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‘The International Framework for Refugee Protection and its Applicability  
in the Current Migration Crisis’

Notes for a Presentation

EMN Norway’s National Conference on

The Future of the European Asylum and Refugee System: Rethinking Asylum  
and Refugee Protection

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1. The role of law and the international legal framework for refugee protection

International law is not itself a ‘solution’ to the problem of refugees, but it can be a facilitator and a guide to the principled effectiveness of measures which States may take or contemplate. In this sense, it offers a *framework* and the *goals* by which to judge the viability of *process* and the quality of *success*, if any. International law thus conditions the sovereignty dimension, particularly when considered within the institutional context of the United Nations and, by extension, within regional contexts such as that provided by the European Union.

- (Nearly) one hundred years of international law and organisation
  - 1921 League of Nations High Commissioner for Refugees... Nansen
  - 1922 Agreement (on identity certificates for Russian refugees) and its successors
  - 1933 Convention, 1938 Convention
  
- ‘Weaknesses’ of the system up to 1945
  - No recognition of the individual in international law
  - Strength of the principle of non-interference – Resignation of James Macdonald (League of Nations High Commissioner for Refugees from Germany); Failings and failures of the 1938 Evian Conference

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- *Ad hoc-ism* – successive agencies, offices and arrangements
- Plus: The ‘temporariness delusion’

- The United Nations

- UN Charter Article 1(3)
- The first resolution on refugees: UNGA res. 8(I), February 1946 (70 years)
- The International Refugee Organization (IRO): Clearing up after WW2
- 1948 Universal Declaration of Human Rights – Not just Article 14(1) on the right to seek and to enjoy asylum, but the whole catalogue of *individual* human rights
- UNHCR and the *politics* of protection: Living with the Cold War
- Post-Cold War: Humanitarianism and its limits?

- The legal framework – organisational and normative

- Organisational: UNHCR, protection and solutions (voluntary repatriation, local integration, third country resettlement)
- 1951 Convention/1967 Protocol relating to the Status of Refugees
  - From the regional to the universal
- The essentials of a treaty-based protection regime
  - Refugee definition
  - Status and ‘rights’: Article 31; Article 32, Article 33
  - Status and standards of treatment oriented to *integration*, but leaving open one independent and unpredictable variable : return and the cessation of protection
- State practice and the broadening mandate
  - Refugees from violence and conflict
  - Returnees, IDPs, stateless, persons of concern
  - Regional regimes: Africa, Central America, Europe
- Human rights, the prohibition of torture, the rights of the child

- The legal background to the legal framework

At a fundamental and old-fashioned level, returning to the basic language of the UN Charter, international law requires that States deal with each other on the basis of *equality*; in crude terms, this means that no State can *impose*

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migration and displacement solutions on others ('safe third country' and 'first country of asylum' are thus European constructs, glosses on the 1951 Convention/1967 Protocol).

International law also 'supports', 'equity', and 'fairness', whether in sharing responsibility when dealing with refugee flows; or in promoting migration and mobility agreements.

Finally, international human rights and refugee law clearly mandates responses to movements between States that have *protection* front and centre. Again, experience confirms that measures taken *without* due regard to international law, whether rules or principles, are unlikely to succeed in the long term. This has very obvious implications for the future of migration management and refugee protection.

**Rules and principles:** Principles may shape the behaviour of States, while hard rules regulate their conduct; not everything is regulated by rules, and there are gaps...

- ... relating to *causes* : (UNGA 1986 resolution on measures to avert new flows of refugees)
- ... relating to *solutions* : (UNGA 2003 puts UNHCR on a permanent footing, 'until the refugee problem is solved', but changes nothing else...)
- ... relating to *the interim* : that is, how to 'treat' refugees pending a 'durable solution'

**International co-operation:** Where there are gaps, then they will only be filled successfully on the basis of international co-operation

- Article 1(3), UN Charter
- States shall fulfil their international legal obligations in good faith and in an international system where the clear goal remains protection and solutions

## 2. The applicability of the international legal framework in the current migration crisis

There is a legal framework, but does it apply to the *facts* of the current crisis?

The relevant facts include the following: A very large number of those arriving

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in Europe over the past 18 months are Syrians (at least 49%), who are fleeing, directly or indirectly, one of the most serious humanitarian crises witnessed since WW2. It can be assumed that they are seeking asylum/protection (even more, that they are *prima facie* refugees), and that they therefore fall within the existing international and European legal framework (in the sense that their claims demand consideration). Some may have come directly from Syria, while others may have spent time in countries of first refuge, such as Turkey, Lebanon or Jordan. Even though *prima facie* refugees, this fact may have a bearing on whether they are entitled to protection in Europe, or whether some other country ought to assume, or re-assume, responsibility. One major gap in the framework is precisely that it does not specify which country or countries should be responsible. Note: ‘safe third country’ and ‘first country of asylum’ as essentially European constructs; if other States are to accept them, a ‘deal’ may be required.

Other groups arriving in recent months have also included individuals fleeing from countries in conflict, or which are known to produce refugees: Iraq, Afghanistan, Eritrea. Again, on the basis of common knowledge (including recognition rates), it can be assumed that they too are entitled to consideration of their claims to protection and that the legal framework applies to them. ‘First asylum’ considerations may also apply to them, as much as to Syrians who have spent time in countries of first refuge.

Still others may be present in what are commonly called ‘mixed flows’. The challenge is to determine who they are, whether they have any claim to protection or to remain, and thereafter to take the necessary follow-up action. There is nothing new in this.

- Clearly, the legal framework applies, but ‘applicability’ is by no means synonymous with *completeness*
- Plus, we are working here, not just with a legal framework, but within an international regime which, which under the umbrella of the 1951 Convention/1967 Protocol and other related refugee instruments, brings together States, UNHCR and the United Nations at large, in a forum, the UNHCR Executive Committee...

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- Similarly, the Common European Asylum System, considered together with key provisions of the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights, brings together Member States, the Council, the Commission and the European Parliament
  - Plus, the Council of Europe, PACE, and the European Convention on Human Rights
  
- Which key rules apply?
  - ***Non-refoulement*** (the prohibition of return of refugees, to the risk of persecution, torture, inhuman or degrading treatment, or to the risk of violence from conflict)
  - **Access to territory and procedure** (without which the applicability of the relevant rules and obligations cannot be determined)
  - **Immediate protection and humane treatment of those arriving or *en route***
    - EU Charter of Fundamental Rights, Article 4; European Convention on Human Rights, Article 3
  
- Incompleteness of the international legal regime
  - Deficit: Non-intervention (R2P)
  - Deficit: Non-interference (Other States' rights and interests)
  - Deficit: International cooperation
  - Deficit: Solidarity and responsibility sharing
  - Deficit: Migration management – 19<sup>th</sup> Century attitudes obstruct effective dealing with 21<sup>st</sup> Century realities
  
- The Secretary-General's April 2016 Report: 'In safety and dignity: addressing large movements of refugees and migrants'
  - What's law got to do with it?