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Refugees and Human Rights: The Future of International Protection in the UK

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Abstract
The global refugee crisis is raising profound questions for the future of international protection. This article, based on a talk given as part of Refugee Week 2015, offers reflections on the current debate. The need to internationalise the conversation is underlined. Although no one state can resolve the problems of the world, it is precisely in the response to the plight of the forcibly displaced that commitments to human rights and refugee protection are tested in practical terms. This article argues that the UK’s approach remains inadequate and problematic.

Refugees and Human Rights in Global Perspective
Any assessment of refugees and human rights must start by reflecting on the scale of the global displacement crisis. UNHCR’s latest Global Trends report notes that at the end of 2014 the number of those forcibly displaced by persecution, conflict, generalised violence and human rights violations (refugees, internally displaced persons and asylum seekers) stood at 59.5m: 19.5m refugees, 38.2m internally displaced persons, and 1.8m asylum seekers.1 The top host countries in 2014 were: Turkey, Pakistan, Lebanon, Iran, Ethiopia and Jordan,2 with developing regions taking responsibility for 86% of the world’s refugees.3 To put this in perspective, at the time of writing there are over 4m Syrian refugees who have sought protection in neighbouring countries, with over 1m registered Syrian refugees in Lebanon – more than 20% of the population of the country.4 Only a small percentage (less than 10%) of those displaced by the conflict have sought asylum in Europe.5 While this is not to understate the problems faced by European states (there were significant increases in forced displacement in Europe in 2014 and 2015), it does place matters in context. All the more important then,

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2 Ibid.
and despite the disagreements, that EU Member States establish ways to make the concept of solidarity a meaningful one.  

In order to advance consideration of the issues this article concentrates on four themes: first, the interaction between international refugee and human rights law; second, the European context; third, the right to seek asylum in the UK; and finally, thought is given to ways forward and what the future might hold for refugee law. The intention is to raise further questions about prospects for international protection from a human rights perspective but also to indicate plainly that the UK’s response is part of a concerted attempt to move away from the idea of a right to seek asylum towards a more selective and restrictive approach. This maps securely on to a more generalised trend and one that is steadily promoting suspicion of many forms of free movement.

**Internationalising the Debate**

First, it is worth considering the state of international refugee and human rights law; it remains vital to locate the discussion in its international legal setting. This may not seem obvious when the practical needs are so pressing and urgent, but there is a strong case for insisting on the applicability of international norms to any current and future discussion.

The treatment of refugees and asylum seekers is governed by what happens in states and regions, and should be guided by the standards of international law. Reference to international refugee law here effectively means the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees (the instrument that removed the temporal restriction, and the geographical limitation for most). The Conference that drafted the 1951 Convention met in Geneva from 2 – 25 July 1951, and the UK was one of the 26 states represented, and an active participant. There are currently 145 States parties.

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7 189 UNTS 150, entry into force 22 April 1954.

8 606 UNTS 267, entry into force 4 October 1967.

to the 1951 Convention, and 146 States parties to the 1967 Protocol. The UK signed the Convention on 28 July 1951, and ratified it on 11 March 1954 (taking the more inclusive option of “events occurring in Europe or elsewhere before 1 January 1951”). The UK acceded to the 1967 Protocol on 4 September 1968. It is worth noting at this point that many of the largest refugee-hosting states are not party to either the 1951 Convention or 1967 Protocol, for example, Jordan and Lebanon, and also see the situation on ratifications in general in the Middle East, South Asia and South East Asia.

The Statute of the Office of UNHCR must also be highlighted (UNHCR has offices in London and Dublin). The international community places a weighty responsibility on UNHCR, and its practical mandate has continually expanded. While unwilling to extend the international legal definition, states – through the UN – are prepared to expand the remit of UNHCR.

International refugee law arose from the post-1945 phase of human rights standard setting, and the Universal Declaration of Human Rights 1948 (UDHR), Article 14, provides for “the right to seek and to enjoy in other countries asylum from persecution”. The Preamble to the 1951 Convention refers to the UDHR, and “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”. What international refugee law does, however, is offer an international legal understanding of “refugee” with listed guarantees. It is a “status-creating” international legal regime; a status that is declared rather than constituted by state recognition.

The creation of a status - “refugee” - and substantive guarantees does not, however, come with procedural obligations on status determination. This is primarily delegated to states. The 1951 Convention and 1967 Protocol are effectively silent on refugee status determination procedures. There is no independent treaty-monitoring body for refugee law; as there is for

17 Article 14(1).
many international human rights instruments.\textsuperscript{20} UNHCR plays a crucial supervisory role, and States parties to the 1951 Convention and 1967 Protocol agree to co-operate with UNHCR, and are required to “facilitate its duty of supervising” the Convention or Protocol.\textsuperscript{21} Refugee status determination is mainly but not exclusively (UNHCR also does status determination\textsuperscript{22}) left to states.

What are the key elements of this status? There must be a well-founded fear of being persecuted for a “Convention reason” (race, religion, nationality, membership of a particular social group and political opinion).\textsuperscript{23} She must be outside her country of nationality or habitual residence and be unwilling or unable to avail of state protection.\textsuperscript{24} The exclusion clauses of refugee law are intended to ensure that it does not apply if there are “serious reasons for considering” she has, for example, “committed a crime against peace, a war crime, or a crime against humanity” or “has been guilty of acts contrary to the purposes and principles of the United Nations”.\textsuperscript{25} UNHCR\textsuperscript{26} and others\textsuperscript{27} have provided helpful guidance, and the EU has developed its own “common understanding” of core elements; but again given the nature of the international regime definitional decision-making takes place routinely at national level.

This declaratory international legal status brings with it guarantees. These include fundamental protections, such as non-refoulement, as well as a range of civil, political, social, economic, and cultural rights.\textsuperscript{28} While these are carefully delimited in refugee law they do offer the potential basis - if effectively implemented - for relative security for refugees. This legal form of international protection persists until effective protection has been secured either voluntarily (in the host state or country of origin) or through a fundamental change of circumstances (in the country of origin).

International refugee law is therefore a carefully designed, and still fragile, status-creating mechanism that represents a compromise between the humanitarian reality of global

\textsuperscript{21} Article 35 (1) 1951 Convention, and Article II 1967 Protocol.
\textsuperscript{23} Article 1A(2).
\textsuperscript{24} Article 1A(2).
\textsuperscript{25} Article 1F.
\textsuperscript{27} For example, James C. Hathaway and Michelle Foster, The Law of Refugee Status (2nd ed. Cambridge: CUP, 2014).
\textsuperscript{28} Articles 2-34. See James C. Hathaway, The Rights of Refugees under International Law (Cambridge: CUP, 2005).
forced displacement and the fact of a state-based international system (states that still view migration control, in all its forms, as intrinsic to their understanding of self-determination). The 1951 Convention and 1967 Protocol are now supplemented by international human rights law in significant ways. To such an extent, in fact, that the relevancy of international refugee law is questioned. The international human rights instruments primarily apply to “everyone”; the status that matters is: human being.

The UK has ratified a significant number of international human rights treaties (although it is less keen to sign up to the complaints mechanisms). The UN Human Rights Committee in its communications, concluding observations and general comments underlines the relevance of the International Covenant on Civil and Political Rights 1966 (ICCPR) to refugees and asylum seekers. Although the UK has ratified the ICCPR it has not ratified the Optional Protocol (that would allow complaints to be taken to the Committee). The Committee has, for example, dealt with questions of refoulement and detention practices (it has been explicitly critical of the UK’s approach to detention in its concluding observations). The UN Committee against Torture, its sub-committee on prevention, and the national preventive mechanisms, have a significant role in relation to, for example, non-refoulement and detention conditions. The Committee against Torture has established a substantial “jurisprudence” on non-refoulement, and it is notable, for example, that Article 16 of the International Convention for the Protection of all Persons from Enforced Disappearance 2006 prohibits refoulement in the context of enforced disappearance. Useful work has been done by the UN Committee on the Rights of the Child (on, for example, unaccompanied and separated asylum

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34 This is evident in, for example, the concluding observations in 2013 on the last UK State report: CAT/C/GBR/CO/5, 24 June 2013, paras 18, 20, 30.
seeking children\(^{37}\) and the Committee on the Elimination of Discrimination against Women (CEDAW). There is continuing work on the use of the Convention on the Rights of Persons with Disabilities 2006 (the UK has ratified the Convention, and the Optional Protocol – a point worth considering given the treatment of refugees and asylum seekers with disabilities).\(^{38}\) On CEDAW, see for example, its recent General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality, and the statelessness of women.\(^{39}\) The UN Committee on Economic, Social and Cultural Rights, in its concluding observations, has been critical of the UK’s approach to access to the labour market for asylum seekers.\(^{40}\)

It is too easy to overstate the significance of international refugee and human rights law. The limits of these international mechanisms are well known.\(^{41}\) However, if the UK’s treatment of refugee and asylum seekers is to be assessed it remains useful to have an internationalised normative environment within which to frame it, assess legal and policy developments, as well as argue for reform. As weak as it seems at times, it is essential that the debate is continually internationalised and creative use made of the standards that do exist.

**Human Rights and Solidarity in Europe**

What can be said about the European context? The appalling events of 2015 are well-documented, as those forced to flee continue to make the risky journey to Europe.\(^{42}\) These are human tragedies founded on global injustice that require an urgent human rights based response.\(^{43}\) The situation is not new for the forcibly displaced attempting to enter Europe or when viewed in global perspective. Recall the interdiction of Haitian asylum seekers at sea in the 1980s, those who fled Vietnam by boat in the 1970s, the “Pacific solution” approach of the

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\(^{39}\) CEDAW/C/GC/32, 14 November 2014.

\(^{40}\) See E/C.12/GBR/CO/5, 12 June 2009.


Austalian government, as well as the response of governments in Thailand, Malaysia, and Indonesia to those arriving by boat.44

There are two European contexts to note here: first, the ambitions of the EU, and then the European Convention on Human Rights as a regional human rights instrument. The EU has established a Common European Asylum System (CEAS), and there is now an elaborate framework of Treaty provisions, Regulations and Directives.45 The CJEU has a role in shaping asylum law; and it has made significant rulings on the meaning of European law in this area.46 The Charter of Fundamental Rights of the EU contains a right to asylum,47 and protection against removal, expulsion or extradition.48 Protocol 21 provides for an “opt-in” procedure49 (for the UK and Ireland) – the UK opted in to phase one of the development of the CEAS, but has not done so for the recast versions of the Qualification Directive, Reception Conditions Directive, and the Procedures Directive.50

Multiple failings in this EU project continue to be highlighted, including the many problems experienced with the Dublin system, and the continuing challenges to it.51 The

47 Article 18.
48 Article 19.
absence of effective European solidarity and lack of basic trust between Member States, evident in the current response to the global crisis of forced displacement, places the future of this project in doubt. The functioning of asylum systems across Europe raises questions for international refugee and human rights law, but also highlights basic matters of compliance with EU law, and adherence to the EU’s own human rights obligations under the Charter of Fundamental Rights. The failures that are now acutely evident relate tellingly to the EU’s own “self-understanding”.

Another context to note is the role of the European Court of Human Rights. The Court is under considerable pressure and strain – and the critical debates in the UK are well known. Despite this, the Court is in fact fairly constrained, and even conservative, in its approach to Convention rights – at times it could go much further. It has established sensible human rights principles and underlined repeatedly that the Convention applies to everyone within the jurisdiction of the state. In Hirsi Jamaa, for example, reminding states of their obligations even when they have concluded bi-lateral agreements with other states. It continues to insist that, for example, Articles 2 and 3 apply equally to deportation, removal, expulsion and extradition, in case after case the Court focuses on whether there are substantial grounds to believe that there is a real risk (the risk need not be for a particular “Convention reason”, and the behaviour of the individual is not a material factor – the Chahal point that exercises the UK government so much). The Court (respectful of subsidiarity and its own workload) stresses the need for effective remedies at the national level; and in cases such as MSS v Belgium and Greece and Tarakhel v Switzerland reminds states of their human rights obligations even in the context of other collective mechanisms.

The challenges involved in using the Strasbourg system are well known, and should be acknowledged (the vast bulk of cases decided are held to be inadmissible or are stuck out),

53 Hirsi Jamaa and others v Italy, Appl. No. 27765/09 (23 February 2012) GC.
54 Chahal v UK, Application No. 22414/93 (15 November 1996) GC.
56 Tarakhel v Switzerland, Appl. No. 29217/12 (4 November 2014) GC.
and there is disappointing case law too. Examples of this include *JK and others*\(^{58}\) - a Chamber judgment on the safety of return to Iraq - and perhaps most clearly the “health care” cases.\(^{59}\)

The popular commentary around its jurisprudence clouds the development of often quite unsurprising human rights principles based on a reasonable and fair reading of Convention rights. The idea of a strong regional human rights court is worth defending, and while dialogue between judges in the UK and Strasbourg is welcome (and happening) it is equally necessary to ensure that the Court holds to a rights-reinforcing jurisprudence.

### The End of the Right to Seek Asylum in the UK?

The aim so far has been to set the global and European scene. It is time to reflect on the state of the human right to seek asylum in the UK. The first thing to note is just how complex and elaborate immigration and asylum law and policy now is.\(^{60}\) The system itself is a relatively, and historically speaking, recent development of the last 20 years.

Although this conversation should not be reduced to statistics, the falls in the overall numbers of those seeking asylum in the UK is instructive. There were 84,132 asylum applications in 2002, reducing to 23,507 applications in 2013 (88% in-country) and 24,194 applications in 2014 (90% in-country).\(^{61}\) When reflecting on this keep in mind that global figure from earlier. In terms of numbers, the UK was 5\(^{th}\) in the EU (after Germany, Sweden, France, and Italy) and 16\(^{th}\) in terms of relative size of population.\(^{62}\) The main countries of origin in 2014 were: Eritrea, Pakistan, Syria, and Iran.\(^{63}\) There is a UK resettlement programme, and it does make a contribution to UNHCR efforts: there were 787 persons resettled in 2014.\(^{64}\) The UK resettled 143 people under the Syrian Vulnerable Persons Relocation Scheme in 2014, and has now committed to a figure of 20,000 over the period of this Parliament.\(^{65}\)

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\(^{58}\) *JK and others v Sweden*, Appl. No. 59166/12, 4 June 2015.

\(^{59}\) See comments in the dissenting opinion in *SJ v Belgium*, Appl. No. 70055/10, 19 March 2015 GC and also the case of *MT v Sweden*, Appl. No. 1412/12, 26 February 2015.


The UK has achieved quite a significant drop in applications since 2002. This is not accidental. The policy of successive governments has been driven by principles of deterrence, deflection and restriction. It is simply very difficult to arrive in the UK lawfully to claim asylum, and there is evidence that individuals have been inappropriately and wrongly “penalised” for doing so (even though there are quite clear protections in place). In thinking about how the UK got those applications down, just reflect on the combination of visa rules, entry clearance, carriers’ liability, criminal sanctions, detention, and the operation of the Dublin system. It is not an easy matter to make it to the UK to exercise the right to seek asylum, and this will become even more challenging in the future.

Once an asylum claim is made, the applicant is then potentially subject to the reception and support arrangements in place for destitute asylum seekers, during the asylum process and subsequent appeal (there is a ‘destitution test’ to underline the point). This includes initial reception, dispersal, limited subsistence support (around 50% single person and 60% couple of mainstream welfare benefits), and the provision of accommodation on a no choice basis. At the end of 2014, over 29,000 asylum seekers and their dependants were receiving section 95 support – with this figure at over 30,000 in the first quarter of 2015. 492 people were receiving section 95 support in Northern Ireland at the end of March 2015.

The restrictions on the right to work should be kept in mind; as a general rule asylum seekers are not permitted to work. Note also, the flawed and problematic nature of the system of section 4 support for refused asylum seekers, and the stark plight of those who do not qualify for support. And remember the detention powers that are available, and the position of those who are detained in Immigration Removal Centres. It is a law and policy framework that

deliberately engineers poverty and destitution for many who are already traumatised by flight from persecution, conflict and human rights violations; it is deprivation of human rights by design. It is not hard to guess what message it is intended to send.

The assessment of the asylum claim, the delays in the process, mistakes, the interview itself (including getting to it) all are continuing causes of concern. Despite extended efforts at improving the quality over many years, the asylum interview remains a problem. Is it noteworthy that of the 8,200 appeals in 2014 28% were allowed? And do not forget, this is often not about a radical new agenda, but simply ensuring the principles that guide this area of policy operate fairly and coherently. For further evidence of the problems it is worth reading the Home Affairs Committee Report from October 2013 on the scale of the difficulties afflicting the system. Little of this is new and the flaws have a long history.

If an individual does manage to make an asylum claim in the UK, recognition rates are improving. For example, in 2014, 41% of the decisions made resulted in some form of leave – most refugee status (36%) (these figures include: refugee status, humanitarian protection, discretionary leave, family life and private life rules, leave outside the rules, and leave for unaccompanied asylum seeking children).

Even if refugee status or humanitarian protection is granted difficulties persist, for example on the application of the rules on termination of support, on family reunification, and on the uncertainty that can arise for families as a result of the rules on leave to remain – as well as the many other obstacles that face recognised refugees in the UK. An effective Refugee Integration Strategy can, for example, help to ensure a joined up approach – such a strategy is long overdue in Northern Ireland.

Time and again across the last 20 years of refugee and asylum law and policy in the UK, courts and judges at all levels have had to remind successive governments of the basics of

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the rule of law, and the minimum standards required by the principle of legality. It was not so long ago that one government attempted (unsuccessfully) to oust judicial review altogether and there have been highly directed criticism of individual judges in the past, and many attempts to render challenge mechanisms practically ineffective or inaccessible. The right of access to justice, and effective access to accountability mechanisms, are particularly important for refugees and asylum seekers.

There are “the risks of getting it wrong” - and what that could ultimately mean - combined with a history of poor initial decision making, and mistake after mistake in an administrative system under immense strain that should remind us why the right of access to justice matters so much. It is essential then that the principle of legality – the simple idea that the rule of law applies fairly and consistently to everyone – is not just a meaningless and abstract label. It is also essential that the Human Rights Act 1998, that has been so helpful in ensuring that the basic rights of everyone are protected, is defended.

The Future?

Finally then, what about the future? The story of the last two decades in the UK is easily told. A substantial and complex body of law, policy, guidance, and practice has emerged. There is a distinctive administrative structure. This exists in the global and regional contexts noted. It is a harsh and at times cruel system that makes it difficult to reach the UK to seek asylum in the first place, and renders life extremely challenging for those subject to it (including those recognised as refugees or with humanitarian protection or other leave). Let there be little doubt. This intended and designed cruelty runs parallel with basic administrative and other problems. It is “intended” in the sense that it is part of campaign to promote mistrust of the concept of freedom of movement (for some but not all), and an approach that will empty the notion of a right to seek asylum of content.

Whatever the profound flaws of existing refugee and asylum law in the UK one major challenge is simply ensuring that the positive aspects are properly, consistently, fairly and humanely applied in practice. Judges, lawyers, all of us must insist that the rule of law, human rights, and the principle of legality apply equally to refugees and asylum seekers.

78 The point was made in the 1990s by the Asylum Rights Campaign in “The Risks of Getting it Wrong”: The Asylum and Immigration Bill Session 1996 and the Determinations of Special Adjudicators” (London: Asylum Rights Campaign 1996).
Perhaps this is best viewed as part of a global human rights crisis in this sense: people are forced to flee their homes for reasons that include armed conflict, persecution, serious human rights violations, generalised violence, climate change, and extreme poverty. If the existing standards of international human rights law were effectively implemented and consistently enforced the picture would be radically different. Hard questions must also be asked about the effectiveness of the global human rights regime. Just look at the states that account for a large number of asylum applications in the UK today: Eritrea, Sudan, Syria, and Iraq. This connects us all directly to the global human rights movement, and the need to retain a sharp focus on the reasons why people are forced to flee in the first place. In that respect, we still need a new global human rights revolution.

To end then, we must work together to ensure that the right to seek asylum, the principle of international protection, and the human rights of all refugees and asylum seekers are securely safeguarded in the UK. The current UK government is continuing to fail in its global and regional responsibilities towards refugees and asylum seekers. The global crisis of forced displacement deserves a better and more humane response.