

# ‘The Continuing Relevance of International Refugee Law in a Globalized World’

A Lecture to Mark the Launch of the  
LL.M in Immigration Law at Queen Mary University of London  
by

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24 November 2014

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I am delighted to be here tonight, and honoured to be invited to mark the launch of the LL.M in Immigration Law with a few words. The movement of people between States continues to be high on national and international agendas and you don’t need to look far beyond the headlines to see what a difficult issue it is for States and for regional and international organizations, and how often they make a mess of managing it.

Nor do you need to look hard to discover how desperate is the situation of many a migrant, whether in the physical hardships and risk to life and limb encountered during the search for refuge, or in the often incomprehensible and complex web of national laws and procedures with which the migrant must deal, or when he or she is on the receiving end of State policies which seem to have left common humanity far behind.

I am in no doubt, therefore, of the need for in-depth study and analysis, not only of the often contested dimensions of the phenomenon in fact, but also and in particular, of the principles and rules which do, and ought, to confine and structure the exercise of those powers of control which States claim as their sovereign right.

So I would very much like to thank Dr Violeta Moreno Lax for her initiative and enthusiasm in developing this programme, to my old friend, Professor Valsamis Mitsilegas, for putting the weight and authority of the Law School behind it, and to all their colleagues who will surely contribute to the success of this LL.M and, I sincerely hope, to improving the lot of migrants, refugees and asylum seekers in the years to come.

Tonight, I want to consider the continuing relevance of international refugee law in the world of today; but first, let me start with a little history...

## 1. 1950 – A Memorandum from the UN Secretary-General

As many of you know or will recall, the initial text of what was to become the 1951 Convention relating to the Status of Refugees was drafted by an *Ad hoc* Committee appointed by the UN Economic and Social Council (ECOSOC). That Committee, in turn, was made up of thirteen

government representatives having special competence in the field of improving the status of refugees and stateless persons, and eliminating statelessness.

Invited to make recommendations on the way things should evolve, the UN Secretary-General submitted a memorandum to the *Ad hoc* Committee in January 1950 (UN doc. E/AC.32/2, 3 January 1950).

This memorandum strongly endorsed the idea of an international *convention*, rather than just a set of recommendations. In part, a convention was seen as likely to assuage the apprehensions of Governments, which might be worried about ‘taking the first step’, or afraid of seeming to act for political reasons. When recommendations were adopted in the 1928 Arrangement concerning the Juridical Status of Russian and Armenian Refugees, States did nothing to give them internal legal effect, even though they had laboured hard to reach agreement on the texts. By contrast, when the same provisions were included in the 1933 and 1938 conventions, a number of parties did indeed follow up with implementation.

The Secretary-General also noted that,

‘A general convention is a lasting international structure; being open to the accession of States which had not signed it, it encourages governments to associate themselves with the work of their forerunners; even if those governments are not in a position to accede to it, such a convention sometimes exerts a direct influence on the administrative and legal practice of their countries.’

And so it has proved to be...

Turning to content, the Secretary-General favoured a treaty applicable in principle to all categories of refugees to whom it was proposed to give international status, taking into account the lessons learned from experience, and that it should be so drafted as to bring on board the greatest number of States. Thus, there should be a minimum core of absolutely binding obligation, and a periphery of other rules and principles to which States might make reservations.

Particular emphasis was given to co-operation among States parties, so as to relieve the burden assumed by initial reception countries in granting asylum. The Secretary-General’s preliminary draft proposed a specific article to this effect, which would have provided that States party,

‘... shall to the fullest extent possible relieve the burden... *inter alia*, by agreeing to receive a certain number of refugees in their territory...’: draft Article 3(2)

But even this cautiously drafted provision did not find its way into the final text and, like a similar requirement that States give ‘favourable consideration’ to the admission of refugees, it was consigned to an uncertain and anomalous place as a recommendation in the Final Act adopted by the 1951 Conference of Plenipotentiaries.

And we are still, of course, trying to find ways to make real and concrete this critical point of co-operation... Think Turkey, Lebanon and Jordan; think so-called irregular movements; think protracted refugee situations; think paucity of solutions...

In other matters, the Secretary-General's draft was no less prescient. The draft preamble would have noted that the refugee without legal status had no guarantee that he or she would be recognized as a person before the law. Likewise – and this was proposed also for substantive inclusion – non-refugee stateless persons were essentially in the same unfavourable position as refugees deprived of their nationality, and for that reason should be granted the same status.

(By the way, the approach to the identification of stateless persons was simple and straightforward: 'persons who are stateless *de jure*, either because they did not obtain a nationality at birth or because they lost the nationality which they possessed without acquiring a new nationality': draft Article 2. This contrasts markedly with the rather unwieldy definition adopted in Article 1 of the 1954 Stateless Persons Convention.)

On the issue of refugee definition, the Secretary-General was cautious, suggesting a number of possible solutions. The most radical and potentially interesting was the idea that the concept of refugee should include, not so much the individual with a well-founded fear of persecution, but rather 'any person placed under the protection of the United Nations in accordance with the decisions of the General Assembly...' (This resonates interestingly with René Cassin's proposal during negotiations over the Universal Declaration of Human Rights, to the effect that the UN should assume a measure of responsibility in finding asylum and making the 'right' effective.)

Not surprisingly, the Secretary-General accepted that what otherwise seemed 'logical and normal' might nevertheless pose difficulties for Governments unwilling to sign the proverbial 'blank cheque'. Still, in his view, there was little logic in 'freezing' the scope of the Convention to the situation prevailing at the time, for the different treatment of later refugees could hardly be justified.

States, of course, saw it differently in 1951, turned their backs on the logical and the sensible, and went for unrealistic and ultimately unworkable temporal and geographic restrictions...

The Secretary-General's approach was ahead of its time, but also the product of an institutionalised approach which viewed refugees in terms of groups and categories (something which found its way in the UNHCR Statute). In fairness, it would have been difficult for anyone at that time – 1950 – to anticipate the extent to which the individual refugee would come to be accepted as a rights-holder, as a person entitled to international protection. *Non-refoulement* then was expressed very much as an obligation between States, but today it is rightly seen as the key refugee right – a law-based claim not to be sent back to where he or she may be persecuted or otherwise at risk of relevant harm.

Nevertheless, UNHCR's and the UN's institutional responsibilities have in fact developed much as the Secretary-General's memorandum imagined, with the General Assembly extending the scope of international protection far beyond the formal limits of paragraph 6 of the UNHCR Statute. Today, the UN's protection concern covers, not just refugees with a well-founded fear of persecution, but also those displaced by conflict, serious violations of human rights, or the breakdown of public order. It covers the asylum seeker, the returning refugee. It encompasses the internally displaced, the migrant (both regular and irregular), and increasingly also those who are or who might be displaced by natural disaster, including developments related to climate change.

In a major sense, the notion of international protection, writ large, has worked to qualify significantly what the drafters of the UN Charter in 1945 understood as the reserved domain of domestic jurisdiction. This does not mean the end of sovereignty, of course, but there is no denying the impact which rights-based claims have had and are having on assertions to absolute competence in the management and treatment of people moving between States.

This is a contested area, nonetheless, and often it is the refugee and the asylum seeker who must push the boundaries of protection, calling States to account for their disinclination or active refusal to implement their international obligations.

## 2. What, then, is International Refugee Law?

If we take the Secretary-General's memorandum of 1950 as part of the opening phase of international refugee law today, how is the field best described?

As you might expect, I would likely begin with a reference to the 1951 Convention relating to the Status of Refugees which, together with the 1967 Protocol, is so often referred to as the 'primary refugee protection instrument', with a 'central place' in the refugee protection regime.

But I wouldn't stop there, of course. There's the 1969 OAU Convention to mention, the 1966 Bangkok Principles, the 1984 Cartagena Declaration, the slew of refugee-specific measures adopted in the European Union, and so on, and so on...

And yet there are some things missing. First, there is the longer historical dimension so important to the international lawyer, for the international protection of refugees began, not in 1951, but in 1921, with the appointment of the first League of Nations High Commissioner for Refugees – and longevity is linked to authority...

Secondly, there is international law at large, for international refugee law is largely the product of *States*, which agreed on certain concepts – such as who is a refugee; on certain rules, such as *non-refoulement*; and on certain exceptions, such as exclusion. Of course, the *original* product has undergone substantial changes in the meantime, not all of them driven expressly by the consent of States...

Thirdly, international law itself is constantly evolving, as States set new rules down in treaty, or contribute to its development through their practice.

International refugee law has its particular role, but being part of something larger, it stands also to benefit from developments in the wider world, for example, with regard to international criminal law, human rights law, and even maritime law.

If the issue is one of interpreting the relevant instruments, such as the 1951 Convention/1967 Protocol, then as the International Court of Justice noted in its *Namibia* Advisory Opinion: ‘... interpretation cannot remain unaffected by the subsequent development of the law... [A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’

Equally, however, the measures which a State may take to ‘manage’ or prevent the movements of asylum seekers or migrants are themselves subject to evaluation in the light of changed standards. Whereas States may have been free to discriminate on racial grounds in the late 19<sup>th</sup> Century, that was no longer permitted in the late 20<sup>th</sup> Century, as several judges noted in the *Roma Rights* case.

But in a globalized world, can international refugee law retain its relevance?

### 3. Globalization

We commonly think of globalization as driven primarily by economic factors. It does not take much, however, to realise that the movement of people between States, whether for economic purposes or in search of refuge, is now and perhaps always was a particularly acute symbol of international interaction, no matter what governments might want.

Not surprisingly, they have reacted to what they perceive as an accelerating process with concerted efforts to ‘manage’ movement, erecting an increasing array of ‘control’ points and implementing, with varying degrees of success, a variety of obstructing or interception measures.

Most significantly, the issue of movement itself has become ‘securitised’ – a phrase intended to signify an expansive and little regulated competence. In such a context, international refugee law and international law at large must prove their resilience and adaptability if individuals in search of refuge are to be protected, and if human rights generally are to be ensured.

#### 3.1 Globalization, security and control

For States remain keen, very keen, on *control*. Understandably, in an age so coloured by terrorism and its rhetoric, whether for or against, certain State interests must be factored into the regulation of the movement of people, if the State is to fulfil both its local and its international duties. States participating in the 1951 Conference made sure that the Convention regime would reflect these

concerns, but as observers and advocates, we know from experience that States inevitably claim more than their interests require. For the State, too, is for ever pushing the boundaries of control, over both citizens and non-citizens.

It is odd, but significant, that the UN General Assembly's 1994 Declaration on Measures to Eliminate Terrorism (UNGA res. 49/60, 9 December 1994, Annex) included a reference to the obligation of States, 'to take appropriate measures before granting asylum for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum for the purpose of ensuring that the refugee status is not used...' for terrorism-related activities.

At the time, and certainly up to and including 9/11, there was no evidence linking refugees to terrorism, and the received wisdom was and is that the would-be terrorist was unlikely to chose the asylum route to his or her target, given the attendant close questioning, finger-printing and information-sharing that would follow.

Nevertheless, refugees and asylum seekers have continued to be identified as potentially suspect in succeeding resolutions, including the General Assembly's 1996 Supplementary Declaration (UNGA res. 51/210, 17 December 1996, Annex), and the UN Global Counter-Terrorism Strategy adopted in 2006 (UNGA res. 60/288, 8 September 2006, Annex).

The UN Security Council also has not hesitated to intimate a connection, including in resolutions adopted after 9/11 (such as SC res. 1373 (2001), 28 September 2001), and most recently in the resolution adopted just two months ago on 'foreign terrorist fighters' (SC res. 2178 (2014), 24 September 2014).

Several reasons may explain this perception of refugees and asylum seekers as somehow a threat. There is certainly a history of 'refugee warriors', as Zolberg, Suhrke and Aguayo showed in their work, some countries have seen asylees as potential 'liberators', and national liberation struggles often elided the distinction between combatants and civilians. But general attitudes towards 'the other' also play a role, as can be seen in the resistance of some States to moves to improve the legal situation and strengthen the rights of those who are not nationals of the country in which they reside, or who are migrant workers. If that is part of the picture, then what we are seeing is the working out of visceral discrimination, in a context in which the refugee and the asylum seeker, but also the regular and irregular migrant, are targeted precisely because of their difference, irrespective of their merit.

In fairness to both the General Assembly and the Security Council, their resolutions have always insisted, indeed, required, that the measures taken by States should comply with all their obligations under international law, including human rights law, refugee law and humanitarian law.

States, however, have not always been compliant. In the name of security, and in both legislation and in operations directed at refugees, asylum seekers and migrants, many States have sought to avoid their obligations, either directly, for example, by projecting power into areas believed beyond the purview of the law; or indirectly, through strained and de-contextualized

interpretations of relevant provisions. In some quarters, too, unilateralism is displacing the clear duty to co-operate with other States and the United Nations in solving humanitarian problems.

### 3.2 The ‘relevance’ of international refugee law

How then, in this area now characterised in such extreme terms, can international refugee law maintain its relevance? And what exactly does that mean? There are several perspectives:

- First, of course, there is relevance *to refugees*, by ensuring that those entitled to protection find refuge and a solution

This means, to state the obvious, that international refugee law must address issues such as mandatory detention, the detention of children, offshore processing, extraterritorial operations targeted at migrants and asylum seekers, discrimination, arbitrary treatment, and *refoulement*.

To do this well, refugee law advocates will need to explore and build on the complementary protection provided by international human rights law, by the Convention on the Rights of the Child, by the criminalization in international law of torture and its cognate offences; they will need, too, to make strategic use of standards intrinsic to democratic government, such as transparency and accountability, and those principles of general international law which attach responsibility to the State wherever it seeks to project power beyond territory.

International refugee law also demands constant monitoring of State compliance with judgments, such as that of the European Court of Human Rights in *Hirsi*, to ensure that regulations and operational practice fall into line.

- Then, there is relevance *to States*, by demonstrating that refugee protection *is* a viable undertaking in a globalized, mobile world; that refugee protection can be, and must be, accommodated within rescue at sea or interception operations; that refugee law is not inconsistent or incompatible with the protection of community interests;
- And next is relevance *doctrinally*, so that international refugee law must:
  - (1) Demarcate its own province within the broad field covered by human rights, but without surrendering its particularity (think ‘persecution’), and without allowing itself to be subsumed within human rights; if every human rights violation equals persecution, then the refugee

loses that special, necessary quality – entitlement to international protection. But if everyone is a refugee, then no one is a refugee.

(2) Demarcate again its own province vis-à-vis international humanitarian law, again recognizing the areas of overlap. Of course, armed conflict produces refugees in the international legal sense, but it also displaces ordinary people who may have different needs. Yes, international humanitarian law addresses ‘causes’, such as ethnic cleansing and persecution, but its approach, purposes and concepts reflect a different, even if complementary perspective.

(3) Locate itself firmly within the system of international law at large; that is, within a system of law, drawn from treaty, custom and general principles, that governs relations between States, and which recognizes that States are responsible, either directly or through their organs and agents, for actions in breach of their international obligations; within a system of law and organization which, in principle, enables and facilitates co-operation in pursuit of solutions to humanitarian problems; within a system in which the realm of matters of ‘international concern’ is dynamic, and in which the individual is recognized as the bearer of both rights and obligations (which in turn may have implications for the criminal liability of government agents and officials, from the highest on down); within a system in which the rule of law demands accountability, and where the interactions of particular regimes – refugee law, human rights law, humanitarian law – reveal, not fragmentation, but a complementary impact on the exercise of sovereign competences.

(4) Remain dynamic and responsive to need, by resisting facile, top-down approaches to protection in favour of the progressive and constructive work streaming from the engagement of different legal systems and cultures in the interpretation and application of a common agenda, a common text.

### **3.3 Globalization and local accountability**

Ironically, the globalization of international law offers opportunities for enhancing accountability at the local level, and the refugee lawyer needs to be conscious of how his or her discipline meshes with the wider national and international legal issues, and how the approach to and control of State power generally resonates with the goal of refugee protection.



Take government-sponsored or condoned torture, for example. State officials have no impunity if they commit crimes against international law, even if they acted, not for individual ends, but in the interest or perceived interest of the State.

In the case of *Habib v Commonwealth of Australia* in 2010, Jagot J. noted that the Court had ‘both the power and a constitutional obligation to determine...’ a claim of aiding, abetting and counselling torture by officers of the Commonwealth in breach of Australian law, even where the relevant acts took place abroad. It could hardly be argued that the alleged violations of international law were in the public interest.

In a judgment handed down on 30 October 2014, the UK Court of Appeal referred to Jagot J.’s opinion in *Habib* as ‘compelling’. This case, *Belhaj v Straw & Others*, involved the extraordinary rendition the claimant and his wife to Gadhafi-controlled Libya, allegedly with the connivance and complicity of the then Foreign Secretary, Sir Jack Straw, and of British officials, including Sir Mark Allen, allegedly the Director of Counter-Terrorism of the Secret Intelligence Service at the relevant time; I say ‘allegedly’, because as the Court itself noted, his status has neither been confirmed nor denied...

The Court of Appeal had no doubt whatsoever that international law had evolved to include the regulation of human rights, and that the prohibition of torture is recognized both in treaty and in customary international law, as a principle of *jus cogens* permitting no derogation. The Court recalled the House of Lords judgment in the case of *A* in 2006, and what public policy has to say about torture. To this, it added:

‘So far as unlawful rendition is concerned, this too must occupy a position high in the scale of grave violations of human rights and international law, involving as it does arbitrary deprivation of liberty and enforced disappearance.’

The parallels between unlawful rendition, surrender to torture, and the principle of *non-refoulement* are inescapable. National officials have no immunity, and the Court found a ‘compelling public interest’ in its investigating the claims, notwithstanding the involvement of other States, notwithstanding potential embarrassment in inter-State relations, notwithstanding the alleged involvement of the security services.

So it is that rules and obligations govern the State internally and externally – it may no more torture a person at home, than abroad. Torture is a crime prohibited by international law, as is any attempt to torture, complicity or participation in torture, and return to the risk of torture.

As States bend the rules or hunt for the ‘gaps’, attention must focus increasingly on those who are behind the policies and practices that impact on the security and well-being of others, as well as on those who implement them. This is not just a question of responsibility at the inter-State level, but concerns also that liability which attaches to individual agents of the State, to officials, to military commanders, to the members and crews of particular units or vessels.

Like human rights law, international refugee law allows courts in appropriate cases to reclaim ground for fundamental rights and constitutional principle – think of how courts in the UK dealt with the attempt to legislate a presumption of particularly serious crime in *EN (Serbia)* and *KC (South Africa)*, and Lord Justice Sedley’s re-iteration of the presumption of innocence in the Court of Appeal hearing in *Al-Sirri*.

In mediating this endless tension between perceptions of policy, on the one hand, and rights and principle, on the other, the jurisprudence of courts in other States when interpreting international texts can provide meaningful support. An active court, well versed and well instructed in international law and practice, can even offer a corrective to the regional legislator, as Lords Bingham and Brown did on ‘social group’ and the Qualification Directive in *Fornah*.

### 3.4 Globalization and the movement of jurisprudence between States

For just as States may collaborate in the implementation of ‘migration management’ policies, so increasingly also do courts find support across jurisdictions for their role in reviewing compliance with international law.

The common text and the common agenda make international refugee law a natural for inter-jurisdictional citation and cross-fertilization. Just as governments share their latest wheeze for frustrating the phenomenon of migration, or trying to, so lawyers and judges can find jurisprudential support, that is, international legal support, for confining and structuring executive power when implementing treaties.

In part, as Eyal Benvenisti suggested in an article in the *American Journal of International Law* in 2008, this may reflect a desire on the part of national courts to reclaim constitutional space, but it also makes good sense to try to forge common understandings of common terms, to work to find, as Lord Steyn once put it, the one, true meaning...

Of course, there are risks here, too, and not every liberal or progressive interpretation of protection criteria will necessarily find support across jurisdictions. The history of the ‘internal flight alternative’ is a case in point, and a current batch of cases dealing with the relevance of ‘expiation’, sentence served, or rehabilitation to the *non*-applicability of Article 1F exclusion is another.

Nevertheless, one of the most remarkable phenomena of the past 25 years or so has been the increasing readiness of courts in different jurisdictions to look over the wall, as it were, to see how other courts are facing up to the problems common to parties working from a common text. In part, this has been facilitated by a professional organization, the International Association of Refugee Law Judges which dates back to the mid-1990s, but certainly in common law jurisdictions, it has also been actively encouraged by industrious refugee lawyers at the grass roots, and by the careful manner in which other States’ case law has been used by Counsel and

understood by courts – not, of course, as binding, but as illustrative of *practice*, and therefore of relevance to interpretation and application in international law.

Among common law and anglophone States, increasingly widely accepted interpretations can be found, identifying, for example, the characteristics of rights and the elements central to human dignity which require to be protected, and which no one should be required to change.

Reading the UK Supreme Court’s judgement in *HJ (Iran)* will lead you straight to the High Court of Australia in *Appellant S395*, to *SZATV*, and then back to the House of Lords in *Januzi*. You can repeat the process with the UK Supreme Court’s judgment in *Al-Sirri*, or last month’s Canadian Supreme Court judgment in *Febles v Minister of Citizenship and Immigration*.

And what national courts do has relevance as *practice*, impacting in turn on regional courts and institutions – you can also follow *HJ (Iran)* and its precursors along the road to Luxembourg, and to the judgments of the Court of Justice of the European Union in *Germany v Y & Z* and *X, Y & Z v Minister voor Immigratie en Asiel*.

Of course, there are one or two stand-outs, the United States resistance to foreign citation being most noticeable. But even Justice Scalia has recognized the relevance of the judgments on treaty interpretation by the courts of other States parties. In *Olympic Airways v Husain* in 2004, he regretted the majority’s,

‘... failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us... One would have thought that foreign courts’ interpretations of a treaty that their governments adopted jointly with ours, and that they may have an actual role in applying, would be (to put it mildly) all the more relevant.’

Perhaps there is room for change. As Kate Jastram puts it in an article in the *Journal of International Criminal Justice*, drawing also on comparative jurisprudence, the use of international criminal norms in the refugee exclusion context provides for a, ‘coherent approach to preserving asylum for those who need and deserve it, while harmonizing interpretations of the enumerated crimes...’

That makes sense, and this approach is certainly reflected in UK case law, such as *JS (Sri Lanka)*, and in Canadian case law, such as *Ezokola*.

#### 4. And What of the Future?

State and non-State actors will continue to persecute others, and to treat them prejudicially for reasons that are and ought to be irrelevant to the enjoyment of fundamental human rights. The upsurge in religious persecution in these times is a clear case in point, but no less is the political persecution visited on those seeking to challenge policies and practices injurious to communities across the world, for example, in relation to development and environmental issues.

It seems no less certain that States, as they struggle to come to terms, not only with human rights as a constraint on power, but also with the inescapable practical phenomenon of people on the move, will continue to deny protection to those in search of refuge, also for reasons that are and ought to be irrelevant to their enjoyment of fundamental human rights.

In this contested field, international refugee law certainly has a future and, moreover, a dual function – to protect and to hold to account. It is the hook which we as advocates can use to secure the protection of those in flight from persecution and other related harm; and at the same time, to hold to account those who would deny protection, who would deny to those in flight what the Secretary-General feared in 1950, recognition as person before the law; who would treat ‘the other’ in disregard of their inherent dignity as human beings and seek to avoid censure by operating out of sight of the law or by outsourcing practice to profit-driven private entities.

This is an abnegation of democratic government within the rule of law, and international refugee law can and must be part of the process by which to redress, reclaim and recapture the balance between individual and State.

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