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The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime

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Abstract This paper draws upon Hannah Arendt's idea of the 'right to have rights' to critique the current protection gap faced by refugees today. While refugees are protected from refoulement once they make it to the jurisdiction or territory of a state, they face an ever-increasing array of non-entrée policies designed to stymie access to state territory. Without being able to enter a state capable of securing their claims to safety and dignity, refugees cannot achieve the rights which ought to be afforded to them under international law. Drawing upon both legal theory and political philosophy, this paper argues that refugees today, just as the stateless in Arendt's time, must be afforded the 'right to have rights', understood as a right to enter state territory.

Keywords Refugees · Asylum · Right to enter · International law · Hannah Arendt

Introduction

In May 2009, approximately two hundred Somali and Eritrean nationals left the coast of Libya aboard three vessels in an attempt to make it to the shores of Italy. Like thousands of asylum seekers before and after them, they had hoped to be able to seek protection in the European Union (EU). Libya has become a major launching post for African asylum seekers attempting to cross the Mediterranean, as war and persecution continue to affect a number of African nations. However, as part of a policy of forcible returns initiated in May 2009 (Giuffré 2012, 693), Italy intercepted the boat of asylum seekers before they could reach Italian waters, subsequently returning the group to Tripoli and preventing them from claiming protection in Italian territory.

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This interdiction and forcible return of asylum seekers was challenged in the landmark case of *Hirsi Jamaa* in the European Court of Human Rights (*Hirsi Jamaa* 2012, 59). In his concurring opinion, Judge Pinto de Albuquerque noted that the 'ultimate question in this case is how Europe should recognise that refugees have "the right to have rights", to quote Hannah Arendt.' This paper takes up Albuquerque's 'ultimate question' through a legal and theoretical analysis of Arendt's critique, where the 'right to have rights' is examined in its relation to the right to seek asylum, realised as a *right of entry* into a territory.

The *Hirsi Jamaa* case is not unique. Recent decades have seen states of the Global North extraterritorialise their border controls in an attempt to prevent asylum seekers from reaching their territory and subsequently asking for protection (Zaiotti 2016). With the treatment of refugees and asylum seekers deteriorating around the world, refugee advocates continue to argue that 'seeking asylum is a human right, which means everyone should be allowed to enter another country to seek asylum' (Amnesty International). However, the international community has failed to provide a legally binding 'right to seek asylum' within international law. Despite enshrining a right to *non-refoulement* within the Convention Relating to the Status of Refugees 1951 ('*Refugee Convention*') and other human rights instrument, the right to seek asylum, outlined in the Universal Declaration of Human Rights ('*UDHR*'), has never been codified into a legally binding treaty. Likewise, attempts to create a Declaration on Territorial Asylum fell by the way side in the 1970s, leaving no binding right to enter under international law. This failure has left a 'protection gap'; refugees are protected from *refoulement* once they come under the jurisdiction of a state, but they are often prevented from accessing a state in the first place. This gap has been exploited by states of the Global North, who have implemented a range of extraterritorial *non-entrée* policies designed to prevent access to would-be asylum claimants.

While scholars have address this lacuna through developments in international law (Moreno-Lax 2008; Gammeltoft-Hansen and Hathaway 2014), this paper seeks to compliment this scholarship via a theoretical approach making reference to Arendt's notion of the right to have rights. Criticisms of the current international refugee regime are analogous to Arendt's critique of the classical 'Rights of Man', which she considered to be powerless as long as no legal or political guarantee existed to uphold them for stateless persons. In responding to this problem, she advocated for the 'right to have rights'—that is, for all human beings to have the right to belong somewhere, to be recognised legally in some form by a political entity—in order to achieve the 'new guarantee' of 'human dignity' that she sought (Arendt 1973, ix). In recognition of their human dignity, states must recognise that refugees have the 'right to have rights' and must thereby allow those seeking asylum access to their territories, claim protection and have a place to belong.

This paper begins with an analysis of Arendt's articulation of the problem of statelessness in the aftermath of World War Two—without a state to protect them, refugees are left without enforceable rights. This problem is still relevant today, as outlined in section two—while states now owe people within their jurisdiction and territory obligations under international human rights law, they have implemented a range of *non-entrée* policies to prevent refugees gaining access to their territories. Section three responds to this problem with reference to Arendt's 'right to have rights', while section four considers the right to enter under contemporary international law.

Finally, we respond to the potential critique of an erosion of sovereignty and an opening up of the 'floodgates' from those who may seek to deny a right of entry for those seeking asylum.

Arendt and Statelessness

Writing after the Second World War, the existence of a significant population of stateless persons prompted Hannah Arendt to reflect upon their rights. In the Preface to the First Edition of *The Origins of Totalitarianism*, Hannah Arendt writes of an era of calamity that has produced 'homelessness on an unprecedented scale, rootlessness to an unprecedented depth.' (Arendt 1973, vii). For those affected, 'powerlessness has become the major experience of their lives' (Arendt 1973, vii). A new group of people, what Arendt calls in German the '*heimatlosen*', the stateless, emerged from the calamity of the war (Arendt 1973, 277). The term 'stateless' for Arendt refers to both *de jure* stateless people and *de facto* stateless, which she sees as 'identical with the refugee question' (Arendt 1973, 279). Writing before the development of the *Refugee Convention* and the Statelessness Conventions, she saw the situation for both as identical—while stateless persons may be formally without citizenship, refugees (who may also be formally stateless) have no effective citizenship which can guarantee their rights..

For Arendt, a new response was needed for these people. The legacy of the 'Nazi movement, then a world war, and finally the establishment of death factories', imperialism, totalitarianism, anti-semitism and the displacement of millions of people:

> …one after the other, one more brutally than the other, have demonstrated that human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities (Arendt 1973, ix).

Arendt drew attention to what she saw as the feckless nature of the Rights of Man, which were ineffective as soon as they were not tethered to citizenship:

> Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as a man, his human dignity. Only the loss of a polity itself expels him from humanity (Arendt 1973, 297).

As Larking (2012, 58) highlights, Arendt's scepticism of human rights arose from 'the basis that these rights carried very little weight in international law before World War II. Individuals were entitled to claim rights — if at all — only against the state of which they were citizens.'

Thus, Arendt is in a tradition that encompasses Bentham, Burke and Marx in evincing a suspicion or hostility with regard to natural rights. Arendt is particularly

sympathetic to Burke, who famously considered natural rights to be 'nonsense upon stilts': 'The pragmatic soundness of Burke's concept seems to be beyond doubt in the light of our manifold experiences' (Arendt 1973, 299). To Arendt, natural rights do not go far enough or are insufficiently compelling: 'the world found nothing sacred in the abstract nakedness of being human' (Arendt 1973, 299). Without the protection of a state, 'it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.' (Arendt 1973, 291) For Arendt, this was no speculative concern—it was a lived experience that came out of being a refugee herself for nearly two decades. As Bernstein (2005, 49) writes, 'It was these personal experiences that impressed upon her so deeply the radical contingency of events – a sense of contingency that influenced and pervaded all her thinking'.

What has emerged in modernity is a political state of ethical and legal exception, where apolity represents 'a space devoid of law, a zone of anomie' (Agamben 2005, 50). Refugees find themselves in a situation where they lack citizenship rights and with only weak enforcement of international law, they are often unable to secure their human rights and exist in a zone 'outside the pale of law' (Arendt 1973, 276). They have, in Giorgio Agamben's phrase, 'put the originary fiction of modern sovereignty in crisis. Bringing to light the difference between birth and nation, the refugee causes the secret presupposition of the political domain – bare life – to appear for an instant within that domain' (Agamben 1998, 131). The collapse of moral standards may quickly follow, as Arendt writes, 'Man is a social animal and life is not easy for him when social ties are cut off…Very few individuals have the strength to conserve their own integrity if their social, political and legal status is completely confused' (Arendt 2007, 271). The risk she identifies is 'that we expose ourselves to the fate of human beings who, unprotected by any specific law or political convention, *are nothing but human beings'* [emphasis added] (Arendt 2007, 273). That is to say, that refugees are those who lack a state to protect their rights, and thus are human beings whose rights are in peril. Human beings may be either stateless or members of a state, but to have their humanity *recognised* requires political membership and belonging.

On this account, there is something else which needs to emerge within the political in order to guarantee human dignity. Such dignity is not reducible to physical life; for Arendt, it emerges in a political context, a view shared by Jean Améry, a writer who lived through the horror of Auschwitz: 'It is certainly true that dignity can be bestowed only by society…and the merely individual, subjective claim ("I am a human being and as such I have my dignity, no matter what you may do or say!") is an empty academic game, or madness' (Amery 1980, 89). For Arendt, this is not achieved via an appeal to natural rights, but rather a political principle, 'We became aware of the existence of a right to have rights' (Arendt 1973, 296). But what exactly does it mean to have a right to have rights? What is the conception of the human subject that informs it, and what legal grounding is required to provide the guarantee of human dignity? What kind of a political configuration or legal principle does she in fact recommend? Gündoğdu summarises Arendt's approach:

> Arendt follows the Socratic example when she concludes her inquiry aporetically and refuses to resolve the perplexities of human rights by grounding them in a

> new normative foundation or by putting forward a new institutional model. Her analysis suggests that the task of critical inquiry is not to offer such a resolution but instead to carefully examine how these perplexities become manifest in human rights norms, institutions, and policies as well as how political actors navigate and renegotiate them in response to challenging problems of rightlessness (Gündoğdu 2015).

Thus, Arendt offers no 'new normative foundation' nor 'institutional model' to account for the guarantee she calls for—rather remaining within a Socratic mode of thinking through aporia and perplexity, a deliberate gesture that enables us to continually reformulate and recontextualise our understanding of the politics of human rights. For Arendt, normative claims within the political are just that—the products of political activity, and not their ground (Muldoon 2012, 639). While she emphasises the need for political enfranchisement and law to guarantee the dignity of refugees, she does not herself articulate what such laws might be.

Arendt's critique of human rights is still relevant for the contemporary struggles of refugees; yet, before elaborating further on Arendt's notion of the 'right to have rights', it is necessary to articulate the situation faced by refugees at present, which differs in many respects from that faced at the time Arendt was writing *Origins*.

Access to Territory in a World of Fortresses

The political problem that Arendt identified decades ago has reached a comparable level of urgency in the twenty-first century. The total population of concern—displaced persons, refugees, and asylum seekers—has reached a level not seen since the end of the Second World War (United Nations High Commissioner for Refugees 2016). Arendt's articulation of the phenomena of statelessness is also unfortunately just as urgent today. While there have been significant developments in human rights law since Arendt's *Origins,* international law is still bound to state sovereignty and requires good faith implementation at the domestic level.

For Arendt, the problem for the stateless was political membership—that without citizenship, refugees had no state to uphold their rights. At the time Arendt was writing *Origins*, the *Refugee Convention* did not yet exist, and she took a sceptical view of the nascent *UDHR* (Menke 2007, 1–2). Yet today's system of international human rights law has moved beyond citizen rights. Today, while states remain the duty bearers of human rights, international human right treaties now obligate states to uphold the rights of all people within their territory and subject to their jurisdiction (Larking 2012, 58).[1] However, as a general principle, 'states do not assume international legal duties in the world at large, but only as constraints on the exercise of their sovereign authority' (Hathaway 2005, 161). States are bound to respect human rights only when subjects come under their sovereignty. This leaves a gap

[1] For example, see the *International Covenant on Civil and Political Rights* Article 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

between obligations owed to those under the power of the state and those yet to come under that power. Thus, the problem today is not access to citizenship but access to territory.

States which have signed the *Refugee Convention* owe refugees in their territory and under their jurisdiction certain rights—rights they have promised under international law. These rights have been institutionalised through the practice of 'territorial asylum – the processing of asylum applications on the territory of a nation-state after a refugee crosses a land or sea border to reach that territory' (Hansen 2017, 7). While this is not the only way in which refugees can receive protection, it has become the dominant way to ensure refugees are afforded their rights under the *Refugee Convention* (Hansen 2017).

Yet in an attempt to escape these legal obligations and prevent access to territorial asylum, states of the Global North have increasingly pushed their borders beyond their territories, implementing migration control activities on the high seas and in third states (Hirsch 2017). While on one hand, asserting the importance of solidarity and refugee protection, the Global North simultaneously erects barriers to ensure refugees are unable to seek protection in their territories. As Gibney (2004, 2) argues:

> A kind of schizophrenia seems to pervade Western responses to asylum seekers and refugees; great importance is attached to the principle of asylum but enormous efforts are made to ensure refugees… never reach the territory of the state where they could receive its protection.

Irregular migrants, particularly those who attempt to seek asylum, present a challenge to the state's claim to sovereignty because they challenge a core component of how the state defines itself—control over its territory. As Bigo (2002, 65) explains, the global panic of irregular migration is 'anchored in the fears of politicians about losing their symbolic control over the territorial boundaries'. Since control over territory is closely connected to the idea of state sovereignty, a lack of enforcement of immigration laws is often interpreted as evidence of a lack of sovereignty. Uncontrolled migration therefore challenges the state's power to decide who is included and excluded, thereby challenging nationhood, national identity and sovereignty (Hirsch 2017, 3). This fear of a loss of national identity is deeply connected to xenophobia, with concerns that increased migration will result in a reduction of national identity and racial integrity. This is seen in the far-right rise in the EU, USA and Australia, with political parties running on anti-immigration platforms (Ayre 2016; Bohman and Hjerm 2016; Cowger et al. 2017).

To address this perceived attack on national identity, states have depicted those who seek protection as security threats, asylum seekers are treated as potential hostiles rather than those fleeing hostilities. The international system of refugee protection is being constantly eroded by a dominant securitisation discourse—a 'governmentality based on mistrust and fear of the uninvited other' (Bigo 2002). In response to this perceived threat, states have expressed their sovereignty through tighter and more regulated migration controls—asserting, relocating and redefining their borders (Weber 2006, 37). This paradigm shift has seen states move away from 'refugee protection' towards 'border protection' (Hyndman and Mountz 2008, 253).

Increasingly, these border controls are taking place beyond the territory of the state, through the use of *non-entrée* policies—'the array of legalized policies adopted by states to stymie access by refugees to their territories' (Hathaway 2005, 291). These migration controls effectively make it impossible for potential asylum claimants to enter a state 'regularly', forcing them to remain in their country of origin, seek out dangerous and unauthorised pathways to seek protection or wait for decades in transit countries which often have not signed the *Refugee Convention*, are still developing and have less capacity to protect refugees and uphold their rights. These policies have proved effective, with 40.8 million people internally displaced in their own countries, and 86% of the world's 21.3 million refugee residing in developing countries (United Nations High Commissioner for Refugees 2016). Without being able to enter a state capable of securing their claims to safety and dignity, refugees are not able to achieve the rights which ought to be afforded to them under international law. As Hathaway (2005, 279) notes, 'the stakes are high: refugees denied admission to a foreign country are likely either to be returned to the risk of persecution in their home state, or to be thrown into perpetual "orbit" in search of a state willing to authorize entry.'

It is because of this lack of safe and legal pathways to protection that the world has witnessed such large movements of asylum seekers through irregular routes. Without a sovereign state to protect them, refugees must circumvent the sovereignty of other states in order to save their own lives. These irregular routes often involve dangerous journeys at sea, the use of people smugglers and the bypassing of border guards and security controls (Larking 2012, 69). It is clear that a strict visa system can force people to utilise clandestine channels—those living in countries of asylum without basic rights have but few options at their disposal to protect themselves and their families. A study by Czaika and Hobolth (2016) found that while restrictive visa requirements had the effect of reducing asylum numbers, they also had the effect of increasing irregular migration.

Yet rather than developing safe pathways, the Global North has responded to these irregular attempts to seek safety through more violent enforcement of their extraterritorial borders (Jones 2016b). This is seen most clearly in the border control policies implemented by the USA, EU and Australia. Navy and custom vessels regularly patrol the high seas seeking to interdict potential asylum seekers and return them back to where they came from. This is seen in Australia's 'turn back' policies (Schloenhardt and Craig 2015), the Italy-Libya arrangements (Brathwaite 2005; Giuffré 2012) and the interdiction policies of the USA (Dastyari 2015).

Agreements have been made with transit countries to deter, detain and deport asylum seekers (Nethery et al. 2013; Gammeltoft-Hansen and Hathaway 2014; Nethery and Gordyn 2014). The EU's Turkey deal allows the EU to return refugees who make it into the EU back to Turkey, preventing them from making an asylum claim (Gogou).

Intercepted refugees are sent to 'offshore processing', such as Australia's Pacific Solution or the US's Guantanamo Bay, where they wait for years in inhumane conditions while their claims are assessed and they are resettled to a 'safe third country' (Dastyari 2015; Gleeson 2016). Physical barriers are erected and guarded along the borders of Europe, and the US President proposes a similar border fence along the US-Mexico border (Jones 2016a).

These extraterritorial *non-entrée* policies have become popular because they exploit an 'implementation gap' in international law (Türk and Dowd 2014, 282): once a

refugee makes it to a state's territory they cannot be returned to harm, yet refugees have no right to enter under domestic law. Extraterritorial immigration controls make it difficult for intercepted refugees to enforce their rights under international law. There is often limited recourse for those denied a visa, detained extraterritorially or towed back at sea. The refugee's physical location beyond the borders of the state makes access to asylum dependent 'not on the refugee's need for protection, but on his or her own ability to enter clandestinely the territory of another country' (United Nations High Commissioner for Refugees 1994, 92). Thus, from the state's point of view, extraterritorial controls succeed in preventing asylum seekers access to state territory, allowing states to escape their obligations under international law. In order to address this gap, states must recognise, as Arendt called for, the existence of a right to have rights.

The Right to Have Rights

The 'right to have rights' is a formula introduced by Arendt in her seminal work, *The Origins of Totalitarianism*, in which she recalls the plight of millions of refugees left without a state to protect them:

> We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation (Arendt 1973, 296–297).

The powerlessness of the 'natural' Rights of Man extends also to their instantiation as a right to asylum, 'the only right that had ever figured as a symbol of the Rights of Man in the sphere of international relationships' (Arendt 1973, 280). Arendt observed that the right to asylum:

> cannot be found in written law, in no constitution or international agreement…It shares, in this respect, the fate of the Rights of Man, which also never became law but led a somewhat shadowy existence as an appeal in individual exceptional cases for which normal legal institutions did not suffice (Arendt 1973, 280–281).

Consequently, to be effective, the 'right to have rights' requires instantiation at the level of international law in the form of a right to entry for people seeking asylum, as Kesby (2012, 13) notes:

> Thinking with and beyond Arendt, the articulation of the right to have rights… is the right to enter and reside in a state. In the present international system of states, it is imperative that each person has a 'place in the world' in the sense of a place of lawful residence and is not constantly shunted between states.

The importance of legal recognition points to the necessary condition of the enforcement of such laws—that there be a political entity which can uphold (or be held accountable to) them. However, a claim to membership or belonging in their territory is precisely what states are reluctant to grant: 'What is unprecedented is not the loss of a home but the impossibility of finding a new one' (Arendt 1973, 293).

Thus, interpretation is required to understand how the 'right to have rights' might be figured in international law; as Judge Pinto de Albuquerque observed, it is a question of determining how states should recognise the existence of the right to have rights. A normative consideration arises in this context, if, as described below, political participation is fundamental to human existence, this constitutes an 'anthropological universalism' (Benhabib 1996, 195). There is a doubling of the meaning of rights in Arendt's concept: it refers both to *moral* right—the needs of human being(s)—and *positive* right, the embodiment of the moral rights claim in law (Ingram 2008, 403). It should be noted that Arendt's conception of the 'right to have rights' is not limited to a legal or territorial framework, but also relates to her view of political participation as that which is proper to the human condition (Ingram 2008, 412). As Balibar has argued, the 'right to have rights' is really a 'right to politics' (Balibar 1994, 212–213). As discussed above in regard to natural rights, Canovan argues that for Arendt, 'The point is that equality of rights is not something we have been given by nature, but a political project to be realised, "an equality of human purpose"' (Canovan 1995, 241).

For Arendt, an important part of human identity is being able to live among and participate with others in a shared political world—indeed, it is of the essence of being human: 'the Romans, perhaps the most political people we have known, used the words "to live" and "to be among men" (*inter homines esse*)… as synonyms' (Arendt 1998, 7–8). Living among others is what enables action, in the political sense—to engage in the political and to introduce new initiatives into the shared space of a polity. Action 'corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world' (Arendt 1998, 7). In *The Life of the Mind*, she writes that 'plurality is the law of the earth'—the condition of diverse human beings having to find a way of living together (Arendt 1978, 18). One could link this to her call for a new law for the protection of human dignity; the law would be that which responds to this condition of plurality and which takes it into account.

To live is to live among others. As Benjamin (2010, 5) writes: 'relationality, as an original condition whose location and thus a sense of location as always already present setting, is identified by the term "being-in-place"…the polis marking in advance the necessity of the placedness of human being'. If being-in-common and being-in-place (placed-ness, that is, human beings are those who dwell together in place, in a city or state) are proper to the human being, then to exclude a human being from the polis is also to deny them their very humanity. To be recognised as human is not simply to be recognised in a state of bare life—to be fed and sheltered—but to have access to the law and to common life and discourse: 'It is the space of appearance, in the widest sense of the word, namely, the space where I appear to others as others appear to me, where men exist not merely like other living or inanimate things but make their appearance explicitly' (Arendt 1998, 198–199).

Consequently, we can understand the meaning of the 'right to have rights' in relation to Arendt's understanding of what it is to be a human being. This political articulation of human dignity underscores the importance of a legal right to entry for people seeking

asylum—to access a shared world (and its political and legal instruments)—it is necessary to be able to interact with others, which under the prevailing Westphalian model of sovereignty, remains possible primarily at the level of the sovereign state. The limitation of the right to entry by states of the Global North thus constitutes a denial of the right of refugees to *belong somewhere and to appear in a shared space*. It is only by being recognised by a political community that they can enjoy any rights, hence Arendt's claim that 'there is only one human right'—the right to political membership, which can then ensure the recognition of other rights. Just what form such membership might take is open to question—Arendt is not explicit on this point, but is usually understood as referring to citizenship (Ingram 2008, 403).

The 'right to have rights' establishes *criterion for judgement*; as Benjamin writes, 'What this entails is that any conception of justice and law has to be defined in relation to the specific formulations that these positionings of human being [being-in-place and being-in-common] have at any one given moment' (Benjamin 2010, 12). Arendt's exploration of Aristotle's notion of the *zoon politikon* (that man is a political animal) demonstrates that it is proper to being human to live politically in common with others, which refugees are largely prevented from doing—they cannot press their demands or be allowed a right to speak, that is, to exercise their status as a '*zoon logon ekhon* ("a living being capable of speech")' (Arendt 1998, 27). Thus, while the 'right to have rights' itself does not establish any law, it explains—beyond the immediate horrors that afflict the lives of refugees, which are also of vital consequence—why it is incumbent upon states to exercise responsibility towards them. It is not itself a law but a call for law based on principle, grounded in an ontological claim concerning what it means to be a human being. This entails an understanding that only through political recognition of refugees, realised via an international law ensuring entry into states, can human dignity—understood not simply as the protection of bare human life, but as a right to belonging and participation—be guaranteed.

The claim that the right to asylum—as a right to entry—requires implementation in law is resonant with Arendt's own understanding of the political. Despite her conviction that human beings are most themselves when engaged in political life, she also recognised that states often act out of self-interest, and that even democratic states are capable of the worst (Arendt 1973, 299). Thus, while sceptical of natural rights, Arendt saw the need for principles enacted in law that would go beyond positive law to recognise the human condition of plurality—'that men, not Man, live on the Earth'—the violation of which constituted an affront and threat to humanity itself. While no political 'sphere that is above the nations' (Arendt 1973, 298) exists that can exercise governance over the right to asylum, there is a legal sphere above states that is capable of compelling behaviour if the right to entry is recognised and enacted in enforceable international law. The 'right to have rights' also addresses the problem, posed by Stefan Heuser, of just 'how far it belongs to democratic institutions to host a shared life with the other' (Heuser 2008, 4); democratic states may owe a primary allegiance to their own citizens, but must make a place for others if they are to recognise them as full human beings (if not, they are found wanting under the criterion for judgment that Arendt's ideas establish). And until there is a 'sphere above the nations' or another way of ordering international asylum politics, the prerogative for taking responsibility remains primarily with the state.

The Right to Enter under International Law

Under international law, states do have a sovereign right to control their borders. The principle of sovereignty allows states the 'freedom to act unconstrained and the right to exclude foreigners from their territory' (Gammeltoft-Hansen 2011, 13). As Arendt (1973, 278) notes, 'in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of "emigration, naturalisation, nationality, and expulsion." However, by ratifying international treaties, states have voluntarily agreed to limit their sovereignty and uphold certain rights for both citizens and non-citizens. Indeed, 'refugee law places a constraint on the otherwise well-established right of any state to decide who may enter and remain on its territory' (Gammeltoft-Hansen 2011, 12–3). When refugees enter the territory or jurisdiction of a state, obligations under international law attach, preventing states from quietly expelling those they deem undesirable. Two such obligations which restrain the absolute power states to control their borders are the right to 'seek asylum and enjoy asylum' and the principle of *non-refoulement.* Together, it can be argued that these rights provide a de facto right to enter. However, this argument has been rejected by many states seeking to extraterritorialise their borders, highlighting the need for a stronger treaty and implementation at the domestic level.

Article 14 of the *UDHR* states that 'everyone has the right to seek and to enjoy in other countries asylum from persecution.' This can be understood as a right to an asylum procedure (the right to ask for asylum and be assessed) and the right to enjoy asylum for those found to be owed protection (Gammeltoft-Hansen and Gammeltoft-Hansen 2008; Edwards 2005). However, the right to seek asylum is often referred to as empty right, as it does not create a subsequent duty upon states to grant asylum (Kneebone 2009, 10). An analysis of the drafting of the *UDHR* shows that states were reluctant to provide a right to be 'granted' asylum (Gammeltoft-Hansen and Gammeltoft-Hansen 2008). Nevertheless, while states may not have a duty to grant asylum, they at least have an obligation to provide access to their asylum procedures—procedures which are usually provided in the territory. Goodwin-Gill and McAdam (2007, 358) argue that 'while individuals may not be able to claim a "right to asylum", states have a duty under international law not to obstruct the right to *seek* asylum.'

Like the Rights of Man which Arendt critiques, the right to seek asylum has not been incorporated into a binding international treaty, and thus remains a soft law declaration of the UN General Assembly. While attempts were made in 1974 to develop the Convention on Territorial Asylum, this did not succeed, with states unwilling to relinquish control over their borders. As Weis (1980, 169) notes, this Convention failed to gain support from the international community, as 'the number of refugees is ever-increasing in this troubled world, and it is therefore understandable that many Governments show reluctance to enter into firm commitments in this field.' Thus, while human right advocates argue that 'seeking asylum is an human right' (Amnesty International), it is unfortunate that this right has no legal binding under international law.

Yet in addition to the *UDHR*, the *Refugee Convention* and its 1967 Protocol provides further restrictions on states' border controls. Two significant challenges to the state's absolute power to control its borders are Articles 31 and 33 of the *Refugee Convention*, which together provide that 'refugees

are entitled to arrive of their own initiative, may not be penalized for unlawful arrival or presence, and must be protected for the duration of risk in their home country' (Gammeltoft-Hansen and Hathaway 2014, 3).

The *non-refoulement* obligation, provided in Article 33, is the cornerstone of international refugee protection and prohibits the return (*refouler*) of a 'refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.' In recognition of its fundamental status, no reservations to Article 33 are permitted (Article 42). The right to *non-refoulement* is also established in a number of other international human rights convention, specifically in relation to the prohibition against torture, and scholars have argued that it has become part of customary international law (Lauterpacht and Bethlehem 2003; Goodwin-Gill and McAdam 2007).

State parties to the *Refugee Convention* must adequately assess any person who claims asylum in order to ensure they uphold the *non-refoulement* requirement in Article 33. This must involve a fair and effective decision-making process, access to procedural fairness and the ability to appeal any decision (Hathaway 2005, 630). Judge Albuquerque in the case of *Hirsi Jamaa* (2012, 72) held that for a refugee status determination procedure to be individual, fair and effective, it must at least adhere to the following features:

> (1) a reasonable time-limit in which to submit the asylum application; (2) a personal interview with the asylum applicant before the decision on the application is taken; (3) the opportunity to submit evidence in support of the application and dispute evidence submitted against the application; (4) a fully reasoned written decision by an independent first-instance body, based on the asylum-seeker's individual situation and not solely on a general evaluation of his or her country of origin, the asylum-seeker having the right to rebut the presumption of safety of any country in his or her regard; (5) a reasonable time-limit in which to appeal against the decision and automatic suspensive effect of an appeal against the first-instance decision; (6) full and speedy judicial review of both the factual and legal grounds of the first- instance decision; and (7) free legal advice and representation and, if necessary, free linguistic assistance at both first and second instance, and unrestricted access to UNHCR or any other organisation working on behalf of UNHCR.

While it may be theoretically possible to provide such procedures extraterritorially, this is difficult, if not impossible. It is because of this difficulty that the UNHCR and scholars have argued that asylum seekers should be admitted into the intercepting state's territory for the purpose of having their claims assessed (Lauterpacht and Bethlehem 2003, 113). This the position taken by Hathaway (2005, 301):

> where there is a real risk that rejection will expose the refugee "in any manner whatsoever" to the risk of being persecuted for a Convention ground, Art. 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk.

An additional argument in favour of a right to enter is found in Article 31 of the *Refugee Convention*, which provides that:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

As the drafters of the *Refugee Convention* recognised, refugees are often unable to comply with domestic legislation concerning authorised entry; refugees often do not have passports, are unable to obtain visas and must often flee in haste:

> A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a bona fide refugee (Weis 1995, 279).

Refugees cannot be punished because the only way they could enter a state is through irregular channels. If found, either at the border or within the state, they must be afforded with due rights.

As such, international law does provide a de facto right to enter. Access to territory is so vital because international law, especially human rights law, requires that beneficiaries be within the territory or jurisdiction of the state. Thus, to trigger obligations under international law, refugees must be under the sovereignty of the state.

However, a right to enter does not necessarily mean a right to *remain*. A right to enter provides the asylum seekers access to territory in order to claim protection under existing international and domestic law. If an asylum seeker is indeed found to be a refugee, they must not be returned to harm, and they must be afforded with other essential rights in order to 'enjoy asylum'. These rights include general international human rights, as well as specific rights owed to refugees under the *Refugee Convention*. The *Refugee Convention* provides rights to refugees in a progressive manner, in respect to a person's attachment to the state. Most rights in the *Refugee Convention* inhere only once a refugee is either within the territory of an asylum country (Hathaway 2005, 156). These rights include freedom of movement (Article 26), right to employment (Article 17), welfare (Articles 20–24) and importantly, the right to naturalisation (Article 34).

Article 34 of the *Refugee Convention* requires states to 'as far as possible facilitate the assimilation and naturalization of refugees'. Thus, a legal right to entry triggers international obligations, and eventually, a pathway to citizenship. In this way, the *Refugee Convention* works to ensure that refugees are afforded, as Arendt sought, a place to belong.

A 'Law above the Nations', State Sovereignty and 'Floodgates'

In order to realise Arendt's 'right to have rights', a right to enter is required. This requires an end to the deterrence based *non-entrée* policies so favoured by the Global North and a reconceptualization of border security. If states are to recognise that refugees have the right to have rights, their policies and laws must reflect this.

However, states have been reluctant to recognise a right to enter under international law or their domestic laws. While international and regional jurisprudence is catching up to the development of extraterritorial non-entrée policies (Gammeltoft-Hansen and Tan 2017), states still act in breach of their obligations. Domestic laws allow states to ignore their international obligations, with parliaments changing their laws to ensure they can act as international pariahs. Without 'newly defined territorial entities' to hold states to account which Arendt sought, enforcement is often weak. Likewise, some states have rejected the argument that the *non-refoulement* obligations require a de facto right to enter (Sale v. Haitian Centers Council, Inc. 1993).

As such, a new commitment from the international community recognising a right to enter for refugees is needed. Arendt's call for a new 'law above the nations' that would guarantee human dignity, might be linked to her recognition of mutual promise-making as one of the only guarantees possible in the political realm (Arendt 1998, 243–247). But she also noted in *Origins* that leaving rights to the guarantee of mutual promise-making between states is inadequate, and argued for an agreement that is reached between multiple states yet which constitutes a 'sphere above the nations' (1973, 298). This might take the form of a renewed Convention on Territorial Asylum that fell by the wayside in the 1970s. Article 4 of the *Draft Convention on Territorial Asylum* provided:

> A person requesting the benefit of this Convention at the frontier or in the territory of a Contracting State shall be admitted to or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by a specially competent authority and shall, if necessary, be reviewed by higher authority.

Ratification and domestic implementation of this treaty would address the lacuna currently confronting the international refugee protection regime, bringing the law more in line with Arendt's vision for refugees. Larking takes a similar view to this call for a right to enter for refugees, arguing for freedom of movement for those fleeing genocide:

> a right to have rights must be secured in a global Citizenship Convention that accords legal status to victims or targets of genocide. Unlike the right to asylum in the UDHR, this would allow genocide victims to travel lawfully across borders without prior authorisation and it would accord them legal status in all countries (Larking 2014, 164)

Yet our call for a right to enter for refugees enshrined in an international convention would go further than Larkin's citizenship convention, providing all those who claim to be refugees under the *Refugee Convention* a right to enter and thus a right to access territorial asylum.

However, the enactment of a law 'above the nations' that would guarantee a right to entry for people seeking asylum poses obvious difficulties. Arendt's demand for a right to have rights, understood as a right to entry for refugees, challenges the ability of states to control their borders. If states must admit non-residents, sovereignty is countermanded by the right to 'territorial security' for the stateless (Ramji-Nogales 2014, 1051). As discussed above, states see irregular migration as an existential threat to their ability to control their borders, and thus their sovereignty.

In one respect, sovereignty is limited by international law. It must be recognised that by signing international treaties, including the *Refugee Convention*, states have voluntarily agreed to limit their sovereign powers in certain areas—this includes their power to reject those who seek to enter their borders. Yet states retain sovereign power in all other respects.

However, a right to enter does not mean that states must relinquish all control over their borders—such a right does not entail open borders such as proposed by Josef Carens (2013), but rather a call for states to implement their existing obligations under international law in good faith. A right to enter applies only to refugees as defined by the Refugee Convention, and thus, states can exclude other migrants who have no claim of persecution. Likewise, Article 1F of the Refugee Convention makes it clear that those who commit a 'crime against peace, a war crime, or a crime against humanity' or 'a serious non-political crime' are not considered refugees under the Convention, and thus do not have a right to enter. This existing concession addresses states' concerns about their security.

While states must allow those who arrive at its border entry, they can also seek to regulate arrivals by offering humanitarian visas for those seeking protection. As discussed, the reason the Global North has seen a rise of irregular migration is because of the lack of legal and safe alternative pathways. States wishing to end exploitation at the hands of smugglers and provide safer routes must simply provide a better service—orderly migration through the use of humanitarian visas. Indeed, a right to enter under existing international law does entail such an obligation, as noted by Judge Albuquerque (Hirsi Jamma 2012, 73):

> States cannot turn a blind eye to an evident need for protection. For instance, if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State.

The case *X* and *X v État Belge* highlights an example of where the right to enter can be upheld through the use of humanitarian visas. The case concerned an application by a Syrian couple with three children for a temporary visa in order to fly to Belgium and apply for asylum. They claimed they faced persecution, including being abducted by a terrorist group in their home city of Aleppo. They

were also unable to receive adequate protection in Lebanon or Jordan because of recent border closures and lack of basic rights. The European Court of Justice ultimately rejected their case, finding, in part, that the relevant law only applies to applications for protection 'made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States' (*X* and *X v État Belge* 2017, 49). While such a finding highlights the current failure of domestic law and the need for a convention recognising a right to enter, it does serve as an example of how humanitarian visas can provide an orderly right to enter.

A humanitarian visa can allow states concerned about their security the ability to monitor who arrives, thereby quelling concerns of an erosion of sovereign power and outside 'threats'. This is not unlike the current system of resettlement, yet with one main difference—while resettlement is a discretionary act of solidarity, a right to enter must remain a legally enforceable right for all refugees—a person who has credible fears of persecution cannot be denied entry. The problems with a discretionary resettlement system are evident—less than 1% of the world's refugees are resettled each year (United Nations High Commissioner for Refugees 2016), leaving millions to take matters into their own hands and risk their lives through dangerous journeys.

However, such a right to enter and the use of humanitarian visas raises the spectre of opening the 'floodgates': that such a right enshrined in law would lead to states of the Global North being overwhelmed by large numbers of asylum applicants. Central to the concern of these states is the ability to prevent such an outcome (Ramji-Nogales 2014, 1062).

This concern is highlighted by Lamey (2012), who discusses the constitutional right to asylum enshrined in post-war Germany, which resulted in large numbers of people from the former Soviet bloc seeking asylum in Germany in the early 1990s. Lamey (2012, 241) mentions a figure of 900,000 people who sought asylum and suggests that this 'provoked a crisis'—attacks on refugee camps, riots outside the Parliament. The 'crisis' was averted, according to Lamey, by amending the constitution and making access to the process of seeking asylum more difficult, as well as the introduction of safe third country agreements (Lamey 2012, 241).

At the heart of Lamey's concerns is the sense that the German situation in the 1990s was a 'crisis', and thus, the attendant need to 'break the vicious circle of ever-increasing unfounded claims and ever-lengthening determination times' (Lamey 2012, 244). This concern is shared by Stefan Heuser, who is untroubled by numbers in terms of the capacity of states to accommodate large numbers of people, but worries about the pragmatic issue of the sheer number of asylum *applications* to be processed: 'The right of asylum in Germany has proven Hannah Arendt right that the right of asylum collapses if the number of asylum seekers becomes too large' (Heuser 2008, 7).

On this point, it should be noted that in calling for a right to have rights, Arendt, while simultaneously expressing a concern about the sheer number of refugees that made the granting of asylum difficult, risked standing in her own way. Arendt evinces a certain ambivalence on this point; in her view, the reluctance of states to provide asylum is a political failure and not a pragmatic recognition of limits: 'This, moreover, had next to nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization' (Arendt 1973, 293–294). Yet in *Origins*, she writes 'The first great damage done to the nation-states as a result of the arrival of hundreds of thousands of stateless people was that the right of asylum, the

only right that had ever figured as a symbol of the Rights of Man in the sphere of international relationships, was being abolished'(Arendt 1973, 280). What she rightly calls attention to is the inadequacy of existing legal arrangements at that time to guarantee a right of asylum. But a concern about numbers does raise its head here, as it also does in *The Human Condition*, where great numbers can lead to conformity in public affairs and even despotism: 'The Greeks, whose city-state was the most individualistic and least conformable body politic known to us, were quite aware of the fact that the polis, with its emphasis on action and speech, could survive only if the number of citizens remained restricted' (Arendt 1998, 43). This concern is reflected in the difficulties she notes around the naturalisation and repatriation of refugees in the 1930s and 1940s (Arendt 1973, 283).

Contrary to Lamey and Heuser's arguments concerning Germany in the 1990s, and Arendt's own concerns dating from the Second World War, it might be argued that more recent events in Germany—the acceptance of close to a million Syrian refugees in 2015—puts into question the concern driving not only state reluctance to grant a right of entry, but Lamey's attempt to mediate between a right to asylum and that concern. Despite some events similar to those of the 1990s (attacks on shelters and protests), the entry of a significant number of persons seeking asylum does not appear to have unduly strained or damaged the fabric of German political and social life, nor led to significant increases in crime or unemployment, according to a recent report (Gehrsitz and Ungerer 2017). It should also be recalled that the numbers of people which concern Lamey and Heuser were to a significant extent refugees from the war-torn former Yugoslavia; thus, their reticence and seeming acceptance of German actions seem somewhat misplaced. Despite concerns about numbers, a commitment to a right to asylum requires that this concern be at certain historical moments, suspended, if not called into question.

One of the arguments made by Belgium in the case of *X* and *X v État Belge* (discussed above) pertained specifically to a fear of numbers; that 'floodgates' might be opened if they were required to issue humanitarian visas (Moreno-Lax 2017). Moreno-Lax argues that this concern is 'empirically unsubstantiated' and points to the issuing of more than 14 million short-stay visas by European embassies in 2015 as belying any pragmatic difficulty with the processing of asylum claims. Conceiving of the issue as one of numbers:

> …reifies beneficiaries of Charter entitlements reducing them to a 'mass' or a collective figure, diminishing the agency and dignity of rights-bearers. Above all, the fear of numbers does not constitute a legal argument, let alone one capable of warranting the limitation of absolute rights. In truth, compliance with the [Charter of Fundamental Rights] is not optional or open to negotiation…and given the 'absolute character' of the rights concerned, even a mass influx or other commensurate difficulties 'cannot absolve a State of its obligations under [the relevant] provision[s]' (Hirsi, paras 122-23). Potential 'problems with managing migratory flows cannot justify recourse to practices which are not compatible with the State's obligations…' (Moreno-Lax 2017).

In the context of a moral claim enforced by a legal right, whether a state is burdened by great numbers of asylum applications may be considered immaterial to the legal obligations of the state. However, the dual fear of a loss of sovereignty on the one hand, and being overwhelmed by great numbers of asylum applicants, on the other, continues to drive state behaviour. As Ramji-Nogales observes, 'this results in serious limitations on international human rights protections for the undocumented' (Ramji-Nogales 2014, 1058). Thus, these concerns must be addressed by those arguing for the legal right to entry in seeking asylum.

The more recent German example contradicts the comparable situation discussed in the literature in relation to Germany in the 1990s; the fear of opening the 'floodgates' can at minimum be put in question as to its likelihood or pragmatic effects. Indeed, one can ask whether there will be big numbers as a result of a right to entry, and whether there is in fact any harm even if this results.

Indeed, it is worth pointing out that the total number of displaced persons make up 0.009% of the world's population (United Nations High Commissioner for Refugees 2016), and the 1 million refugees who entered into Europe in 2015 make up 0.001% of Europe's population (International Organization for Migration 2015). Such figures belie the concern expressed by Heuser and Lamey in relation to 'floodgates'. Numbers are but one factor in understanding recent European policy responses where the right to asylum has been diluted by an emphasis on border control, and where 'humanitarian' regimes (ostensibly designed to prevent deaths at sea while also protecting the 'security' of Europe) are not coterminous with human rights (Sciurba and Furri 2017, 3). Finally, if a principle relating to a right to asylum as a right to entry is to be enshrined in law, that principle would need to be upheld as a duty rather than being subject to the arbitrary caprice of political winds, with asylum being granted whether the numbers are great or slight.

Conclusion

This paper has identified a gap in refugee protection; while states have obligations to refugees under international law, they have implemented a range of policies designed to ensure refugees never make it to their territories to claim these rights. Arendt's idea of the 'right to have rights' expresses an ontological understanding that to be fully a human being requires political membership, to be seen and to act among others: 'to live in a framework where one is judged by one's actions and opinions' (Arendt 1973, 296–297). Thus, in addition to the pragmatic need of refugees to be able to access their rights, there is also a recognition in Arendt's argument of the need to 'guarantee' their 'human dignity' (Arendt 1973, ix). This can only be achieved through a right to enter.

Providing a legal right to entry puts state sovereignty and border control in question, and provokes a question of numbers and the opening of 'floodgates'. Yet as argued above, whether such concerns are legitimate can be disputed. There remains a difference between a protectionist argument about numbers and sovereignty, on the one hand, and the obligations of states are under international human rights law, on the other. States which have voluntarily agreed to uphold the rights of refugees and must adhere to such commitments.

Arendt thought that the guarantee of the 'right to have rights' would require 'newly defined territorial entities', but in the absence of any such new international order, the responsibility to receive asylum seekers remains largely at the level of individual states. Why states should recognise this responsibility is met by Arendt's explanation of that which is fundamental to human existence; to be human and to appear among others is coterminous. Thus the law itself, as it pertains to human rights, must address this aspect of the 'human condition' in order to do it in justice, and that ultimately means political membership. The gap that exists in law in terms of a right to entry can be met pragmatically, simply by the creation of a new law; but as we have argued, the relation of that law to an understanding of human identity and relationality needs to be articulated.

While a right to enter eventually entails a pathway to citizenship (Article 34 of the *Refugee Convention*), this does not immediately follow. Rather, a right to enter enlivens access to other rights under domestic and international law. A legal right to entry would at minimum provide a guarantee for every human being to safety and to the realisation of the conditions necessary for the recognition of their very humanity—as those who have the right to *belong*.

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