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Harvey, C. (2016). Our Common Humanity: Human Rights and Refugee Protection. Working Notes, 2016(78), 23-26.

**Published in:**  
Working Notes

**Document Version:**  
Publisher's PDF, also known as Version of record

**Queen's University Belfast - Research Portal:**  
[Link to publication record in Queen's University Belfast Research Portal](#)

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# Our Common Humanity: Human Rights and Refugee Protection

Colin Harvey

## Contexts

The global refugee crisis is raising profound questions about the status and effectiveness of protection regimes at all levels. It should also prompt reflection on the present international order and why, despite the plea of ‘never again’, we still witness human rights violations on massive scales.

The world remains a structurally unequal place, where social injustice is rampant, and individuals and communities are routinely forced to flee their homes. However small it may now feel, the interdependent world we inhabit is not the welcoming place we might expect. Recognition of our common humanity increasingly runs parallel with exclusion, deterrence and deflection. For many, but not all, the world is a much more tightly regulated space, where states determine the contours of movement on a highly instrumental basis. The lives of individuals and communities become secondary to strategic games lacking in mercy and compassion. The plight of the forcibly displaced therefore presents a distinctive set of challenges: to deliver justice to the ‘stranger’ in need and to struggle for justice and peace in our world.

Pope Francis continues to place great emphasis on refugee protection, and his work has generated a renewed focus on the social doctrine of the Church. Through word and deed, he demonstrates an openness to the humanity of the refugee. This is reflective of a long-standing practical engagement within the Catholic tradition of respect for the human rights of the forcibly displaced, and an embrace of an inclusive concept of ‘refugee’.<sup>1</sup> Underpinning this perspective is a strong alignment with many pressing concerns of the modern human rights movement. At its heart is enduring respect for the dignity of the human person, and a conscious negation of all forms of domination and oppression that deny our inherent dignity. The demand is to experience the person first, as someone in need of our support and help.

Those who are forcibly displaced confront the theory and practice of human rights in direct ways. The fact of being coerced into flight combines with

the reality of seeking sanctuary in another state or, for those who are internally displaced, elsewhere within the state. Can the principles of human rights and refugee protection rise to the challenge of providing security in a harsh and often cruel world? What might be the way forward?

## Human Rights and Catholic Social Teaching

It is worth noting something about human rights and Catholic social teaching that can get lost in the public square.<sup>2</sup> Catholic social teaching clearly insists on the fundamental significance of human rights and human dignity.<sup>3</sup> This focus on respect for the human person has implications for those who are forced to rely only on their humanity.<sup>4</sup> There is a strong imperative for Catholics everywhere to be leading voices within human rights movements. It remains possible to miss the centrality of human rights to Catholic social teaching, and thus underestimate the potential impact.

The commitment to human rights and human dignity in the Church’s social teaching embraces civil, political, economic, social and cultural rights. This ‘Catholic perspective’ influenced the drafting of the Universal Declaration of Human Rights (1948), a document that stresses dignity, brings together the full range of rights, and recognises the centrality of community to the formation of the person. The *Compendium on the Social Doctrine of the Church* provides abundant evidence to support the role of human rights.<sup>5</sup> Pope Francis underlines how much the principle of the common good is based on respect for human rights.<sup>6</sup> The strength of the existing doctrinal resources can be neglected, and perhaps the time may be right to revisit their practical implications as part of any process of radical renewal. Does the Catholic Church consistently stand with the marginalised, excluded and those whose dignity is denied today?

## Law and Human Rights

Law increasingly dominates the discussion about human rights. Rights now take legal form at international, regional, national and sub-national levels; the debates which emerge are often over the meaning of specifically *legal* norms. The post-1945 rise of international standards and institutions

(itself shaped by constitutional developments) is also evident in the further advancement of constitutional rights. States such as Ireland and the UK have ratified a significant number of international instruments. For example, Ireland is a state party to the International Covenant on Civil and Political Rights (and to the Optional Protocols to the Covenant), to the International Covenant on Economic, Social and Cultural Rights, and to the UN Convention on the Rights of the Child (and to, for example, the Optional Protocol to the Convention on a communications procedure). Ireland submits periodic reports to international treaty-monitoring bodies, and is subject to the Universal Periodic Review process under the auspices of the UN Human Rights Council (of which it was a member from 2013 to 2015).

The effectiveness of international human rights law is an open question, but its existence holds out the idea (and the possibility) that legal norms can be generated and accepted that universally acknowledge the rights of the human person.

These international mechanisms have their *regional* equivalents, with the European Convention on Human Rights system (established by the Council of Europe) being the best known in Ireland. The EU too has its own ‘human rights agenda’ – obvious, for example, in the Charter of Fundamental Rights of the European Union (including, under Articles 18 and 19, a right to asylum and protection against removal, expulsion or extradition).

These are standards that primarily embrace ‘everyone’, and although in practice they often depend on national realisation, the ambition is plain. The simple and powerful idea is that citizenship, or any other form of membership, should *not* be the key to unlocking these legal guarantees. ‘Asylum seeker’, ‘migrant’, ‘prisoner’: these are all forms of categorisation that should not stand in the way of entitlement to human rights. There may also be individuals who require special guarantees, and additional measures to ensure that their rights are affirmatively respected. This too is acknowledged.

On some occasions, human rights will place a normative question mark over individual and collective action, including work that is undertaken in the name of the common good. This does not necessarily mean that an absolutist view of atomised rights will prevail. For example, it may be possible to justify lawful and proportionate

interference with certain legal rights – an idea that is well accepted in human rights law. The law may also insist that certain things are never permissible and can never be justified: torture is often given as an example.

The domestic impact of international standards depends on many things, including whether the obligations have direct effect or whether they require transposition into the national legal system. ‘Dualist’ states, such as Ireland and the UK, must take an additional step before these standards become legally effective. However, the absence of that additional step does not mean that the international measures have no impact. They can still be used in advocacy and argument, and it can still be quite legitimately said that a state is in breach of its international legal obligations. There is scope for more work to be undertaken to ensure that these international guarantees are incorporated into domestic law. State-based responses must therefore be viewed as part of an internationalised conversation about human rights and their practical realisation.

## Human Rights and Human Displacement

The suggestion here is that it is essential to locate discussions about international protection measures within a broader human rights framework. This is precisely because Catholic social teaching and the global human rights movement are in a similar space when the cry is ‘to experience the human person first’. It is not difficult to understand why this is vital to consideration of refugee protection.

The scale of the global crisis of forced displacement is well documented. The levels have returned to ‘world war’ proportions, and the causes are becoming ever more diverse (for example, climate change). The current international legal regime grew out of the post-1945 period, and emerged during the first phase of human rights institution-building and standard-setting. The Universal Declaration of Human Rights places dignity and rights at the core of its understanding of ‘freedom, justice and peace in the world’.<sup>7</sup> It contains a human right ‘to seek and to enjoy in other countries asylum from persecution’.<sup>8</sup> The right to ‘seek’ as well as the right to ‘enjoy’ asylum must be continually emphasised today.

The cornerstones of international refugee law remain the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (Ireland is a state party to both). The Office of the United

Nations High Commissioner for Refugees (UNHCR) provides ongoing support for this international legal mechanism, and is the lead organisation in supervising the application of these instruments.

The legal regime established a concept of the refugee that has endured, even though there have been key advances and significant developments in regional contexts. The ‘status-creating’ nature of international refugee law means that those who are ‘refugees’ for these legal purposes (recognition by states is declaratory and not constitutive) possess international legal guarantees.<sup>9</sup> The ‘well-founded fear of being persecuted’ test has not remained static, and perhaps one of the more notable trends in refugee law is how the ‘definition’ is consistently informed by progressive developments in human rights. This has allowed the concept of refugee to remain surprisingly relevant, and the scope for further interpretative innovation is there. The protections which the concept unlocks for those seeking asylum are of fundamental value, and give recognition to civil, political, economic, social and cultural rights and needs.



Refugee camp, Kurdistan, Iraq, 2014 iStock Photo ©claudiad

Although it is still significant, the relevance of the concept of refugee is consistently questioned.<sup>10</sup> The definition, however expansively interpreted, can seem unduly narrow. International refugee law effectively delegates to states the procedural dimensions of implementation. UNHCR, of course, plays a vital role too, but there is no equivalent of the treaty-monitoring bodies of international human rights law. Even the guarantees that are there are often hedged around with limitations.

It is possible to acknowledge these weaknesses and, for principled and pragmatic reasons, defend the existing system. Its survival remains an achievement, and it has assisted in ensuring

protection when needed. As tempting as it may be to commence another reform initiative, it is perhaps not the best time, and there is ongoing work to be done to maximise the effectiveness of what is there now. If good use is made of international human rights standards (in advancing refugee protection) it may be sensible to accept the limitations of refugee law – and the exclusionary debates that swirl around the notion of the ‘genuine refugee’ – while also paying much more attention to the complexities that shape human displacement and human migration. Human rights discourse has much to contribute to this task. There is growing recognition, for example, of the human rights of those who may be in need of international protection but who may not be ‘Convention refugees’.

For states such as Ireland this picture is supplemented by regional and supranational contexts. The Council of Europe continues to promote human rights throughout Europe and, when given the opportunity, the European Court of Human Rights rightly reminds states what the human rights of ‘everyone’ mean in practical terms. It is a court that is often under considerable pressure and strain and, although not without flaws, it must be defended and strongly encouraged to hold to its rights-reinforcing jurisprudence. In the time ahead, its role may become of heightened value, but only if it is willing to apply its own jurisprudence on Convention rights in a robust, consistent and principled way.

The EU presents its own distinctive questions. Its emergence as a more ‘constitutionalised’ entity means that it has embraced human rights further. At the same time, however, it is creating a Common European Asylum System that can look and feel very much like the caricature of ‘Fortress Europe’. The utter failures of that system became all too evident in 2015, as the notion of solidarity effectively collapsed into inter-state contestation. What cannot be neglected in this is the emerging role of the Court of Justice of the EU, and the impact its work is having on European and global discussions of refugee protection. If this European project continues to advance, then the struggle will be to ensure that it is radically reformed to reflect a rights-based approach guided by best practice on international protection. Human rights discourse can play a valuable role in these conversations by reminding states of the human person at the centre of whatever ingenious mechanisms they devise for managing the forcibly displaced.

## Ways Forward?

In order to promote further discussion it may be helpful to note elements that should be present in any humane approach. It is not the intention here to give an exhaustive list, but simply to provide some general reflections on what we might strive for.

First, there is a need to play a full and active part in strengthening the existing tools of international human rights and refugee law. At a minimum, this includes ratification of relevant instruments and encouraging other states to do so. Without seeking to overstate the role of international law, there is an urgent need to bolster the international machinery. This should combine with all relevant international and regional efforts to advance peace, justice and solidarity. Global problems of this scale must be tackled and solved collectively as part of a multi-stranded approach.

Second, no state should make matters worse – the notion of ‘do no harm’. This includes the myriad ways that states (and others, including multinational corporations) find to nurture conflict and inequality. Those that engage in persistent ‘refugee-generating’ and/or ‘inequality perpetuating’ behaviour should not be surprised when forced displacement is the result.

Third, it must be clear in national (and in supranational) law, policy and practice that existing international guarantees will be respected, upheld and implemented. There is little point in attempting to be a global ambassador for human rights if domestic practice is appalling. This might be a simple plea to ‘practise locally what you preach globally’.

Fourth, put in place an accessible, sustainable, humane and effective system of international protection at the national level. This includes treating people with dignity and respect throughout any determination process and afterwards. Too many states try to send a message to the world through their asylum systems; it often reads: ‘Do not come here’. It is a stark example of the instrumental use of human beings. Procedures must be fair and accessible, as well as efficient and effective. There is much guidance available on what a good system might look like. This embraces too the subtle (and not so subtle) attempts to undermine the human right to seek asylum. Do not make it impossible for someone to seek asylum in the first place.

Finally, in all the systems for dealing with people who are forcibly displaced, it is imperative that states, individuals and communities try to ensure that those seeking protection do not encounter only labels and categories. We must find ways to experience the human person first (in all her or his complexity, strength and fragility). This means deploying available tools to ensure policies and practices are anchored in human rights, as well as thinking about the language that is used to talk about international protection. A human rights framework might assist, and Catholic social teaching and the global human rights movement are more aligned here than is often acknowledged.

## Notes

1. Eugene Quinn and David Moriarty, ‘Forced Migration: A Challenge for European Solidarity’, *Working Notes*, Issue 74, May 2014, p. 3.
2. Colin Harvey, ‘Encouraging Dialogue? Vatican II and Human Rights’ in Niall Coll (ed.), *Ireland and Vatican II: Essays Theological, Pastoral and Educational*, Dublin: The Columba Press, 2015, pp. 130–43.
3. See, for example, Conor Gearty’s call for dialogue in ‘Human Rights: Faith for a Secular Age?’ in Eoin Cassidy (ed.), *Who is my Neighbour? Deus Caritas Est: An Encyclical for our Times?*, Dublin: Veritas Publications, 2009, pp. 95–105.
4. Conor Gearty also notes the tensions; see: ‘Human Rights: Faith for a Secular Age?’, *op.cit.*
5. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, London & New York: Burns & Oates/Continuum, 2005.
6. Pope Francis, *Laudato si’ – On Care for our Common Home*, Encyclical Letter, issued 24 May 2015, Dublin: Veritas Publications, 2015, par. 157: ‘Underlying the principle of the common good is respect for the human person as such, endowed with basic and inalienable rights ordered to his or her integral development.’
7. Preamble to the Universal Declaration of Human Rights. See also Article 1: ‘All human beings are born free and equal in dignity and rights ...’
8. Article 14(1), Universal Declaration of Human Rights.
9. See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva: UNHCR, reissued December 2011, p. 9: ‘A person is a refugee within the meaning of the 1951 Convention as soon as he [or she] fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his [or her] refugee status is formally determined. Recognition of his [or her] refugee status does not therefore make him [or her] a refugee but declares him [or her] to be one. He [or she] does not become a refugee because of recognition, but is recognized because he [or she] is a refugee.’
10. Eugene Quinn, ‘The Refugee Convention Sixty Years On: Relevant or Redundant?’, *Working Notes*, Issue 68, December 2011, p. 19.

**Colin Harvey teaches human rights law (and related subjects) in the School of Law, Queen’s University Belfast.**