the arguments around a supposed correlativity between the right to emigrate and the right to immigrate - starting with the belief that they are correlated in some way - cannot be neutrally grounded in abstract debates in legal theory; instead, they are easily retrieved to deeper theoretical commitments in moral theory and political thought.

5 Indeed, the problematisation of the relation between entry and exit rights has been carried out mainly from the viewpoint of political theory and has not sufficiently deserved attention from legal theorists. In fact, for the most part, legal theorists do not consider it a problem, which raises interesting questions not only about migration as a phenomenon that cuts across legal and political boundaries but also about the notion of ‘right’ that political theorists use vis-a-vis legal theorists.
alone ‘(as)symmetry’ - may already commit one to certain theoretical or even political views on rights, law and society.\(^6\)

Finally, I want to caution the reader about the rather frequent use in this paper of the term ‘correlativity’. Talk of rights correlativity usually refers to two different dimensions of rights, both of them are present in this work. One way - perhaps the most common - in which rights can be said to be correlative is when they are said to imply or follow from a duty within a specific legal relation. In this case, rights are correlative to duties and this understanding of rights is the more frequent one in the history legal philosophy, spanning from Thomas Aquinas to Wesley Hohfeld. But in the case of this paper, it is important to stress that there is a second dimension of correlativity, one which refers to the way in which rights are correlative to other rights (and not just to duties). Given that the same term is used for both dimensions in the literature, and to prevent further confusion and needless conceptual duplication, I will not adopt a different terminology here. Note, however, that the object of the correlativity of a right may be a duty as much as another right and it is thus important to keep in mind that despite the two dimensions - ‘right-duty correlativity’ and ‘right-right correlativity’ - both rights and duties are not always correlative, as there are also cases of non-correlative duties and non-correlative rights (Haakonsen 2010: 314).

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BEFORE THE DECLARATION

The right of every single person to emigrate from her country of origin as for a long time been acknowledged in customary international law, despite the great number of domestic legal dispositions that, on different occasions and in different states, restricted it or forbid it on different legal and political grounds. The UDHR attested to the century-old practice by political communities of all sorts - and not just the modern sovereign state - of allowing its members to leave its jurisdiction in a more or less unqualified manner. It was not, however, the first time that it was codified in law or appeared as an individual right in an international agreement. Exit rights have been ubiquitous in constitutions and legal codes of all sorts since at least the Magna Carta (1215); in turn, emigration had appeared as an individual right in international law on the occasion of what many consider to be the first modern international treaty and one which is usually taken as the foundational stone of the sovereign state itself: the peace settlement of Westphalia (1648). A century before, the peace agreements of Augsburg had already introduced the right as an overall strategy to bring ‘tranquility’ to the tumultuous and religiously fervent Europe of the 16th century (Witte 2007: 128). These peace settlements helped to materialise the ideals that informed the reformation movement by establishing the \textit{ius reformandi} of sovereigns,

\[\text{6 My choice of the notion of correlativity is also questionable and I naturally also consider those views that state that there is no correlation whatsoever to be had between the two rights.}\]
that is, their ‘sovereign’ right to demand religious obedience within their dominions. The upshot of this inditement was the (correlated) right of emigration, made to protect the lutherans and calvinists’ ‘freedom of conscience’, in cases in which they did not share in the faith of their own sovereign (Witte 2007: 128). Paper 24 of the Augsburg treaty hence established that

‘It may happen that Our subjects or those of the electors, princes, and other estates, either of the old faith or the Confession of Augsburg, wish to leave Our lands or those of the electors, princes, and estates of the Holy Roman Empire, together their wives and children, and settle elsewhere. They shall be permitted and allowed to do so, to sell their goods and possessions, after having paid a reasonable sum for freedom from servile obligations and for taxes in arrears, such as has everywhere been customary for ages. Their honorary posts and their obligations, however, shall be unrecompensed. Their lords, however, shall not be deprived thereby of their customary right to demand recompense for granting freedom from servility. (1555) (in German History in Documents and Images, 2016).

As the historian Ronald Asch reminds us, this specific ius emigrandi was a direct implication of the right of the prince to establish its own religious credo and demand its subjects to follow it (2000: 78). What needed to be guaranteed was the safety of those who dissented from it, not of those who immigrated in order to pursue the same faith. Later on, the same right of emigration would be amended in the letter of the treaties of Westphalia so to accommodate the protection of that liberty as well as to pressure sovereigns to let dissenters remain in the territory - or otherwise face a diaspora of unforeseen proportions by religious minorities. Asch observes that

‘…men or women who had the right to emigrate if they rejected the officially ordained forms of worship had a fortiiori a right to stay where they were living and to practise their own religion, provided this fell within the scope of the two forms of faith officially accepted in 1555, Catholicism and Protestantism - as defined by the Confessio Augustana - and provided also that they were content to worship and pray privately in the form of the devotio domestica and not in public unless they enjoyed special privileges which permitted them to do so’ (2000: 78).

This reminds us of yet another aspect which the literature on the correlativity between exit and entry rights has left untouched. Even though the Augsburgian and Westphalian peace settlements stressed the right of emigration - arguably the first individual right to be enshrined in an international treaty - a closer look at the historiography of that period allows for three conclusions that I will now sketch out briefly.

First, even though the primary concern of those treaties - and especially the treaty of Osnabruck in 1648 between the Holy Roman Empire and the Swedish Empire - was to ensure that members of oppressed religious groups could, with their family and property, leave a state unharmed be granted the sufficient time to do so, social practices of hospitality among several regions and free cities with different religious cults found themselves into legal agreements among different national, religious and municipal authorities during that period. Benjamin Kaplan alludes to the practice of Auslauf where communities united by faith, but geographically displaced and under different political authorities, who seek out their commitment to ensure not

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7, according to the famous principle cuius regius eius religio, hailed as the premise of the whole peace by the holy roman emperor Ferdinand I (Witte 2007: 128).
only the right to leave, but also guarantee that religious dissenters could arrive safely and join them for worship. Under these agreements - which mostly took place in central Europe - rights of emigration were accompanied by corresponding rights of immigration (Kaplan 2007: 144-171; see also Witte 2007, Manetsch 2000 and Grossmann 1979).

Second, the precarious correlativity between exit and entry rights did not really operate between fully-fledged sovereign states, but only among the semi-sovereign quasi-states of the holy Roman empire. Therefore, the analogy cannot be carried out fully, even though the case of free movement within the European Union seems to echo those past experiences where the state’s power to control its own borders were limited or at least relaxed by the memory of war. It does, however, indicate that overlap between exit and entry rights occurs only in those historical cases that take place in periods of strong transnational integration, both political and legal. An international legal order with anarchical features in the sense that lacks an overarching authority - standing above micro-political units of government - and is composed by states with the exclusive of territorial jurisdiction thus seem to undermine the possibility of even a minimal correlativity between exit and entry rights, let alone of perfect symmetry or free mobility.

Thirdly, the historical insight laid out above also allows for a conclusion to which I shall return at the end of this paper. What seemed initially to be a different topic than the one fuelling the debate between communitarians and cosmopolitans turns out to be at its heart. By correlating the right of emigration with a right of immigration one does not only reach a perfect symmetry between two rights. What seems to be the outcome of it is instead their merging into one single right of free movement as Philip Cole remarks (2006). This is due to the international legal standing of the right of emigration as a ‘human right’, which means that a corresponding immigration right would also carry that label. But if that were the case, then we would be speaking of a ‘human right of free movement’ - and not of two separate rights - akin to a ‘liberal order of universal mobility’ (2006: 6).

But just as in the 17th century, the emergence of the right to emigrate as a human right three centuries later in the UDHR was not devoid of its symbolic meaning as a political - and even ideological - strategy to pressure sovereign states to incorporate a set of rights into their constitutional architecture, or at least commit to them internationally. The UDHR was not detached from the specific geopolitical arrangements of the period, which reflected deeply in the negotiations among national delegations, and which left their mark in the drafting of each paper, not excluding paper 13 (Jagerskiold 1972; Morsink 1999; Kleven 2000; Naiziger 1980). While it is not the purpose of this paper to transcribe every official instance of the international codification of the right of emigration, it is important to state that its formulation in numerous international legal documents8 basically follow its enunciation in UDHR which states that

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8 The more salient formulations of the right of emigration follow the UDHR verbatim. They appear in, the 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). The Convention Regarding the Status of Refugees (OHCHR, Art. 1951) is also of extreme relevance for migration issues, but not for emigration specifically, as there is no reference to it in that document.
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.

Recent investigations about the proceedings leading up to the writing and final approval of the declaration note a tension hinging upon not just the content of rights, nor only about what rights to uphold in detriment of others (Morsink 1999). However, what was also underway during those years according to Morsink was a careful articulation of how specific human rights relate to other rights. This was especially the case in those ‘special’ international human rights which required more than one duty-bearer, namely those which inherited their status as ‘rights’ from a long tradition of ‘natural rights’ vindications, and whose codification in international law went back at least to Augsburg and Westphalia:

...in the case of some of the rights in the Declaration this shift in perspective was not quite as easy, for most of the domestic constitutions of member states did not contain any of what I have called ‘special international (human) rights.’ National constitutions are not addressed to worldwide audiences and hence do not usually speak of rights which require more than one nation to implement, such as the right to move between countries (Paper 13), the right to asylum (Paper 14), and the right to a nationality (Paper 15). For people to enjoy these rights various countries have to cooperate and hence give up a piece of their sovereignty. The same is true of Papers 22, 28, 29 (3), and 30, which also require international cooperation. These rights are, therefore, real test cases for any list of human rights, for in their case the question, the problem of sovereignty can no longer be hidden behind the veil of positive national law (Morsink 1999: 72-73).

Morsink’s account of the history of the drafting sheds light on the topic that guides this paper. The question as to whether a right of emigration, with the universal scope that any human right has - as it applies to all humans everywhere - should be accompanied with a right of immigration was present in the mind of René Cassin, the main drafter of paper 13 (ibid., 73). As this paper shows, this was not the first time that the right to emigration appeared in an international document of great magnitude. Neither was the run up to the drafting of the declaration the first occasion in which the specific correlativity between exit and entry rights had been highlighted. After all, the issue of interdependence among rights was crucial to their understanding as indivisible, as many human rights theorists like to highlight.

‘As Cassin said in the Third Committee of the discussions about asylum, “in case of the papers studied so far, the national society in which the individual was living was required to ensure the rights in question. The right to asylum, however, was a conception of an essentially international character: it was therefore necessary to specify who was to ensure the enjoyment of that right”. The same observation applies to all the rights or papers discussed in this section’ (Morsink 1999: 72-73).


By indivisibility, they refer to the need to positivize a certain number of rights so as to make possible the de iure exercise of other rights. For more on the indivisibility of human rights see Nickel (2008) and Donnelly (2013).
Indeed, Morsink’s insightful book about the negotiations behind the drafting of UDHR mentions a very important side note made by the commission in charge, stating that

‘the right to leave a country was correlated with the right to enter another one and that the commission hoped that “these corollaries would be treated as a matter of international concern by the and that members of the United Nations cooperate in providing such facilities” *(E/CN.4757/p. 9) (1999: 74).*

What was at stake, Morsink tells us, was not so much the lack of a universal right of immigration in general, but more specifically, the need to ensure that those who fled tyranny or war were not forced to return to it. As he puts it,

‘…no one can leave one country without sooner or later entering another one. The right to leave is hollow without the right to enter. The right to ask for and be given asylum is therefore a necessary corollary of the right to leave one’s own country. This problem is different from the rights to emigrate and to immigrate, rights that at the point in the discussion were replaced by an exclusive focus on the problem of refugees seeking asylum from persecution. As the references to the Nazi experience have already shown, the delegates were deeply concerned about the protection of those who are persecuted by their own state, as the Jews and other minorities had been in Nazi Germany. They were also very concerned about the waves of refugees produced by the 1948 Arab-Israeli war’ *(1999: 75).*

But even though it is arguable that the right of emigration should be accompanied by the right of immigration, what seems to be the case is that further steps where taken in international law to allow for a right of immigration under certain conditions. Already in the declaration, the right to return to the country of origin as well as the right to seek asylum and the right to nationality offer some guarantees to at least some immigrant groups, even though they cannot be said to compound a human right of immigration with the same degree of universality, that is, with humanity as a whole as its scope. This has prompted many scholars to look at the relation between emigration and immigration rights so as to explore further their object but also question the extent and nature of that relation. In a very insightful paper about the priority of the right of emigration over the right of immigration in international law, Thomas Kleven makes the argument that such ‘dichotomy’ squares neatly with ‘the liberal ideology underlying international law’ since at least the second world war *(2002: 74).* He offers a strong case about the fact that the

11 for a structured advocacy of a universal right of immigration, see Karen Oberman *(2013).* Apart form free mobility advocates, earlier support for the idea that the right of immigration should belong to international law and not depend solely on the jurisdiction of each state can be found in the world Alfred Verdross: "[l]es questions d’immigration ne sont pas du tout laissées a la compétence arbitraire d’un Etat seul, car le droit international limite sa compétence en la matière, en vue du bien commun de l’humanité" *(1932).*

12 This also means that Jane McAdam and other historians of international law are fundamentally mistaken when talking about a human right of free movement, if by human right they are referring to what the declaration states *(McAdam 2011).* Indeed, both the declaration and customary international law have never allowed for a right of free mobility for the whole world of the sort that we now find confined to the European Union, for instance. For more exhaustive accounts of free movement rights in intellectual history see McAdam *(2011)*, Cavallar *(2002)*, Chetail *(2007)* and Baker *(2011).*
primacy of exit over entry rights denotes the fundamental liberalism that grounds the postwar international order, in that emigration is much more easily associated with an individual reaction against political tyranny that immigration could ever be (Dowty 1987: 14). This has to do with the underlying set of motivations that lead to migration in the first place. While leaving a state might not in most cases be the result of political persecution, one could hardly see how anyone would wish to immigrate to a place where oppression or some form of discrimination would be the rule.

Kleven also points out that the liberal nature of the ‘dichotomy’ can be framed in terms of the tension that befalls the principle of self-determination that constitutes the very threshold of ‘liberal idealism’. Indeed, the uneven relation between exit and entry rights is not just the outcome of the historical pedigree of emigration as a ‘natural right’ since before the liberal tradition. What is at stake for him is the fundamental conflict of individual self-determination with collective self-determination. On the one hand, the historical triumph of the right of emigration over the power of the state to control exit reveals how individual self-determination has trumped the claims of the state for the well-being of the community - i.e., the ability of a people to self-determine its own peoplehood. On the other, however, collective self-determination remains very much alive through the ability of states to bar incomers under and uphold, in this way, their ‘sovereign right’ of self-preservation.

Kleven’s lucid account of the ideological intricacies of the correlativity is thus very useful as it highlights the paradoxical character of the absence of a right of immigration due to the overall moral, political and legal primacy of self-determination. In his view, the problematic character of correlativity can be framed as a ‘dichotomy’ - and not as an ‘asymmetry’ - in the sense that the lack of a right of immigration that can correspond to the right of emigration is the mere unfortunate outcome of an age-old battle between the community and the individual and their mutual rights of self-determination vis-a-vis each other. The voluntaristic grounds that underpin the liberal ideology and its core principle of self-determination lead to the fundamental conflict of natural rights - individual freedom vs. collective survival - which characterises the tension inherent to modern individualism. His marxist approach on the topic leads him to conclude about how the dichotomy is embedded in the very structure of global capitalism which leads to the reproduction of the divide between rich and poor and the privileging of wealthy societies over more vulnerable ones. The strive for sovereignty - both on the part of the individual and on the part of the state - are presented by him as the politico-economic structural forces that help reproducing fundamental social inequalities, from which the priority of emigration right is the mere byproduct.

But Kleven’s historical materialism seems to assume that a full correspondence between the two rights would necessarily lead to a more equal distribution and global justice. It leads him to incur in some theoretical bias, namely that of privileging economic factors over political, social or religious ones. For this reason, he does not succeed in historicising the priority of the right of emigration over the right of immigration in a satisfactory manner. However, his point that there are ideological overtones to the ‘dichotomy’ between collective and individual self-determination is very insightful, and one which this paper confirms. Indeed, the right of emigration has always been hailed as a natural right by those thinkers who are today perceived as foundational to the liberal tradition. The appearance of the right of emigration as a human right in mid-20th century, as well as the need to refine the cluster of rights that refer to movement across borders in rights declarations and international treaties, brought to light a theoretical and legal contention that was already underway in international law scholarship at least since the 20s, precisely when self-
determination gained momentum as the catchphrase that could solve all the conflicts of interest that had led to the Great War. That contention was about the way in which the right of emigration can be considered legally valid and exercisable by all human rights-bearers without a right of immigration with that same universal scope.

However, the history of international law and legal and thought is as prolific in the study of both rights as it is almost absolutely silent about any correlativity between the two. Even in those cases, such as Immanuel Kant or Thomas Jefferson, where freedom of movement is held, for different reasons, as a fundamental right, the defence of a right of immigration as correlative to a right of emigration never sees the daylight (see Whelan 1983). And while classical references in ancient Greek and Roman political thought are obviously central to the intellectual history of freedom of movement, the correlativity between the right of emigration and the right of immigration was never subject to much discussion. Nor could it be, as the world was not yet, from a legal perspective, dominated by the territorial jurisdiction of sovereign states, with full control of their borders. While contemporary historians tend to look at Francisco de Vitoria as the pioneer of the right to free movement in early 16th century, they also stress that the kind of emigration vouched for by Vitoria was mainly - if not exclusively - addressing Spanish colonisers (Vitoria 1991 (1532): 278). With free mobility rights the correspondence between the right of emigration and the right of immigration would be perfect, and Vitoria clearly wished to transcribe natural law presuppositions into international positive law provisions. His understanding of the *ius gentium* attempted to safeguard the historical possibility of a world community - headed by the Spanish empire - against the pretensions of states to divide it up. Vitoria was thus, already in his generation, stranded between a classical and a modern view of international law. His version of Spanish exceptionalism meant that the crown should take upon its shoulders the responsibility to transpose natural law premises into its actual imperial rule.

‘in the beginning of the world, when all things were held common everyone was allowed to visit and travel through any land he wished. This right was clearly not taken away by the division of property *(divisio rerum)*. It was never the intention of nations to prevent man’s mutual intercourse with one another by this division’ (Vitoria 1991 (1532): 278).

Many historians caution against the idea that Vitoria was an unconditional supporter of a supposed symmetry between right of exit and right of entry as early as the 16th century. To be sure, he would never have admitted that Indians could themselves travel to Spain and make use of its (mining) resources without problem. In this regard, Vitoria’s contradiction in his advocacy of the *ius communicationis* immediately came under fire by at least one of his contemporaries, Domingo de Soto who, in what seemed as an anticipation of the contemporary communitarian critique of cosmopolitanism, claimed that ‘neither can the French enter into Spain for the same purpose *(mining)*, nor can we enter France without the permission of the French’ *(in* Pagden 1998: 52). Soto’s point was that the limitation, and not the continuity, of those natural law principles which Francisco de Vitoria recalled, was precisely what the law of nations was about, as a positive law seeking to reform and even repress what was once a natural state of affairs - namely that of primitive communism *(ibid.)*.

Second, Soto was not claiming that positive law should supersede natural law - or that sovereign rights should determine the rights of individuals. What he meant, instead, was to question the modern trajectory that Victoria was pioneering by claiming that individual rights are natural and as such states must respect them. Soto was, in this regard, much more conservative -
and still aligned with the high middle ages as far as the natural law tradition is concerned. For
Soto, natural rights were not the preserve of individuals - something which, even more the
Vitoria, Grotius and above all Hobbes and Locke would claim. What defined the premodern
notion of the political was precisely the correlation between rights and duties between different
levels within the hierarchical scale of a given legal and moral order. The sovereign right of kings
was therefore as natural as that of the individual subject. The move to ‘artificialise’ the state and
‘naturalise’ the individual was, however, already underway.

At this juncture there are two aspects worth pointing out if we are to understand the
interplay between the right of exit and the right of entry vis-a-vis the duties of states to grant
both. First, the gradual recognition of a ‘natural’ right of emigration in both international law and
in legal and political thought - which, as we will see, culminated in its acknowledgement as a
human right in the 20th century under what Phillip Cole calls the ‘liberal orthodoxy’ of an
asymmetry between exit and entry - had to do mostly with the need to protect the most
fundamental of all rights: the right to life understood as the natural desire for survival, especially
against the potential tyranny of kings (Witte 2007). Notice, however, that, from this point onwards
survival becomes a highly individualised concept; as the references below will show, the question
of protecting life is about the individual and not the lives of entire communities or groups. Even
the rights of religious minorities against their sovereigns - whose right to freedom of conscience
was, as I show below, an integral ground of the ius emigrandi in the 16th and 17th centuries’ peace
settlements - was framed in terms of the individual members of those minorities (see below, Asch
2002). ‘Natural rights’ were therefore becoming more and more about individuals - and it was
only with the rise of individualism in the history of political thought that the very notion became
widespread. This shift explains my second point.

Among other implications, the religious wars that devastated Europe in the late middle
ages certainly led to the emergence of the sovereign state, modernly understood. But this power
accrual of sovereigns was accompanied by the generalized assumption of their ‘natural right’ to
rule only to some extent. Growing in parallel to the rise of absolute monarchs, there was a deep-
seated suspicion about the naturalness of political authority, as an organic upshot of the natural
community of subjects. The theorists of popular sovereignty that first grounded the legitimacy of
the state - such as Bodin or Hobbes - were particularly disruptive of the idea that, just as
individuals, so communities had, as it were, a ‘life of their own’ of which the sovereign himself
was an integral part. Much to the contrary, the idea that groups and collectives have ‘rights’ and
that states must aim for the survival of their communities, lost ground to the more nominalist
view that rights - namely security - must be ensured at the micro-social level of the individual
first and foremost, rather than at the collective level of the political community.

This might explain why the sovereign right of kings that informed most of the absolutist
experiences of monarchical rule was, all in all, short lived when compared to the history of
constitutional monarchies and republican regimes inspired by the theory of popular sovereignty.
The idea that the ‘body politic’ was no longer that of a ‘natural’ collective person, but instead of
an ‘artificial person’ pioneered the triumph of modern individualism as the ontological
grounding of natural rights. In regard to the right of emigration specifically, those shifts explain
the fact that it evolved from the mere need to legally protect the subject of the Spanish king
when physically leaving the realm - in Vitoria - to the later Lockean view of emigration as a
‘natural right’ of individuals to relinquish their political allegiance to the state altogether. In what
follows I explain this shift in more detail.
Note that even though Vitoria seems to refer to the right of *any* subject to travel and settle anywhere, he also begins his discussion with an explicit mention to Spanish colonizers. ‘Spaniards’ had the right to free movement, by which he meant that they were to promote the rule of the king *by emigrating*. What is key for our discussion is that Vitoria never sanctioned any form of political alienation from the Spanish crown - only their physical displacement from the territory of the Spain. Vitoria thus never admitted that subjects could be cut loose from their allegiance to their Sovereign. He never considers the case of what Frederick Whelan has aptly referred to as ‘a right of emigration-and-expatriation (the right to leave in the strongest sense)’ - meaning total revocation of political submission to the sovereign or, in the modern era, of citizenship (1981: 638). The same applies to the Magna Carta, three centuries before. Mostly due to pressures by the ecclesiastical authorities upon the english crown, the right of emigration was formulated in such a way as to safeguard loyalty to the king - which was highlighted by the very explicit caveat ‘saving their fidelity to us’ - thus excluding a ‘strong right’ of emigration as self-exclusion from one’s political community:

> It is allowed henceforth to any one to go out from our kingdom, and to return, safely and securely, by land and by water, *saving their fidelity to us*, except in time of war for some short time, for the common good of the kingdom... (my own italics, Magna Carta, Ch. 42).

The case for a ‘strong right’ of emigration was to be made explicit only in the 17th century, in one of the most interesting arguments about legitimate authority. In his *Second Treatise of Government* (1689), John Locke offers a sustained defence of a natural right of emigration as a political statement of the individual’s right not to consent to the sovereign. His was after all a continuation of the protestant reformers’ move, to which I have referred previously, to be granted the right of emigration as a form of political pressure against their sovereign (Witte 2007; Asch 2000; see also ). Since the peace settlement of Augsburg, the right of emigration had become the cornerstone of the right to freedom of conscience and an essential way of guaranteeing religious liberty. Over the centuries, princes and kings had gradually and intermittently came to recognise such liberty, under the threat of massive diasporas. The right to emigration was thus enshrined in the treaty of Westphalia as the first individual right to be recognised in international law. But the concern was obviously with leaving a tyrant king - and the provisions of that period that seem to anticipate the right to seek asylum and refuge did not find their way into the letter of either Munster or Ösnabruck treaties like the right of emigration did. Even though Locke hesitates between prohibiting or allowing emigration after the subject had consented to political authority, his defence of a ‘natural right’ of emigration - held by any rational subject before deciding to enter the social contract - was equally blunt:

> ’Tis plain then, . . . by the Law of right Reason, that a Child is born a Subject of no Country, or Government. he is under his Fathers Tuition and Authority, till he come to the Age of Discretion; and then he is a Free-man, at liberty what Government he will put himself under; what Body Politick he will unite himself to’ (2003 (1688), Ch. IX, sec. 118: 152).

Locke’s version of the natural law leads him to stress the individual liberty of any subject to leave the realm as the ‘ties of natural obligations are not bounded by the positive limits of kingdoms and commonwealths’ (*ibid*). But his reflection on the right of emigration is never accompanied by any concern with the right of immigration. The following passage illustrates why:
so that whenever the owner, who has given nothing but such a tacit consent to the
government, will, by donation, sale, or otherwise, quit the said possession, he is at liberty to go
and incorporate himself into any other commonwealth; or to agree with others to begin a new
one, in vacuis locis, in any part of the world they can find free and unpossessed: whereas he
that has once, by actual agreement, and any express declaration, given his consent to be of any
commonwealth, is perpetually and indispensably obliged to be, and remain unalterably a
subject to it, and can never be again in the liberty of the state of nature; unless, by any
calamity, the government he was under comes to be dissolved, or else by some public act cuts
him off from being any longer a member of it’ (2003 [1688]: Ch. IX, sec. 121: 153).

Locke’s world was not yet one of full sovereign jurisdiction over the territory of the globe. Hence,
in a context of open-ended territoriality, where neither states or empires had a hold on yet,
emigration was not necessarily followed by immigration. The above quote actually shows that
Locke is thinking about emigration into the uncharted lands of America, where new kingdoms
could be found ‘in vacuis locis’ by emigrants who were ‘settlers’, not immigrants.

This does not mean that there were no rights of immigration or entry whatsoever. What it
does mean is that immigration rights have always been up to the sovereign decision of the state -
including the right of persecuted migrants to seek asylum. Both in legal thought and legal
practice, the only right of immigration that seemed to be growing in acceptance across the holy
Roman empire and seldom in the other signatory states was the right of refugees to be protected
from harm. But this right was obviously conditional: it remained contingent upon the political
persecution of the migrant. As such, it was not an unqualified right that all could enjoy in the
same way that the right of emigration was. Hence, the right to enter a territory never attained the
status of a ‘natural right’ similar to that of the rights of exit, except in those cases were other
natural rights - namely the right to life, that is, to be safe from harm - were at stake, such as in the
case of refugees. In much the same way, what Locke had in mind was not so much the need to
ensure the entry of dissenters into another sovereignty; rather, what was at stake was the status of
the right to leave as an act of dissent against submission, and revocation of political obedience.
The problem of the correlation between exit and entry rights never arose - with one
exception however. Hugo Grotius’ discussion of the rights of both emigration and immigration in
The Right of War and Peace (1625) deserves our attention due to the nature of the arguments
involved as well as the historical sources invoked. Grotius can, even more than Vitoria, be seen as
the first modern advocate of a right to freedom of movement. In general, he considers these
rights in separate segments of Book II of his magnum opus, and advances arguments in favour of
both which seem, at first sight, to be unrelated. In the case of the right of immigration, which
appears first, Grotius sets the conditions under which property and resources within the
jurisdiction of any state might be claimed, or at least explored, by foreigners - who might for that
reason immigrate. The literary sources mobilised by Grotius to support his view are numerous,
but his argument boils down to the question of property. The upshot is wherever there are
unexplored properties or unused resources, immigration must be allowed:

13 The historical-materialist approach of Thomas Kleven (2002), revisited earlier, did not account for the fact
that the priority of emigration rights over immigration rights was also connected to this aspect of
geopolitical history, namely the fact that during the centuries following the birth of the modern territorial
state, it was still possible, even from a legal viewpoint, for those who emigrated from one state, not to
immigrate to another. Naturally, the vacuis locis thesis is no longer legally possible today.
‘…if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, I because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction, which always continues the Right of the ancient People’ (2003 (1625): Ch. V, sect. XVI, 448).

With regard to the right to leave Grotius is equally liberal. The right of emigration is not unconditional, but Grotius recognises that in most cases it must be up to each individual to decide whether to leave or stay. And unlike Vitoria, he does admit of the possibility of a complete break with the political allegiance of the sovereign - in much the same way that Locke would, at least before the individual enters the social contract that establishes the legitimate authority of the sovereign. In the context of this discussion, Grotius speaks specifically of choice of membership, drawing on the classical speeches of Tryphonius and Cicero, so to assert the individual freedom to opt out of its political bond in favour of another ‘city’.

‘Tryphonius says, that Every Man is at Liberty to choose the State of which he has a Mind to be a Member. And Cicero, in his Plea for Ballbus, commends that Privilege which every one has, of Not staying in any State against his own Inclinations: And he calls the Power of either keeping or parting with one’s Right, the Foundation of Liberty’ (2003 (1625): Ch. V, sect XXIV-2, 554).

So far there is nothing particularly original in Grotius discussion, with the exception perhaps of his admission of a legitimate break with the political allegiance toward one’s own sovereign, a liberal statement clearly ahead of his time. Rather, it is the end of his discussion of migration rights that is particularly striking. In a rather cryptic style, Grotius concludes with a brief, but very surprising, consideration about how emigration relates to immigration:

‘it is to be presumed that Nations leave to every one the Liberty of quitting the State, because from this Privilege they themselves may reap no less an Advantage by the Number of Strangers they receive in their Turn’ (2003 (1625): Ch. V, sect XXIV-3, 555).

Here Grotius seems to assume that the ‘liberty of quitting the State’ by emigrating must be left to each individual in view of what states can obtain for those immigrants who come to replace those who leave. The ‘they’ in the sentence refers to ‘Nations’. The comparison between the value of (the liberty of) those who leave and the ‘advantage’ which ‘the number strangers’ represents is explicit. Grotius is referring to the expected compensation that an immigration policy that allows incomers to contribute to the state - mostly economically - might bring, in return for the economic value of those who leave and can no longer participate in the national production of wealth. Grotius’ take on emigration and immigration rights assumes an economic dimension

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14 It is also important to note that the sources Grotius uses, namely Cicero, held, for obvious reasons, a totally different ideal of the optimal political community - which could never be that of a sovereign state, already in its embryonic stages at the time Grotius was writing - let alone of how allegiance between authority and its subjects ought to occur. Mobilising classic sources in this way made Grotius incur into several anachronisms, not least the one of grounding the natural right of emigration in an understanding of ‘nature’ which was ancient and conveyed an organic vision of the relation between community and individual which was no longer possible to hold in the 17th century.
which is unprecedented in the history of law, let alone international law. By allowing people to leave, states also give way for others to come and make their contribution to society and welfare. This understanding sounds surprisingly contemporary and places the Grotian case for free movement beyond mere metaphysical considerations about natural rights. Grotius is indeed thinking about the economic circumstances of states, and how migration flows - in and out of borders - might play a substantial economic and commercial role for the welfare of communities.

Grotius appears therefore as the key author in all major classical references of legal and political thought considered in this paper. His is definitely the first and only fairly systematic treatment of exit and entry rights which can possibly be said to anticipate other modern takes on the topic. Except for him, the concern for the correlation between exit and entry rights appears to be exclusive of the 20th century and to gather momentum especially during the run up to the approval of the UDHR in 1948. Long before its appearance, however, the question about the connection between the two rights did emerge in a more substantial way in at least one occasion. As early as 1924, an international law scholar of some note, Paul Fauchille, makes the first historically known statement of a conceptual correlation between the right of emigration and the right of immigration:

‘The definitions of emigrant and immigrant are in reality very closely connected, since the individual who on his departure is an emigrant becomes on his arrival an immigrant. Emigration and immigration thus imply at the same time departure from the territory of one state into the territory of another’ (Fauchille 1924: 318).

But Fauchille was not just the first to state what he saw as an underlying tension between two individual rights in international law. In this paper, he explores, as no one else does in the 20th century, the reasons as well as the implications of that tension. He thus sets out to answer two questions that frame the problem:

(1) ‘Has a state a duty to open its frontiers to those who wish to leave its territories? (2) Is there an obligation on a state to admit to its territories foreign nationals who wish to enter them?’ (Fauchille 1924: 318).

For the purposes of this paper, it is Fauchille’s approach to the second question that reveals the inherent tension that he is after. Note that what is worth considering in his account is not just the acknowledgement of an implied right of immigration in the right of emigration, but also the conclusions he draws from their correlativity about state sovereignty and international law. Fauchille starts with a general assertion of the right of the individual ‘to come and go as seems good to him, in order to seek, in a community which he considers more favourable, greater facilities for achieving his end, that is to say, material and moral perfection’ (ibid.: 324). He also observes that the idea ‘that every man is indissolubly bound to his native land’ has long been abandoned by ‘modern law’ (ibid.: 324). We should keep these preliminary remarks in mind as they set the stage for what is probably the first example in the history of international law of an attempt to establish a correlation between the right of emigration and the right of immigration. According to Fauchille, ‘it can hardly be possible for the individual to have an inalienable right to emigrate but no right to settle anywhere’ (ibid.: 324).

Fauchille is of the view that the respect for the right to leave conceptually requires the respect for the right to immigrate. The nature of this correlation becomes clearer to the reader as
Fauchille gives grounds as to why the ‘natural right’ to emigrate cannot go without a ‘natural right’ to immigrate. Restrictions to both rights apply, but only in very specific cases, where the self-preservation of states is at stake - an unoriginal argument that is typically heard. What is more atypical, however, is Fauchille’s conclusion that, given the correlation between exit and entry, the state should ‘therefore refuse to admit the right of emigration on the part of those who would be excluded as immigrants by the laws of the country of destination’ (ibid.: 321).

This a surprising observation which, however, only confirms how strong the correlativity between the two rights is believed to be. Fauchille then goes on to offer historical examples of states who have incurred in this practice:

‘Some countries have laid this down as a general rule (e.g. Hungary, Switzerland, Czechoslovakia, the Serb-Croat-Slovene Kingdom). Others have applied it to particular cases and prohibited the emigration of sick, infirm, or aged persons (e.g. Belgium, China, Spain, Italy, Norway, the Netherlands, Portugal)’ (ibid.: 321).

The upshot of Fauchille’s take on migration rights is a general theory of the relations between individuals and states. But this theory is itself grounded on his particular take on international law as a coherent ‘system of cooperation’ among states that, as such, submit to norms and rules, and whose rights and duties can only be understood from the viewpoint of their mutual correlations. 318 Given migratory movements, as well as the economic interdependence that results from global trade, states are not, in the view of the french international lawyer, the ultimate deciders of who goes out and who comes in. ‘Their sovereignty is not absolute but only relative; every state must take into account the rights of other states’ and ‘the general interests of the international community’ (ibid.: 318). Fauchille’s underlying theoretical assumption therefore is that of a holistic conception of the international state system, where each sovereign decision cannot be taken in isolation from other states. As he also rightly points out, even the right of emigration is not just a right of any individual human being whose duty-bearer is the state of origin only; all states must respect the right of emigration - and there is therefore no reason not think the same of the right of immigration.

The important insights of the french international lawyer about the naturalness of these rights and his insistence that they are integral to ‘the principle of the liberty of the individual’ sheds light on his specific understanding of ‘right’ that guides his thought. In his view, the individual freedoms that exit and entry rights ground are to be protected not only by the state where each individual is placed at a particular time, but rather by all states. Note that the duty-bearer of these ‘natural rights’ is therefore the international society of states as a whole and each individual state by implication. Fauchille’s formulation of the problem thus places a great emphasis on the relation between individual rights and international law, with domestic law operating - at least as far as migration rights are concerned - as a mere facilitator of those two poles. The correlativity between the right of emigration and the right of immigration hence presumes a holistic and unitary vision of international law similar to that adopted by many cosmopolitans. The very framing of both rights as correlative is therefore already grounded on the rejection of a pluralist take on international law or international politics more generally.

The same holistic understanding of international law as a coherent system of rights and duties distribution seemed to be in minds of two other international legal scholars who correlated the right of emigration with the right of immigration. A couple of years after Fauchille’s publication, the american legal scholar Herbert Manisty published an paper entitle
‘The Right of Immigration’ where he develops a discussion about whether immigration is ‘a matter solely within the domestic jurisdiction of a State?’ (1926: 1). Manisty is on this occasion developing a wider argument about the classical legal scholar Hugo Grotius, but his question nonetheless emanates from the generalised acceptance in customary international law of the right of emigration. He does not, however, spell out a direct relation between exit and entry rights, ending with the hope that the theoretical proposal of having a right of immigration enshrined in international law might lead to the understanding that ‘moral rights’ such as these ought to be ‘analogous to legal rights, and therefore be respected and recognised as such’ (1926: 3).

Two decades later, the acclaimed Cambridge international law Professor, Hersch Lauterpacht, raises the same concern of Paul Fauchille, albeit in a more categorical manner:

‘it is clear that for a period of one hundred and fifty years the United States were enunciating in the form of a general principle of an inherent right of man a national policy dictated by the requirements of a country of immigration. But the intrinsic value and justification of that principle is not affected by the circumstance that it was propounded in conformity with or in pursuance of a national interest. Neither is it rendered purely nominal by the fact that the country which propounded it adopted in the twentieth century a rigid policy of limitation of immigration. It is true that without a corresponding right of immigration and naturalization the freedom of emigration tends to become theoretical’ (my own italics, An International Bill of the Right of Man, 1945: 130).

By ‘theoretical’, Lauterpacht meant that the right to emigrate could hardly be seen as a right in the sense of being legally enforceable for precisely the reasons laid out by Fauchille. He added that this right ‘...is not altogether theoretical so long as immigration and naturalisation take place...’ thus stressing the importance of a right to emigration in its own right (1945: 130). Overall, however, his argument in the Bill does point out the great difficulty of qualifying this type of right as a fully enforceable right when both sides of the movement of migration are not guaranteed by right.

Lauterpacht’s hesitations in this regard are indeed symptomatic of what appears to be an unsolved theoretical legal problem: how to ensure rights which depend, for their enforcement, of the coercive power of the state and yet conflict with it at the same time because they challenge its sovereign right over its own community? Lauterpacht realised that positing rights in law meant precisely a backward move against their reification in the ‘state of nature’. What these authors were, after all, facing was the difficulty of having certain rights - which were seen as moral entitlements against any political and legal system - turned into the very object of law. But the modern Hobbesian separation between morality and law - and between ‘rights’ (droits) and ‘Right-as-Law’ (Droit) - made the conflict between the rights of individuals ‘to roam the world’ as if there were no states and the natural rights of states to exclude - as something pertaining to the very ‘nature’ of sovereignty - inevitable and a permanent feature of all contemporary political battles. In turn, this seems to tragically confirm the Hobbesian predicament that in the international sphere is the privileged arena of an eternal conflict between natural right-holders - which human rights law has not appeased but only fuelled, at least for now.
After the signing of the Universal Declaration, legal scholarship is very omissive about the moral or political need - let alone the legal one - to match a human right of emigration with a human right of immigration. References to what was, in the view of René Cassin, an important gap in migration rights, are nowhere to be found and even in the coming decades they appear sparse and in a highly unsystematic manner. Just as before, and in coherence with the liberal tradition that dominated international legal theory and jurisprudence since the second world war, emphasis was put on the right to leave and on the need to establish and enforce a cluster of rights around that right - with the obvious exclusion of the right of immigration.

But as the regional and international dynamics of migration changed and problems related to immigration intensified, the attention of international legal scholars started to shift. An important turn in the history of the cold war helps to explain why some voices began to echo the need to assure a right of immigration with the same scope of the human right of emigration. Indeed, as Nafziger points out, the attention paid to the right of exit over the right of entry revealed the same imbalanced bipolar nature of the cold war and of the postcolonial world more generally.

‘Although emigration under the Accords is generally an “Eastern” issue, immigration is generally a “Western” issue. Within the bipolar framework of the Accords, there is an inverse correlation between emigration and immigration issues: the more a country restricts emigration, the less likely it is to attract immigrants. There is another obvious, even truistic, relationship: in order to emigrate from one country, a person must be able to immigrate into another’ (Nafziger 1980: 408).

For this very reason - and following also some of the arguments reviewed above by Thomas Kleven - it does not come as a surprise that the first staunch defence of a human right of immigration that could pair that of emigration, would come from the third world.

‘The right to leave a country cannot be fully exercised unless there is a right of entry into another country. If there is an obligation upon a state to let everyone leave it, there must be a corresponding obligation on other states to let people enter it without discrimination. Barriers imposed by states on entry, such as quota systems or racial and religious requirements, must be lifted’ (Remarks of Hussein A. Hassouna (1973)).

The speech by Ambassador – took place in a meeting of the American society of international law in 1973. One year before, however, an important meeting of scholars and international jurists - including René Cassin himself - had also taken place in Uppsala University to reflect upon ways to improve the legal guarantees and tools that could bolster the enforceability of the human right to leave and to return, along with the need to incorporate it in international treaties and national legal systems. The thematic focus of the meeting, as well as the declaration that emanated from it - The Uppsala Declaration of 1972 - only confirmed the focus of the (western) international
community with the right of emigration. The colloquium expressly stated four aims drawing specifically on the paper 13 of the UDHR and all the communications and recommendations followed suit in focusing exclusively on that right. However, one of the historical accounts of the emergence of the right of emigration as a natural right starts precisely by highlighting, albeit loosely, a connection between rights of exit and entry. Stig Jagerskiold makes the case that the prevalence of the right of emigration in international law is a result of the fears raised by large immigration trends all over the world:

‘Even before the first world war, and especially during that war, the atmosphere changed. One reason for this change of opinion was the fear in many countries of competition by foreign labour. In some countries the reason was an unwillingness to receive immigrants of a particular race, as in the case of the American Chinese Exclusion Acts. If immigration was restricted, emigration was made more difficult or even impossible’ (1972: 7).

Jagerskiold thus correlates emigration and immigration in a simple way, by pointing precisely to the codependence between the two rights. Once immigration rights of certain people become conditioned, their emigration is also affected. More strikingly was the speech of the Spanish international lawyer Jose Inglés, himself a participant in the preliminary meetings leading up to the approval of the UDHR in 1948, whose concern with a putative human right of immigration - which he describes as implicit in those meetings - makes a swift appearance when he claims that

‘the right of emigration and the right of immigration have been aptly described as two sides of the same coin (…) However the Commission on Human Rights and the Economic and Social Council excluded immigration from the scope of the proposed study’ (1972: 475).

In the same book, the international law scholar Antonio Cassese specifically warned about the nature of the right of emigration and how it carried a specific ‘nature’. Apart from its long history of vindication as a ‘natural right’ in political and legal thought, Cassesse was referring to yet another key feature of this right, as of migration rights in general. In his view, the distinctive ‘nature of this right’ laid in the fact that it functioned in between legal systems. Its validity, as much as its enforceability and exercise depended therefore on at least two states with different legal jurisdictions, which turned migration rights into a specific type of rights:

‘Unlike other human rights and freedoms, its exercise does not produce effects only within a single state; it often affects at least two communities, that of the country to be left and the community of the State to the territory of which ingress is sought’ (1972: 493).

Cassese was in this occasion referring not so much to the correlativity between the right to leave and the right to enter, but in its stead to the challenge posed by the fact that the duty-bearer of the right of emigration could not account for the effects of the exercise of that right - given the practical implication of leaving one country, namely that of immigrating into another one.

The 80s witnessed a similar kind of concern with the lack of correspondence between exit and entry rights. The first known approach to it was, surprisingly enough, one of support for its maintenance as a crucial feature of the ‘distinctiveness of cultures and groups’ and indeed the very possibility of their existence as such. Michael Walzer was the first theorist to coin the lack of

\[15\] Something which the historian David Morsnik also observed, see above.
correspondence between exit and entry rights as consisting of a ‘moral asymmetry’ - even though he was drawing on Maurice Cranston’s idea from his book *What are Human Rights* (1973). In his *Spheres of Justice*, he delves quite deeply into the subject of the relation between emigration and immigration rights, in what is arguably the first sustained and systematic approach to it. He starts by debating the very nature of human association by claiming that

> ‘the distinctiveness is a value, as most people (...) seem to believe, then closure must be permitted somewhere. At some level of political organisation, something like the sovereign state must take shape and claim the authority to make its own admission policy, to control and sometimes restrain the flow of immigrants’ (1983: 39).

He then proceeds to state the asymmetry in a way which already lends itself to a normative statement of its moral virtue and which deserves to be quoted at length:

> ‘But this right to control immigration does not include or entail the right to control emigration. the political community can shape its own population in the one way, not in the other: this is a distinction that gets reiterated in different forms throughout the account of membership. The restraint of entry serves to defend the liberty and welfare, the politics and culture of a group of people committed to one another and to their common life. But the restraint of exit replaces commitment with coercion (1983: 39).

At this stage Walzer touches on an issue which has deeply concerned most authors in democratic theory, namely those dealing with the so-called ‘boundary problem’. He assumes that while the prohibition of emigration represents an act of coercion, the barring of immigrants does not - an assumption which he leaves unexplored. But whether the right to form a community must entail the right to exclude others - and hence, at least in some minimal sense, ‘coerce’ them from entering - is highly controversial. Walzer then proceeds to formulate the problem under paper in terms of a moral asymmetry among rights:

> ‘the fact that individuals can rightly leave their country, however, does not generate a right to enter another (any other). Immigration and Emigration are morally asymmetrical. Here the appropriate analogy is with the club, for it is a feature of clubs in domestic society - as I have just suggested it is of states in international society - that they can regulate admissions but cannot bar withdrawals’ (1983: 40).

Walzer’s *Spheres of Justice* constituted a breakthrough in the literature in many fronts - but it was also particularly original in framing the correlativity between exit and entry rights in terms of a

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16 In this context, Arash Abizadeh has made a convincing argument that just as much emigration restrictions, the impediments upon immigration are equally coercive. His take on the boundary problem leads him to claim that any form of liberalism in these matters logically implies that states owe justification of coercive measures to all those upon which those measures fall, and not just to members of the community which the state supposedly protects. The boundary problem is in this way very related to the asymmetry problem as most of the critics of Abizadeh’s theory tend to come from the communitarian side. For an extensive overview of this problem, see the debate between David Miller and Arash Abizadeh on open/close borders (Abizadeh 2008, 2010; Miller 2010). See also the first account of the border problem by Whelan (1983) and the more recent overview by Sarah Song (2012).
rights ‘asymmetry’. Several problems about his own definition of a right come out of this passage, but in this paper I only briefly sketch the two most obvious ones.

First, Walzer’s employment of the term ‘asymmetrical’ at least raises the possibility of these rights ever being symmetrical - in fact, it surreptitiously stresses the issue of symmetry as a defining or qualifying element of [at least some] rights. One cannot stop imagining what it would mean to reach a moral symmetry between these two rights. What seems evident, however, is that Walzer’s views on this matter show that different positions regarding the relation between emigration and immigration rights lead to, or come from, different understandings of rights and how they may operate within a moral, legal or political setting. Second, there is the problematic analogy with clubs, which many have already dismissed as inappropriate, not least because it immediately begs the question of the pervasive character of political allegiance vis-a-vis that of voluntary associations: unlike clubs, human beings can decide not to belong to a political community only if they attach themselves to another. But they cannot voluntarily be non-citizens. In other words, as human beings we must be citizens of some state. However, we may well decide not to belong to any club.

Regardless of these problems, Walzer’s account does assert the point that the problem is moral, not legal: those who think the ‘asymmetry’ should persist come closer to the communitarian view, while those who protest against its injustice do tend to favour relatively or absolutely open borders and hence stand nearer to cosmopolitanism. As we will see with the case of John Finnis, Walzer views the right of emigration as standing on different philosophical moral grounds than the right of immigration. From a political and moral viewpoint, while the restriction of the right of emigration implies coercion, the limitations to the right of immigration protect the welfare of the members of a community. Hence, while emigration is about individual freedom, immigration is about welfare. And rights to one thing or the other get to be rights for moral and political reasons - not just because they stand in relation to each other, or to some correlative duty.

One year after the publication of Walzer’s most acclaimed book, the American Society of international law issued a draft declaration entitled Human Rights and the Movement of Persons stating general ‘Principles of International Law on Mass Expulsion’ where the acknowledgement of a general absence of correlativity between a right of emigration and a right of immigration comes to the fore in a rather lengthy passage of the final version, approved by more than 30 speakers.

‘Simply put, the issue is this: If people are allowed to leave in large numbers, where are they entitled to go? Through a combination of luck, political skill and diplomatic maneuvering the world has not often had to confront these issues in their starkest terms in the past. Places have been found - eventually - for people who managed to leave. But the question is posed more often now, and much more acutely, perhaps just because the world is growing more crowded, or perhaps because of what Senator Alan K. Simpson has called “compassion fatigue” on the part of the traditional countries of immigration - the United States included’ (Nanda et al., 1984: 347).

17 A point also made by Ann Verlinden (2010), discussed below. Hence, authors as different as Karen Oberman (2013), Arash Abizadeh (2008), Philip Cole (2002) or Joseph Carens (1987) are, in their own way, defending some version of the cosmopolitan outlook on migration issues. David Miller, (2005) Michael Walzer (1983) and John Finnis seem to be closer, if not fully in, the communitarian side.
The declaration goes on to state bluntly that

When we come to these new questions, paper 13 of the Universal Declaration is most unhelpful. The only right of entry described is a right to enter one’s own country. That right, of course, is beside the point in the situation under discussion. Nevertheless, as a practical matter, some right or privilege of entry is indispensable. The right to leave is inoperative unless its beneficiaries manage to find some place to go. (ibid.)

Reference to the lack of correspondence between the two rights is phrased on this occasion as one of ‘operativeness’ of rights, which suggests that if emigration is to consist of a human right than it directly calls, both conceptually and practically, for an entitlement to enter another country. Among the members of the American society of international law, James Nafziger has made the most of the correlativity of exit and entry rights in denouncing the lack of correspondence between them. Perhaps more then any other legal scholar, he has called attention to the internal imbalance of the right of emigration when claiming that

the prescription in the Universal Declaration of Human Rights of ‘the right to leave’ would seem to require states, taken together, to respect the right by not totally barring entry (1980: 13).

But in spite of the significant turnaround in the prioritisation of emigration over immigration rights - as the first massive crises of immigration in subsaharan Africa and the Middle East had by then be made visible to the international community - the legal solutions suggested by most international legal scholars and practitioners only address exceptional cases of immigration, resulting from general violations of human rights of migrants in their country of origin or from war. As such, many of the recommendations in international legal scholarship tended to add more rights to asylum and refugee rights, or to refine these in view of the new realities. Efforts were never made from a legal and jurisprudential viewpoint to actually develop a right of immigration that could mirror the ‘human’ scope of the right of emigration. As Alan Dowty would conclude in one of the first books concerned with close borders propositions, ‘whatever the arguments over the authority of the state to block emigration, there is little dispute over its right to limit immigration (1987: 14).

The concern for the lack of generally accepted right of immigration in international law continued into the 90s. John Rawls was perhaps the first to formulate the problem in an unequivocal manner, even though it only occupied a footnote of his Law of Peoples. When discussing the right of emigration as an essential feature of the liberal tradition, Rawls claims that

‘It may be objected that the right of emigration lacks a point without the right to be accepted somewhere as an immigrant. But many rights are without point in this sense: to give a few examples, the right to marry, to invite people into one’s house, or even to make a promise. It takes two to make good on these rights. Another complex question is how far the right to

Following his comment, Nafziger quotes the Advisory Opinion on the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory by the Permanent Court of International Justice which ‘confirmed treaty rights of Polish nationals to free and secure access to Danzig’. But Nafziger seems to forget that these immigration rights are purely circumstantial and do not afford any comparison to the generalized legal practice of protection and enforcement of a human right of emigration.
emigration should extend. Whatever the answer, certainly the right to emigration for religious minorities should not be merely formal, and a people should provide assistance for emigrants when feasible’ (my own italics, 1999: 74, fn. 15).

Rawls comparison of the right of emigration - in his view, a ‘right without point’ - with the right to marry or be accepted in one’s house face the same sort of difficulties which I previously highlighted in the case of Walzer. Just like in the latter, the right to marry assumes that just as one is initially single in the sense of not being committed to someone else legally, one can also be a non-citizen - a de jure impossibility as I observed previously. The same goes for entering into someone else’s house. Unlike the case of citizenship and nationality, I am legally allowed to stay on the street having left my house, without necessarily entering someone else’s.

This sorts of arguments in favour of the asymmetry sparked a more critical reaction in the literature. It was not, however, until the turn of century that we witness the first systematic account of international law’s overall omission of a human right of immigration. The most categorical formulation of this problem comes to us by Philip Cole who confronts the inconsistencies highlighted above. His is until now the most comprehensive argumentation in favour of a correlativity between exit and entry rights. In his book *Philosophies of Exclusion*, published in 2000, he argues that the lack of correspondence between a moral right of emigration and a moral right of immigration is one of the most striking paradoxes of what he calls ‘the liberal orthodoxy’. In his view,

‘there is a moral asymmetry between emigration and immigration, such that there is a moral right of emigration which cannot be justifiably constrained by a liberal state (…) but there is no moral right to immigration’ (2000: 44).

Cole’s book deserves a more careful exploration than any other reference in our paper, as it takes the correlation of migration rights further than any other author. There are at least three dimensions of his analysis that deserve further excavation. What stands out from Cole’s assertion that the right of emigration requires an equivalent right of immigration is (1) the theoretical grounds on which that correlation stands - namely, following Walzer, that of morality, not legality; (2) the layout of the correlation between the two rights - to which he significantly refers to as an ‘asymmetry’, drawing on Michael Walzer; and (3) the consequences that he derives from it. Each one of these features deserves a more careful analysis.

Regarding the first dimension, Cole fleshes out the problem of the absence of a right of immigration as it stands in both international law - namely in human rights law - and in what more generally he takes to be a general liberal consensus on the rules that govern global migration regimes. The ‘standard position’, he claims, is that ‘a Sovereign state has discretionary power over movement across its borders except in two cases: (1) All agents have the right to exit; (2) Its citizens have the right to enter (ibid.). He gives examples of authors that follow Rawls and Walzer in claiming that if a human community has the right to protect its identity in any sovereign manner, then it is also entitled to exclude others and bar immigration. As Alan Douty claims, ‘departure ends an individual’s claims against a society, while entry sets such claims in motion’ (1987: 14). While Dowty observes that ‘control of entry is essential to the idea of sovereignty’ and ‘the basic character’ of a society, Brian Barry concurs by arguing that ‘emigration

\[19\] In fact, Rawls is drawing on Walzer’s *Spheres of Justice* on this precise point as on many others.
does not change a society in the same way’ as migration does (Dowty 1987: 14; Barry 1992: 286). Dowty thus concludes that emigration and immigration rights ‘are not symmetrical’ (1987: 14).

More recently, a restatement of the case for moral symmetry between emigration and immigration rights has been made by Rainer Bauböck and again Philip Cole. Their account of the problem rapidly redounds in a normative defence of a global open borders system, and Cole goes as far as to remind us of the both the ethical and the aesthetic value of symmetry as a guiding principle of ‘the natural world’ (2006: 1) and one which international law ought therefore to pursue so as to improve its own moral standards. Bauböck, in his turn, offers a clear demonstration of the ‘inconsistency’ of the asymmetry:

‘Imagine you live in a room that has several double doors leading to adjacent rooms. In each room of this building there is a guard who is in charge of maintaining it in proper conditions. If you want to leave, the guard has been instructed to give you the key that unlocks all doors leaving your room. Yet you will still be imprisoned if the entrance doors to all the other rooms are locked and your key does not fit any of them. So it seems obvious that universal freedom of emigration must entail real opportunities for immigration somewhere else, i.e. at least one other open room’ (2006: 1).

Bauböck’s argument is very important for our purposes for he provides a theoretical reason as to why the right of emigration gained priority over the right of immigration in the history of the liberal tradition. In what is probably the most insightful account of the correlativity, he observes that the right of emigration carries a negative meaning which alone justifies its praise within liberalism. In his view, the liberal asymmetry is rooted in a deep formalism similar to that which Thomas Kleven pointed to when referring to ‘self-determination’ as the guiding principle of the relation between states’ rights and human rights. From the viewpoint of the sovereign state, ‘the duty of the guard does not extend beyond giving you his key’ (2006: 2). For Bauböck, this is clearly unsatisfactory:

This is a very formalistic interpretation that does not take into account the material reasons why liberals regard the right of exit as a fundamental freedom. (…) Some of these reasons assume that freedom of movement is intrinsically valuable. The most extreme version was put forward by Thomas Hobbes who defined liberty as “the absence of external impediments” (Hobbes 1973: 66). Charles Taylor has ironically pointed out that on this conception of freedom the absence of traffic lights in Enver Hodsha’s Albania would have made it a comparatively free society (Taylor 1985: 218). Yet traffic lights enable people to coordinate their movements on the road, while Hodsha’s ban on emigration was an arbitrary restriction of free movement by an illegitimate political authority. What liberals value about free movement is the opportunity to realize individual choices unconstrained by arbitrary power, which can manifest itself in restrictions of exit as well as of entry’ (2006: 2).

Bauböck and Cole thus stand against those who, like Michael Walzer, stand for the ‘asymmetry’ and sets in motion a renewed defence of cosmopolitanism and open border regime. His original take on these two has to do with what he sees as a deep ‘inconsistency’ in the liberal orthodoxy. In an paper published after his book, he returns to this point by claiming that migration rights ought to be symmetrical, lest they give rise to the sort of inequalities and violations that they were supposed to protect against in the first place. The controversial nature of the ‘asymmetry’ is in his view deeper than first meets the eye. For it is not just the issue of a non-correspondence
between rights, meaning that even the right of emigration gets compromised if the right-bearer is not assured, at the start, of his right to enter somewhere else. For Cole, the ‘asymmetry’ also creates a second order imbalance between those who are actually granted full rights of exit and entry in at least some countries - such as European Union citizens that can move freely within the Schengen treaty members - and those who are not.

‘It is worth noting here, then, that the asymmetry view has a level of complexity that is often overlooked. It is not simply that agent P has the moral right to do X but no moral right to do Y, but also that agent Q has the moral right to do both’ (2000: 45).

There is a second aspect of Cole’s work that is worth highlighting and which I have already pointed to in Michael Walzer. He refers to rights of exit and entry as moral rights rather than legal ones, thus placing his argument in the realm of moral and political theory, rather than a strictly legal theory of rights. Indeed, most scholars that have recently approached this supposed gap in human rights come from political theory, which suggests that the problem is political rather than strictly legal. But in framing these rights as moral, Cole automatically places what he sees as a logically necessary correlation within ethics, rejecting from the start any discussion of legal rights as pertaining to a positivist tradition which he curiously deems illiberal. Hence, deriving a right of immigration from the right of emigration is in, his account, a moral question - not a legal one.

However, Cole adds to this the important caveat that the asymmetry is also conceptual. On the one hand, the incoherence of the asymmetry may be considered a question of ethics from the internal viewpoint of that tradition that has been known to thrive through the language of rights and their universalization: the liberal tradition. However, in his view the incoherence is also conceptual due to its inherent bias about state responsibility regarding migration. For him, there is no clear reason, even outside the liberal approach, as to why the state should be more limited in regulating emigration than it is in regulating immigration. ‘The two stand and fall together’ (46) He concludes this point by reminding liberal theorists that a perfect symmetry between rights of emigration and rights of immigration may also obtain by the total refusal of any rights on either side of exit and entry. Here, we face the case of an illiberal symmetry. And Cole does make the relevant point that the reasons that a state might have to limit immigration may

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20 Of course it could be argued, and Philip Cole does seem to assume, that given the moral necessity of this correlation, then it follows that law - or at least international law or human rights law - should reflect that. But to assume that was is morally required is also legally required is something that, in itself, requires justification and represents, anyhow, a commitment to the supervenience of morality upon law. Unfortunately, these issues are beyond the scope of Cole’s work, who purposively couches the problematic in terms of ‘moral rights’ due to the limitations of what he calls a positivistic take on rights that reduces rights-talk to positive law, and he simply takes as granted that whatever is morally given in terms of rights should be translated into the corresponding legal provisions.

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often, albeit not always, be precisely the same reasons that could be invoked to limit emigration as well.21

A third important aspect that comes out of Cole’s account is about the consequences of the liberal asymmetry among migration rights. One of the logical implications of the asymmetry, in his view, is not just about the imbalance that the asymmetry creates among countries of origin and countries of destination. What the absence of a human right of immigration leads to is to a \textit{de facto} limitation of the exercise of the right of emigration. Indeed, to the extent that the right to enter is not ensured to all persons that wish to immigrate into a country, emigration is also compromised. Cole is thus pushing the asymmetry forward so as to ground the argument that not only the right to immigrate, but also the right to emigrate, becomes more limited, if not legally, at least from the practical viewpoint of its exercise.

Furthermore, he criticises those, like John Finnis, who stand for the moral and legal validity of asymmetry. According to 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 whatever the foreseeable consequences for the economic, political and cultural life of its citizens’ (1992: 207).

Cole proves Finnis’ argument in favour of the ‘asymmetry’ to be, however, deeply inconsistent:

‘If there is a moral right of immigration, then it is true that the individual holds it against all states, but can enact it only against one state at a time; and if there is a moral right to emigration, one can enact it against only one particular state at a time, while one still holds it against all states (one has the right to leave any state). In that sense, both rights impose duties upon all states at the level of theory, but in practice both would extract that duty from one particular state at any given moment’ (2000: 50).

He thus makes a very clear case of logical incoherence on the side of those who stand for the ‘asymmetry’. His point is that the duty-bearer of the right of emigration is not only, unlike Finnis thinks, the state from which the migrant departs; from the human rights perspective of the declaration, the claim is against \textit{all} states to let \textit{all} people leave, should they desire to do so. Correspondingly, for Cole, the duty-bearer of a right of immigration would also have to be \textit{every} state in the world, at least in theory.22 In much the same way, Ann Dummett had called attention to what she saw as ‘an obvious \textit{lacuna} in international law where agree propositions have stopped short of saying what the assumptions they rest upon seem to impel them to say’ (Dummett 1992:

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21\footnote{Indeed, a quick overview of the most known historical cases of emigration prohibition - namely revolutionary France and the Soviet Union - shows that closed-border systems were justified on the very same grounds of the restrictions to immigration that liberal democracies practice today still. The appeal to the need to ensure public order, protect private property or natural resources, and the more general political allegiance and loyalty have legitimized, although in different ways and in variable degrees, the limitation of emigration as much as of immigration rights.}

22\footnote{Cole never embarks in any idealistic belief that a human right of immigration would be easily put into practice, either domestically or internationally. What he does claim is that a moral right of immigration should follow, in theory, from a right of emigration.}

27
She adds to this what seems to be the most blunt statement of the asymmetry so far, stating that exit and entry rights are logically ‘complementary’:

‘Logically, it is an absurdity to assert a right of emigration without a complementary right of immigration unless there exists in fact (as in the mid-19th century) a number of states which permit free entry. At present, no such state exists, and the right of emigration is not, and cannot be in these circumstances, a general human right exercisable in practice’ (Dummett 1992: 173).

John Finnis’ response to Dummett (cited above) does provide some clues as to why many authors defend the same position. What seems to be in his mind, as well as Rawls’ or Walzer’s views, when reflection upon the right of emigration, is its precise definition as corresponding to a duty. Hence, the difficulty of coupling the right of emigration with a right of immigration has to do with who holds the duty not to interfere with such right. In their views, the duties of state grow as we move from emigration toward immigration. As I mentioned earlier with regard to Thomas Kleven’s historical materialist approach to the problem, while the sovereign right of states to stop emigration appears as the violation of their own citizens moral right to self-determination, barring immigration is a question of the state’s own right to self-determination - a right that is exercised, furthermore, vis-a-vis foreigners to whom the state has no moral or political relationship. From the view point of international legal theory, the problem is hence one of state responsibility toward strangers. As Walzer points out, there is no ‘global state’ that can owe duties to every citizen in the world and hence right of entry remains a defining feature of an international order governed by parochial sovereignties (1983: 39).

Following this, I have attempted to highlight throughout this paper that, historically, the right of emigration did not emerge in international law as the preserve of one state vis-a-vis another. While the enforcement of the right of entry in one state predominantly depends on the domestic legal system till this day, the right to leave the jurisdiction of a political authority was already the subject of international law and transnational legal regimes much before the very birth of the sovereign state and its control of territorially established borders. Hence, from the viewpoint of the modern geopolitics that came out of Westphalia, it is easy to understand how the right of emigration was prioritised over the right of immigration, for the history of the rise of modern states is also the history of the need to guarantee the rights of its own subjects, and later on, of its citizens and ‘nationals’. The idea that states ought to grant rights to outsiders - at least those who fell outside of traditional immunities that date back to the Greek and Roman periods (such as diplomats, merchants and religious and state officials) - was a later development, and one which has always remained secondary, given the historical pedigree of popular sovereignty that came to ground democratic legitimacy. The social contract consensus that still undergirds modern liberal societies had since then established that states ought not to grant rights - or do so only minimally and under special circumstances (such as those of prisoners of war) - to those who were not in a position to legitimise the authority of the state anyway. What for Philip Cole ends up being the core theoretical and logical inconsistency of what he calls the ‘asymmetry’, can neither be easily discarded as historically accidental - nor easily resolved by the ideal of perfect symmetry as he pretends.
Ann Verlinden’s more recent analysis of the literature on free movement comes to the same conclusion of this paper: standing for either the asymmetry - as most communitarians do, including Michael Walzer who coined the term - or for symmetry - such as Cole - immediately places one in either side of the debate (2010). Hence, the question as to whether a right of emigration can correlate to the right of immigration - either legally, conceptually or logically - is a moral concern. This paper shows that the great majority of scholars who have been concerned with the correlativity were either political or moral theorists (or both). This descriptive insight might suggest that correlations between rights can hardly be dealt with as a legal issue unless they happen in the context of a single legal system or jurisdiction - such as in other cases where codependence between rights obtains. But that is not the case of the rights in question: the very act of perceiving the relation of the right of emigration with that of immigration as problematic already requires taking on a philosophical standing which lies beyond legal theory strictly speaking.

This applies equally to the correlation of migration rights with duties. The relation between the two moral rights of exit and entry and the moral responsibilities and duties they entail seems again to be a question pertaining to morality and international ethics. Verlinden highlights the moral and political nature of the problem when claiming that the very appeal to inconsistency is a question of democratic coherence in the international realm, about the equal treatment of citizens and non-citizens (see also Loewe 2009). Restrictions on immigration in those cases where there are none on emigration ‘necessarily entails that liberalism comes to an end at the national border’ (2010: 54). This is otherwise confirmed if we consider that perfect symmetry would also obtain in case there was no right of emigration whatsoever. Again, if all states were to condition emigration in the same way they limit immigration the asymmetry would not emerge as a problem. While there might be many legal aspects relating to what both Walzer and Cole, on the different sides of the debate, have referred to as a central feature of the liberal order, it is thus the case the problem is fundamentally a moral and political one, namely, that of knowing which rights a democratic state can vindicate for citizens which do not yet belong to the political community and in many cases are not even physically present within it.
CONCLUSION

The theoretical material gathered in this paper attests to three important aspects regarding the relation between a right of emigration and a right of immigration. First, both political and moral philosophy and, to a lesser degree, international legal theory show, in their history, a permanent and unexplored concern with the question of a potential correlativity between the two rights. It is fair to say that most political and legal theories of migration rights do not even mention the asymmetry - or any sort of correlativity for that matter - and it is uncertain whether this is simply because most scholars prefer to focus on other issues - such as the open borders debate or the ‘boundary problem’ - or because they already assume the asymmetry as informing these and other concerns. Even in those cases where both emigration and immigration rights are discussed in tandem, the correlativity between one and the other is not always there. This seems to be the case especially when we look at the so-called founders of modern international law - with the qualified exception of Hugo Grotius - but also, more generally, in the history of legal and political thought. Notably, any systematic suggestions of the correlativity appear in the modern period and more specifically in the 20th century. As our sources show, the correlativity of the two rights only becomes an issue when, legally speaking at least, emigration from one country implies immigration into another - which was not the case when the globe was not divided into sovereign nations. In this light, the comparative reasoning of Grotius is thus even more astonishing, for he puts the emphasis on the general balance among nations between emigres and incomers, and stands for exit and entry rights on the basis of the economic advantages of both migration flows for any state.

Second, the way in which this question in the history of political thought and international legal theory is framed takes the shape of an ethical and political concern in most cases, which has not been met by a systematic account from the viewpoint of legal philosophy - let alone the perspective of rights theory. This might be because the great majority of approaches to both emigration and immigration rights are immersed in deep political and moral commitments that determines how the relation is perceived and conceived. I noted that, for example, those who look at the correlation between emigration and immigration rights as being asymmetrical - namely Michael Walzer, who coined this formulation, and Philip Cole who explored it further - are employing the term ‘asymmetry’ to make a prescriptive point within their own research agenda in moral and political theory24. Whilst correlativity is thus approached mostly from a normative stand, exit and entry rights have been analysed by both political and legal theorists from a descriptive perspective. But this approach never looks at both rights as being related to each other in even a minimal way. Hence, most legal-theoretical approaches to emigration and immigration rights were excluded from this paper as they never arrive at establishing any sort of connection between the two rights, which is precisely what is at stake in this paper. As such, we conclude that correlativity between exit and entry rights remains a preserve of normative political theory and moral philosophy.

Third, I observe that what authors generally take to be the nature of the rights under analysis here is left highly undefined. With the possible exception of the early modern language

24 And yet, in spite of their implicit agreement on the appropriateness of that concept, they hold radically opposed views on it.
of ‘natural rights’, most of the experts that this paper revisited offer very little discussion about the very notion of ‘right’. This is especially the case of those theories that frame exit and entry rights in terms of ‘human rights’ - arguably the type of rights that raise more controversy among rights theorists. What also seems lacking here is a further investigation that questions the extent to which emigration and immigration rights might be very distinct from other rights; and whether or not that distinctiveness - their special character as David Morsnik observes - challenges more common understandings of rights as they put different legal systems and more than one duty-bearer in relation with each other.

These aspects set the stage for a more detailed account of this relationship from the viewpoint of descriptive legal theory. On the one hand, most descriptions that have so far been advanced by most authors are too general and isolated to provide a profound understanding of what exactly is at stake here. Is it a problem of correlativity between rights that are different in both their legal formulation and philosophical grounding? Are the historical circumstances that led to the priority of emigration rights over immigration rights sufficient to account for the lack of a perfect correspondence between them at the level of international human rights law? Or are they simply not related at all and have been linked only accidentally? Do exit and entry rights have different duty bearers or do they point to one? To what extent do these questions depend on specific assumptions about what rights are, what international law should be, or the demise or persistence of state sovereignty? Are we talking about moral rights or legal rights - and what are the implications of referring to them in these terms?

On the other hand, highly detailed excavations of the problematic - like that of Philip Cole - frame the correlativity with a normative end in mind. It might be that the problem is normative by definition. But if that is the case, the language of rights, correlation and asymmetry needs further digging. Indeed, the correlativity between entry and exit rights cannot be taken for granted, and further explanations are required to avoid the counterargument that the correlativity is being couched as asymmetrical so that we can envisage a world where the symmetry of rights is the only possible way of ensuring an internally coherent legal order for the whole world. These worries should be taken into account. However, they do not halt the need for further research on the matter; rather they only reinforce the urgency for a clearer layout of the sort of relations that might be theorised between two rights that lie at the core of international migration and hence of international law more generally.

My historical account of some of the most explicit instances of correlativity between the right of exit and the right of entry demonstrates that there is a fundamental misunderstanding that has however become the central bedrock of any claim about how migration rights are to be related in the context of human rights law and the international legal theorisation of state sovereignty and responsibility, in assuming that only the individual right to movement is natural vis-a-vis the supposedly artificial power of states to bar movement. What is at stake in contemporary debates about borders and migration rights is the conflict between two visions of what natural rights are, and namely whether the natural right of individuals to migrate whatever they please can surmount, from both a moral and a legal viewpoint, the equally natural right of states to control their borders. I conclude that the cosmopolitan argument that a natural right to movement should supersede the state’s positive right to bar entry is already fraught with liberal anachronism as it purposively neglects one important part of the history of natural law tradition, in which the vindication of the sovereign’s right to rule is placed on the same equal natural grounds.