

# Faultlines, refugees, and the law

MADELEINE REES 27 September 2015

The refugee crisis in Europe has challenged many accepted truths, and shown that the solution lies in applying international human rights law to override political maneuvering.



Volunteers prepare to

welcome 1,000 refugees at Dortmund station (Felix Huesmann/Demotix)

In her excellent [article](#) referencing the refugee crisis, Jennifer Allsopp pointed to a fault line which social and cultural practice have tried hard to obscure. She noted the fact that *"it is men who are the protagonists of the current refugee crisis. ...they have begun to weave a new narrative around what it means to be vulnerable, to be a man and to be a refugee. They depict new masculinities of war that challenge the militarised assumptions..."*

The role of nonviolent men: the possibility of an alternative narrative to that of men as warriors or as reluctant but participating foot soldiers to a cause, men who do not slavishly fall in behind regime or opposition. They have always existed as an inconvenient truth that the powerful know has the potential to undermine them - which is why traditional social and cultural mores vilify men who oppose violence as a means of conflict resolution as cowards and homosexuals, and, reflecting the gendered and misogynist assumptions around honour - condemns them as 'women'.

This is not the only faultline that is being exposed by the recent exodus of refugees, particularly from Syria. Whoever gets to create a narrative gets to dictate the response.

For the refugee 'crisis' this narrative went along predictable lines: reports of numbers and the response of States. The inability of Greece, Macedonia, and then Hungary to 'cope', and the defensive measures taken to stop the 'invasion'. The generic term used was 'migrants' 'Syrians' 'refugees' - depersonalising. Although there were some personal stories, there was no analysis as to who they were: men, women, children, age?

Nothing then of the support that was being given by ordinary people in the Balkans whose actions basically kept the refugees alive, of the human connection in the park in Belgrade where so many of the refugees were forced to 'camp' with only a minimum of support in the form of a water tank and some toilets provided by the state. Ordinary people just hanging out and chatting, bringing tea, toys pampers...from Serbia, Bosnia, Slovenia. They followed the actions of the many Greeks who, in the middle of their own economic trauma, likewise came to help.

It was not until the move to support refugees by ordinary people in Western Europe became so obvious that the 4th estate was finally forced to look away from governments to the people. A faultline! Democracy is not just about occasional elections; and this wrong footed our politicians to the extent that they had no choice but to concede some ground.

Many rejoiced in the new found humanity, solidarity and 'people's power'. There was a growing belief that there would now be common sense and common purpose in the EU. There was not. On the contrary, the ruling classes - particularly in the UK, did not roll over so easily. Supported by the right wing media, the talk of 'swarms' of migrants and document fabrication, of cultural clashes of terrorism, and of young men coming into Europe and "our women" therefore needing protection, continued. Hungary had the audacity, in that very distorted interpretation of Christianity, to say that it would take only Christians. And now there is antagonism across borders as states try to abdicate and pass on responsibilities to other states, any state but their own - again fuelling narratives of ancient tribal hatreds that could spill over.

In short, there has been a rush to paper over the faultlines, to provide disingenuous information, to confuse.

It is vital to understand that most of those seeking protection do not want to stay in Europe. They want to go home. It is the myth of all migration narratives that it is a permanent solution for those seeking it. Most people would stay home if they could, most go home at some point. This is more so for asylum seekers who did not choose to leave but were driven out by persecution and conflict.

These faultlines lie in traditional narratives; there are other constructions of masculinity which are not militarised and not violent. There is such a thing as common humanity that will respond with kindness and solidarity. Militarised security mitigates against peaceful solutions and causes more violence. The majority of asylum seekers will go home when there is peace. The shift is to look at these as our points of reference not as the faultlines, and then apply our existing legal frameworks from that perspective to find the solution.

This is an irony in the current panicked response: none of it need have happened. There are still solutions in international law and regulatory frameworks which are based on fundamental human rights principles carved out from the catastrophe of the Second World War, developed over decades in accordance with social change, and which provide us with a road map as to how States must respond to refugees, to migrants, to human rights, and indeed to conflict.

**Why the rule of law should override politics**



*Signing of the UN Refugee Convention*

(UNHCR/UN Archives)

Whilst politicians have tried to evade and obfuscate, as a matter of law their obligations are clear: The cornerstone is the right in international law, guaranteed by [Article 14 of the Universal Declaration of Human Rights](#), to seek asylum. This was given legal and practical efficacy by the solemn obligations undertaken in the [1951 Refugee Convention](#) and the [1967 Protocol](#) which define the status of the Refugee as someone outside of their country of origin who has a well founded fear of persecution or serious harm for one of the reasons recognised in the Convention - race, religion, nationality, membership of a particular social group or political opinion. [Article 1A2](#)). This clearly includes those who, like the Syrians fleeing civil war, are at risk of serious harm as actual or perceived opponents of the regime or of other non-states actors including pro government militias, ISIL and other opposition groups.

There is therefore no issue that those currently fleeing Syria fall within that definition, (as do many of the other asylum seekers in transit from countries also in conflict such as Iraq, Libya, Yemen, and Afghanistan), and as asylum seekers all countries must permit Syrians at and within their borders to seek asylum and to determine their claims. Obstacles to the making of such claims through forced removal, razor wire, fences, water cannon, tear gas and pepper spray are all incompatible with Article 14 of the UDHR and the Refugee Convention.

The Refugee Convention also prohibits the imposition of penalties for illegal entry or presence in host states on those seeking asylum ([Article 31](#)) which places Hungary in immediate breach with the creation of criminal offences for irregular entry into the country. Hungary's willingness to accept "Christians" and not Muslim asylum seekers further compounds their violation - in particular under human rights laws prohibiting religious discrimination - and effectively nullifies the very essence of the Refugee Convention which is to provide international protection for those at risk of discriminatory forms of serious harm. No doubt in the 1930s Jewish refugees were denied sanctuary from fascism because of the asserted threat posed to the "Christian" way of life.

The core of refugee protection is that of Non-refoulement i.e. you cannot return directly or indirectly via third states an asylum seeker to the country of feared persecution. Non-refoulement is a principle of customary international law and is replicated as an absolute obligation in respect of torture in [Article 3 of the ECHR](#) and [UNCAT](#) and [Article 7 of the International Covenant on Civil and Political Rights \(ICCPR\)](#).

It is bewildering that the EU has been so lacking in clarity and coherence in its response, as these international human rights obligations are fully incorporated into a comprehensive framework of effective

refugee protection in EU law through the Directives on [Procedures](#), [Reception](#) and [Qualification Directives](#) which set minimum common standards for fair procedures and humane treatment for those seeking asylum. These include special measures for unaccompanied children and vulnerable adults, as well as common criteria of identification and recognition for those in need of international protection. In short, the obligations under the Refugee Convention and under Human Rights Law have been incorporated directly into the EU legal framework.

Much has been said of the [Dublin Regulations](#), which demand that the asylum seeker claims in the first safe country and hence must return to the country in which he/she first enters the EU. This is, however, subject to the *non-refoulement* obligation. The country must be a safe country. There must be no risk of onward removal to the country of feared persecution and there must be the opportunity for a fair determination of the claim in humane conditions. This has important protection consequences: for example, a [recent decision](#) by the Austrian Federal Administrative High Court blocked Dublin transfers to Hungary, and the Strasbourg court has also issued Rule 39 (temporary measures) to prevent return to Hungary. In previous decisions, both the [European Court of Justice](#) and the [European Court of Human Rights](#) have concluded that removal to Greece, under the first safe country practice, is incompatible with the core obligations of non-return, access to fair asylum procedures and humane conditions. All of which means that return to the first country under the Dublin Regulations is not automatic, and must be subject to judicial scrutiny to ensure the core and overriding human rights obligations under the Directives are complied with.

Of even greater significance to the current situation is a specific [Regulation](#) promulgated by the EU in 2001 which has not yet been evoked, but which would steer governments towards a coherent solution. It provides for temporary protection in circumstances, such as those that prevail at this time, of actual or imminent “mass influx” of displaced persons from third countries who are unable to return to their country of origin. A Council Decision is required by a qualified majority of Member States to declare a situation of mass influx which would be binding on all Member States (Art 5) and would oblige states to provide temporary protection for a maximum period of one year which can be extended and would continue until safe return to the country of origin is possible (Art 6). Full status determination is not required but the individual's status must be regularised and documented (Art 8), there must be access to employment, self employment or education (Art 12), provision of housing, social welfare, and means of subsistence and health care for those without their own sufficient resources (Art 13).

The Directive also makes provision for family reunion for those divided by the conflict (Art 15) and once the temporary protection ends, an obligation to facilitate voluntary return to the country of origin (Art 21). Articles 24-26 provides for burden sharing in the spirit of solidarity, and administrative co-operation in Art 27.

This is practical. It would ensure State collaboration, end the ‘dumping’ of responsibilities on countries of first entry, stop the hysteria around ‘migration swarms’ and above all else, is reflective of what the majority of Syrian refugees are asking for. They must be safe and able to help in building a peaceful solution for their country so that return is possible. Participation is crucial, as has been said in the dialogue on openDemocracy 50.50 over and over again: peace processes without participation, most specifically of women, will fail.

The legal regime for protection in the EU, *de jure* ensures that no Syrian asylum seekers should fall outside of its provisions. There should be no protection gap simply because of the numbers of those displaced. Nor does the practice of first country of asylum provide any sort of justification for off loading legal and practical responsibility. Geography should not dictate responsibility for refugees. People in Europe have demonstrated their desire to support the refugees. The EU has contemplated precisely this scenario and made provision for it. What is it waiting for?

What needs to be done is to remove the politics from human rights, and respect and give effect to the law.

Practical implementation could address real needs and rights, and include the lessons we have learnt by the actions of ordinary people in providing assistance. The practical implementation has to respect the rights set out above and maintain the dignity of those seeking international protection. There is no question that there need to be reception centres, but fundamental to their effectiveness is how that centre is set up. It cannot be internment and must be consistent with the right to liberty which is guaranteed by the Reception Directive (Art 7) and Article 5 ECHR.

Camps with fences separating people from the host community create hostilities and othering. Imperfect as the ad hoc camps have been, a positive element has been the ability to talk and mix, to mutually educate and support. Why not look at models of open facilities run with the assistance of non state actors - local people and NGOs - with the State fulfilling its obligation by providing security, registration, documentation and humanitarian support as per the Directives? These centres can be on all routes across the Balkans and Hungary. They would be only the first port of call and transportation could be provided so that there is orderly transfer to other host countries. This can facilitate an analysis and planning for what is needed from a gender, age and disability perspective.

There is also a massive need to guard against traffickers and smugglers. If asylum seekers know that they will be protected, then there is less opportunity for criminal activity and exploitation. Right now many risk all with such criminals as there is no alternative - which places States additionally in breach of the Trans-national Organized Crime Convention.

The ultimate solution to the current refugee' crisis' is to end the war. That must be the end game. Traditional narratives and the policies and knee jerk reactions that follow, have failed. A different approach is needed and this crisis has perhaps shown us the way forward: there is a new and positive image of masculinity which favours peace over war; there is a tide of good will and common humanity across borders, languages and cultures, which has shown that our governments can be swayed by citizen engagement-democracy. Above all, and to meet the demands of the immediate situation now, there is a legal framework which can guide States through this if they only drop their political rhetoric and seek practical ways forward.

***Read more articles on [People on the Move](#), 50.50's migration, gender and social justice dialogue, edited by Jennifer Allsopp***

