Loophole or Law-Breaking? Rwanda Plan's Inconsistency with International Refugee Law

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Abstract

In April 2022, the United Kingdom announced its plans to deport asylum seekers arriving by small boat to Rwanda, a policy which has been dubbed the 'Rwanda Plan'. The Rwanda Plan seeks to address a problem which British policymakers have grappled with for decades—how to reduce the number of asylum seekers entering the country and achieving refugee status. The UK Government argued that the Rwanda Plan is entirely congruent with international refugee law. This claim has been refuted by various human rights agencies, the most prominent of which is the United Nations High Commissioner for Refugees. These organisations have argued that the Rwanda Plan violates the principle of non-refoulement. This article contributes to the international legal critique of the Rwanda Plan by arguing that the Rwanda Plan also violates the principle of non-discrimination. It does so by inspecting the demographics of asylum seekers likely to be affected and contrasting the Rwanda Plan with the contemporaneous Ukraine asylum schemes. This article deploys an interpretivist legal perspective to put forward this argument, that international human rights law has an inherently moral purpose and therefore must be understood in its moral context.

1 Introduction

On the 28 April 2022, the Nationality and Borders Act 2022 achieved Royal Assent, paving the way for asylum-seekers arriving through 'irregular' means to be sent to an 'alternative safe country'. Two weeks prior, the United Kingdom (UK) had agreed to a Memorandum of Understanding (MoU) with Rwanda, which established that Rwanda would receive said asylum seekers in exchange for financial remuneration.[1] These are the constituent elements of the 'Rwanda Plan', a policy that paved the way for asylum seekers arriving in the UK to be permanently relocated to Rwanda. The Rwanda Plan is the newest instalment in years of policies dedicated to reducing the UK's intake of asylum seekers.[2] Asylum policy in the UK, and a host of other wealthy Western nations, has become increasingly more restrictive since international refugee law (IRL) was made universally applicable in 1967.[3] Architect of the Rwanda Plan, the former Home Secretary Priti

[1] Home Office, 'Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement' (*GOV.UK*, 14 April 2022) <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r#part-4–financial-arrangements> accessed 1 June 2023.

[2] Home Office, 'Impact assessment: Migration and Economic Development Partnership with Rwanda: equality impact assessment (accessible)' (*GOV.UK*, 4 July 2022) <https://www.gov.uk/government/publications/migration-and-economic-development-partnership-with-rwanda/migration-and-economic-development-partnership-with-rwanda-equality-impact-assessment-accessible> accessed 1 June 2023.

[3] Matthew Gibney and Randall Hansen, 'Asylum Policy in the West: Past Trends, Future Possibilities' in George Borjas and Jess Crisp (eds), *Poverty, International Migration and Asylum* (Palgrave Macmillan 2005); Lucy Mayblin, *Asylum After Empire*: *Colonial Legacies in the Politics of Asylum Seeking* (Rowman and Littlefield 2017).

Patel, argued that the policy is the 'humane, decent, and moral response' to a 'broken' global asylum system.[4] Patel asserted that the Rwanda Plan would 'break the cycle' of people smugglers facilitating small boats making dangerous journeys across the Channel.[5]

Proponents of the Rwanda Plan perceive it as exploiting a loophole in IRL and the distinction between an asylum seeker and a refugee. Once a person achieves refugee status—known as being granted asylum—the state must uphold extensive obligations to ensure their welfare, and may not forcibly relocate them outside of the state's jurisdiction. However, the state does not have the same obligations towards asylum *seekers*—those engaged in the process of achieving refugee status. By exporting asylum seekers during their application process, the UK avoids activating most of its obligations towards them altogether. The UK Home Office has elaborated a legal defence of the Rwanda Plan which essentially reiterates this position, that relocating asylum seekers who have not yet had their claims processed is not prohibited under IRL.[6]

Despite this defence, the Rwanda Plan has been widely criticised as morally deficient,[7] and it is an ongoing and highly controversial debate

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[4] Priti Patel, 'Oral statement on Rwanda' (*Home Office*, 2022) <https://www.gov.uk/government/speeches/oral-statement-on-rwanda> accessed 1 June 2023.

[5] Priti Patel, 'World first partnership to tackle global migration crisis' (*Home Office*, 2022) <https://www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis> accessed 1 June 2023.

[6] Home Office, 'Nationality and Borders Bill: A differentiated approach factsheet' (*GOV.UK*, March 2022)<https://www.gov.uk/government/publications/nationality-and-borders-bill-differentiation-factsheet/nationality-and-borders-bill-differentiation-factsheet> accessed 1 June 2023.

[7] Yasmine Ahmen and Emilie McDonnel, 'UK Plan to Ship Asylum Seekers to Rwanda Is Cruelty Itself' (*Human Rights Watch*, 2022) <https://www.hrw.org/news/2022/04/14/uk-plan-ship-asylum-seekers-rwanda-cruelty-itself> accessed 1 June 2023; BBC, 'UK's Rwanda policy "immoral, ineffective" – Archbishop of Wales' (14 June 2022)

whether the UK's use of offshoring is compliant with the UK's obligations under IRL.[8] This article employs the legal philosophical school of interpretivism to make the argument that the Rwanda Plan is not compliant with IRL. By deploying an interpretivist lens, this article offers a new perspective and makes legal arguments not present elsewhere in the academic literature. Legal interpretivism is valuable for our investigation as it holds that there is no separation between legality and morality.[9] This allows one to develop the moral critique of the Rwanda Plan into a legal argument.

IRL protects the right to asylum and contains three fundamental principles: non-discrimination, non-refoulement, and non-penalty.[10] This article does not detail the principle of non-penalty in relation to the Rwanda Plan because the policy complies with this principle. In the sense of the 1951 Refugee Convention, a 'penalty' is one 'meted out as

<https://www.bbc.co.uk/news/uk-wales-61802560> accessed 1 June 2023.

[8] UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (June 2022); 'Rwanda: Commonwealth leaders must oppose UK's racist asylum seeker deal' (*Amnesty International*, June 2022) <https://www.amnesty.org/en/latest/news/2022/06/rwanda-commonwealth-leaders-must-oppose-uks-racist-asylum-seeker-deal/#:~:text=%E2%80%9CCommonwealth%20leaders%20must%20take%20a,and%20asylum%20seekers%20to%20Rwanda.%E2%80%9D> accessed 1 June 2023; Nigel Chidombwe, 'The Legality Of The Asylum Partnership Agreement Between The UK And Rwanda Under International Law' (*Human Rights Pulse*, May 2022) <https://www.humanrightspulse.com/mastercontentblog/the-legality-of-the-asylum-partnership-agreement-between-the-uk-and-rwanda-under-international-law> accessed 1 June 2023.

[9] Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24(1) OJLS 1–37; Gianluigi Palombella, 'The Principles of International Law: Interpretivism and its Judicial Consequences' (Robert Schuman Centre for Advanced Studies, Working Paper 70, 2014) 4.

[10] This is noted in the UNHCR's introductory note on the treaty. UNHCR, 'Convention and Protocol Relating to the Status of Refugees' (2010) 3.

a punishment by a judicial or semi-judicial body' and includes 'imprisonment and fines'.[11] This article focuses on the principles of non-discrimination and non-refoulement, which it argues are violated by the Rwanda Plan. Legal critiques of the Rwanda Plan, the most comprehensive of which is the analysis provided by the United Nations High Commissioner for Refugees (UNHCR),[12] have not sufficiently engaged with the principle of non-discrimination. This is primarily the area to which this article contributes. This gap in the literature is striking as the outcomes of the Rwanda Plan are demonstrably discriminatory. The Rwanda Plan targets 'irregular' asylum seekers, particularly those arriving into the UK via small boats.[13] Home Office statistics show that small boat entrants are overwhelmingly of African and Middle Eastern origin.[14] Former Prime Minister Boris Johnson, in relation to increasing barriers to access for asylum has said that 'our compassion may be infinite, but our capacity to help people is not'.[15] Meanwhile, the UK

[11] UNHCR, 'Commentary of the Refugee Convention 1951 (Articles 2–11, 13–37)' (1997) 98.

[12] UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (n 8).

[13] The UK Government foregrounds small boat crossings in its 'Impact Assessment' of the Rwanda Plan: Home Office, 'Impact assessment: Migration and Economic Development Partnership with Rwanda: equality impact assessment (accessible)' (n 2).

[14] Home Office, 'Irregular Migration to the UK, year ending June 2022' (*GOV.UK*, 2022) <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-march-2022> accessed 1 June 2023. Here, and throughout the article, I use the term 'Middle East' to include Afghanistan, which though controversial, is more in line with the Western-conceived 'Greater Middle East' than typical notions of the Middle East. I generalise in the Interest of clarity rather than reimagining political boundaries. For a discussion of the Greater Middle East, see Aylın Güney and Fulya Gökcan, 'The "greater Middle East" as a "modern" geopolitical imagination in American foreign policy' (2010) 15(1) Geopolitics 22–38; Medhi Amineh, *The Greater Middle East in Global Politics: Social Science Perspectives on the Changing Geography of the World*, vol 106 (Brill 2007).

[15] Boris Johnson, 'PM speech on action to tackle illegal migration' (*GOV.UK*,

has facilitated the arrival of over 125,000 Ukrainian refugees in a space of months.[16] This is around as many refugees the UK accepted in 2021,[17] and twice the number of small boat arrivals since 2018.[18] To premise that the UK was 'at capacity' for refugees is clearly false. As will be argued, the driving difference between the UK's approach to refugees from Ukraine compared with those from Africa and the Middle East is nationality.

The importance of asking whether the Rwanda Plan is compliant with the UK's international legal obligations is undeniable. Interrogating any asylum policy is significant because of how it could materially affect the lives of some of the world's most vulnerable people. The UK, as a relatively wealthy country, has the resources to meaningfully improve the lives of refugees fleeing war and persecution. The 1951 Refugee Convention and 1967 Protocol have been instrumental in creating a system whereby wealthy states like the UK play a part in international refugee protection. With the Rwanda Plan, the UK is seeking to circumvent its obligations in a way that it perceives as legal. Should the Rwanda Plan ever be put into practice,[19] this will have serious consequences for the lives of any of the affected asylum seekers. Challenging the perception that the Rwanda Plan is legally valid, and therefore legitimate state practice, is extremely important.

2022) <https://www.gov.uk/government/speeches/pm-speech-on-action-to-tackle-illegal-migration-14-april-2022> accessed 1 June 2023.

[16] Home Office, 'Ukraine Family Scheme, Ukraine Sponsorship Scheme (Homes for Ukraine) and Ukraine Extension Scheme visa data' (*GOV.UK*, 2022) <https://www.gov.uk/government/publications/ukraine-family-scheme-application-data/ukraine-family-scheme-and-ukraine-sponsorship-scheme-homes-for-ukraine-visa-data--2> accessed 1 June 2023.

[17] 'United Kingdom Refugee Statistics 1960–2023' (*Macrotrends*, 2022) <https://www.macrotrends.net/countries/GBR/united-kingdom/refugee-statistics#:~:text=U.K.%20refugee%20statistics%20for%202021,a%204.01%25%20increase%20from%202017> accessed 1 June 2023.

[18] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

[19] At the time of writing, no asylum seekers have been sent to Rwanda.

Beyond the UK, the international context amplifies the significance of this article. The Rwanda Plan is the answer to a problem not unique to the UK. Refugee displacement is a growing crisis which requires a global solution and international cooperation. Like the UK, other wealthy Western states are well poised to assist in this. Consistently across the West, states have long sought to reduce their intake of refugees from the Global South.[20] Without challenges to the Rwanda Plan, it is reasonable to speculate that it may inspire other like-minded states to adopt similar policies, particularly given that other versions of offshoring for asylum seekers already exist in Australia and the European Union.

In the next section, this article establishes an overview of legal interpretivism and details a brief history of British asylum policy and the immediate context from which the Rwanda Plan emerges. Having laid the theoretical and empirical groundwork necessary for our investigation, this article then answers the question: is the Rwanda Plan compliant with the UK's legal obligations under IRL? This article argues that the answer is no: the Rwanda Plan violates the principles of non-refoulement and non-discrimination. This article's contribution to the literature on the Rwanda Plan is found in the later discussion in the argument that the Rwanda Plan is discriminatory. This bolsters the critique of the Rwanda Plan, ensuring that it isn't solely contingent on poor conditions in Rwanda, but also on British asylum policy itself.

2 Interpretivism

Legal interpretivism's preeminent scholar is Ronald Dworkin and thus this article's discussion of interpretivism will centre around his ideas and writings.[21] Dworkin's arguments begin by critiquing the legal

[20] Gibney and Hansen (n 3).

[21] Nicos Stavropoulos, 'Legal Interpretivism' in *The Stanford Encyclopaedia of Law* (rev edn, Spring 2021) <https://plato.stanford.edu/cgi-

philosophy of positivism, specifically the legal theory put forward by HLA Hart.[22] Both Dworkin and Hart were trying to create a theory on the nature of law, explaining what law *is*. The basic distinction between Hart's positivism and Dworkin's interpretivism is that the former claims that morality and legality are separate while the latter argues that there is no such separation. Positivists believe the basis of law is its origin. Interpretivists believe that the content of the law is partly determined by the moral purpose it fulfils. For interpretivists, the law should be interpreted in the most morally attractive manner because that is the most accurate way to do so.

The unifying proposition for all legal positivists is that 'in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on it sources, not its merits'.[23] For positivists, morality is not part of the law: it exists purely as a matter of historical fact. In Hart's theory, law is valid when it fulfils the 'rule of recognition', a master rule which sets the criteria for what qualifies as law.[24] Whilst this may vary in different legal systems, the unifying feature of every sophisticated legal system is a convention whereby legal officials accept the rule of recognition.[25] Laws can take form in many ways, including legislation, customary practice, jurisprudence, or general declarations from specified persons.[26] These things constitute valid law if they fulfil the rule of recognition. This is known as the 'pedigree thesis' which 'explains legal validity in terms of how or by whom standards are promulgated'.[27] In the positivist story

bin/encyclopedia/archinfo.cgi?entry=law-interpretivist> accessed 1 June 2023.

[22] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978).

[23] John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 Am J Jurisprud 199.

[24] HLA Hart, 'The Foundations of a Legal System' in *The Concept of Law* (OUP 2012).

[25] ibid.

[26] ibid.

[27] Kenneth Himma, 'Judicial Discretion and the Concept of Law' (1999) 19(1) OJLS 72.

of legality, it sometimes occurs that the law is incomplete, or that it 'runs out'; in novel and complex cases, where existing rules may be ambiguous or vague, a judge has to exercise discretion to fill in this gap and reach a decision.[28]

For interpretivists, the positivist account of law is insufficient. 'When the rules "run out", one must look to why those rules are there in the first place to determine how they should be extended'.[29] In novel cases, judges are only able to make decisions by considering 'what is valuable about the law'.[30] Dworkin argues that judges apply moral principles when adjudicating novel cases. This argument is evidenced through various examples of the judges' deliberations and reasonings for their rulings in complex cases,[31] such as in *Riggs v Palmer*. In *Riggs v Palmer*,[32] the court deliberated as to whether or not Elmer Palmer should inherit his grandfather's estate, as was his grandfather's will. The case arose because, fearing his grandfather would change his will, Palmer had murdered his grandfather seeking to ensure his inheritance. The court argued that whilst reading the legislation literally, in isolation from other relevant considerations, Palmer would inherit his grandfather's estate; this defied the moral principle that 'no one may profit by his own fraud' and thus the judge ruled against him.[33]

The Dworkinian account of law, therefore, opposes the positivist thesis that law is composed solely of historical facts, arguing that 'law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules'.[34] Dworkin continues to

[28] Hart (n 24) 'Postscript'.
[29] Alexander Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality' (2011) 4(1) Eur J Leg Stud 154.
[30] ibid.
[31] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 15–30.
[32] *Riggs v Palmer* 115 N.Y. 506, 22 N.E. 188 (1889).
[33] Dworkin (n 22) 23.
[34] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011)

state that law 'also includes the rules that follow from those justifying principles, even though those further rules were never enacted'.[35] For interpretivists, the principles and moral justifications of the law which judges must consider are part of the law, but do not fulfil the positivist 'pedigree test' as they have a normative, rather than institutional, foundation.

The incompleteness of the positivist account leads interpretivists to a different conceptualisation of law. Interpretivists believe that the content of law is determined by both social and moral facts; law is comprised of rules *plus* the moral justification for those rules. Therefore, law and morality are not separate spheres, as positivists argue. In the interpretivist account, law must be interpreted 'as an adequate response to the moral concern that is characteristic of legal practice'.[36] Interpretivism, then, is concerned with discerning the moral justification for law, and then applying that justification to novel cases. In Dworkin's words 'legal argument is a characteristically and pervasively moral argument. Lawyers must decide which of competing sets of principles provide the best—morally most compelling—justification of legal practice as a whole'.[37] The interpretive process is as follows:

(1) Pre-interpretative stage—identifying the social phenomenon known as law but knowing nothing other than that it exists and where to look.
(2) Interpretative stage—the interpreter settles on some general justification for the main elements of the practice identified.
(3) Post-interpretive stage—the interpreter adjusts their sense of what the practice 'really' requires so it serves the interpretation they accept at the interpretive stage.[38]

401–402.
[35] ibid.
[36] Stavropoulos (n 21).
[37] Dworkin (n 9) 4.
[38] Dworkin (n 31) 65–67.

In line with the interpretivist method outlined above, this article first identifies the relevant pieces of international refugee legal practice, before discussing the moral principles which justify international refugee legal practice. Then, social facts are interpreted in the light of their moral justification, discerning what IRL requires states to do. Finally, this article applies this analysis of IRL to the Rwanda Plan and asks whether the policy is compliant with the legislation.

There is a debate in the literature as to whether interpretivism can rightly be applied to international law. Without contributing to the debate per se, this article assumes that this application is possible. Nonetheless, it is worthwhile to roughly sketch the nature of the dispute. The essence of this disagreement is that Dworkin's ideas were about a domestic legal system, not an international one. Anti-application scholars such as Jason Beckett argue that Dworkin's ideas cannot be transposed into the realm of international law,[39] while pro-application scholars such as Başak Çali and Alexander Green argue the reverse.[40] This debate focuses on the asymmetrical features of national and international legal systems, such as the relative impotence of international courts, or the contrast between the value-homogenised nation and the value-heterogenized international system.

In the face of disagreement about how to interpret international law, a choice must be made. To do so, it must be asked: what is gained from separating morality from international law? Nahuel Maisley presents a convincing argument, stating that even if this separation is possible, it is not desirable.[41] This is particularly salient given our focus on IRL, a

[39] Jason Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 EJIL4.

[40] Alexander Green, 'Legal Interpretivism Beyond the State' (McMaster Philosophy of Law Conference, 2014); Başak Çali, 'On Interpretivism and International Law' (2009) 20 EJIL 3.

[41] Nahuel Maisley, 'Better to see International Law This Other Way: the Case Against International Normative Positivism' (2021) 12(2) Jurisprudence 151–174.

branch of human rights law. Human rights legal practice is so imbued with moral notions of fairness and freedom that interpreting it in lieu of this moral purpose risks missing the point altogether. Many scholars now accept that interpretivism can be applied to international law and have developed arguments on this basis.[42]

Even for those unconvinced by interpretivism in general, or its application to this case, it is wise not to throw the baby out with the bathwater. Interpretivism is fundamentally concerned with moral coherence and the law. There is an intrinsic value in analysing whether the moral foundations of an area of law are consistent with a new piece of practice. Regardless of a lawyer's philosophical allegiance, and indeed whether they find the legal argument presented here convincing, the moral argument which is presented here is compelling and significant. The UK has adopted a policy which will have a serious impact on the lives of asylum seekers; weighing the moral soundness of this in the light of international law is a meaningful endeavour.

3 UK's Asylum Policy

Having presented an outline of the theoretical framework, it is now time to establish the 'facts of the case', as it were. For centuries, refugees have sought asylum in the UK. After WWII, as British asylum politics became increasingly racialised, the UK Government sought to reduce its intake of refugees from outside of Europe.[43] Initially, it did so by influencing the architecture of IRL to exclude citizens of colonies from

[42] See George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509; Dimitrios Tsarapatsanis, 'Human Rights beyond Ideal Morality: The ECHR and Political Judgement' (2021) 10 Laws 4; Başak Çali, Nicola Bruch and Anna Koch, 'The Legitimacy of Human Rights Courts: a Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35(4) Hum Rts Q 955–984.

[43] Stephen Small and John Solomos, 'Race, Immigration and Politics in Britain: Changing Policy Agendas and Conceptual Paradigms 1940s–2000s' (2006) 47(3-4) Int J Comp Sociol 235–257.

the right to asylum.[44] However, the event of the 1967 Refugee Protocol undermined these efforts by universalising the right to asylum.[45] From the 1980s, facing high numbers of refugees from the Global South, the UK Government introduced a barrage of national legislation aimed at drastically increasing the barriers to entry to asylum for prospective refugees.[46] In academic literature, this is referred to as a *non-entrée* regime.[47] In 2022, the *non-entrée* regime has had its newest addition—the Rwanda Plan. Meanwhile, the Russian invasion of Ukraine created a new refugee crisis in Europe. In response, the UK Government has introduced schemes to assist Ukrainian refugees achieve asylum in the UK. The juxtaposition between the Rwanda Plan and the Ukrainian refugee schemes demonstrates that the right to asylum is not enjoyed equally amongst asylum seekers arriving in the UK.

3.1 A Brief History

The UK has a rich history of sheltering refugees in the centuries preceding WWI, starting in earnest in the late 17th century with the flight of Huguenots fleeing religious persecution, followed by political exiles escaping the French Revolution in the 1780s, and starving refugees escaping the Irish Potato Famine. British asylum legislation is relatively sparse prior to WWI. On one hand, there are examples of the UK legislating to protect refugees within its borders, such as the Foreign Protestants Naturalisation Act of 1708 (which provided Huguenots with the same rights as citizens), and the 1870 Extradition Act (which prohibited extradition for political fugitives). However, the UK had also foreshadowed its propensity to legislate against refugees it deemed undesirable. This is evidenced by the Aliens Act 1793, which established powers to deport foreign nationals on account of their political views, and later by the 1905 Aliens Act, which introduced

[44] Mayblin (n 3).
[45] UN Refugee Protocol (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).
[46] ibid.
[47] Phil Orchard, *A Right to Flee* (CUP 2014).

immigration controls into the UK for the first time, with the aim of restricting Jewish immigration.[48]

After WWI, the UK's asylum policy was managed through the League of Nations.[49] This was the case until the League of Nations was dissolved and replaced by the United Nations (UN). Refugee treaties from the League of Nations focused solely on refugees coming from Europe. Foremost amongst these was the 1933 Convention relating to the International Status of Refugees, which created arrangements for refugees fleeing Russia and Armenia.[50] The UK did not engage in the drafting of the 1933 Convention.[51] Further arrangements in 1936 and 1938 extended the provisions of the 1933 Convention to Jewish and other 'non-Aryan' refugees fleeing Germany and Austria.[52]

3.2 1951–1993: The Changing Face of Refugees

In 1950, facing a huge refugee crisis in the wake of WWII, UN representatives began drafting a new refugee treaty at the Conference of Plenipotentiaries.[53] Ultimately, the Conference authored the 1951 Refugee Convention.[54] Records from the Conference demonstrate that the UK representatives sought to limit obligations to refugees from the

[48] Bernard Gainer, *The Alien Invasion: The Origins of the Aliens Act of 1905* (Pearson Education 1972).
[49] Mayblin (n 3) 16.
[50] Robert Beck, 'Britain and the 1933 Refugee Convention: National or State Sovereignty' (1999) 11(4) IJRL 597–624.
[51] ibid.
[52] Provisional Arrangement concerning the Status of Refugees Coming from Germany (1936) vol CLXXI LNTS No 3952; Convention concerning the Status of Refugees Coming from Germany (1936) vol CXCII LNTS No 4461.
[53] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951) 189 UNTS 137 < https://www.unhcr.org/uk/what-we-do/publications/final-act-united-nations-conference-plenipotentiaries-status-refugees-and> accessed 4 June 2023.
[54] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

Global South by 'purposefully excluding' non-Europeans from the 1951 Convention.[55] UK representatives pushed for a 'colonial' clause to be inserted which would have given the UK a veto on applying the Convention to its colonies.[56] After resistance, a compromise was found with the 'territorial application clause', which had the same effect.[57] The UK made it clear that it would be reluctant to agree to the Convention without this clause.[58] At the time of accession, the UK extended the rights of the Convention only to the Channel Islands and the Isle of Man.[59] The UK ratified the Refugee Convention operating under the assumption that refugees would be predominantly European, which was true until the early 1980s.[60] Initially, many refugees arriving in the UK had been displaced by Nazi Germany, and they were fleeing communism in the East, reinforcing the standard conception of a refugee in the West as being 'white', and later 'anti-communist'.[61] During the Cold War, the Refugee Convention was regarded by the West as an ideological victory against the Communist Bloc, with refugee flows from East to West demonstrating the superiority and desirability of the Western way of life.[62]

Over time, with the weakening and eventual disintegration of the Soviet Union, the demographics of refugees in the UK changed. After an initial dip in refugee intake following the end of the Cold War, the numbers began to increase sharply. The increased number of asylum seekers migrating to Europe was caused by factors like decolonisation, the departure from policies which allowed migration from the

[55] Mayblin (n 3) 20–21.
[56] ibid.
[57] ibid.
[58] ibid.
[59] ibid.
[60] Charles Keely, 'The End of the Cold War Matters' (2001) 35(1) Int Migr Rev 306.
[61] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) J Refug Stud 350–374.
[62] Keely (n 60) 306.

Commonwealth, the spread of technology, and the broader definition of a refugee offered by the 1967 Refugee Protocol.[63] The refugees arriving in the UK were now predominantly from the Global South, fleeing conflicts far from the imagination and sympathy of the British public. Lucy Mayblin explains that 'these new refugees are *different*, and there are a lot of them. They also come from poor countries, meaning that they implicitly blur the boundaries between economic migrant and refugee'.[64] A corollary of this was that asylum and immigration, which had previously been regarded as conceptually distinct by the UK Government, was increasingly regarded as the same category. [65] Most of the 'new' refugees were poor and not white.[66] They were undesirable by the British state or media and portrayed as 'uncivilised hoards'.[67] The British state quickly began to regard asylum seekers with considerable hostility, and by the late 1980s, they were categorised as 'a problem around which government policy must be focused'.[68]

3.3 1990–2019: The *Non-Entrée* Regime

The average annual number of refugees being accepted in the UK each year was steadily declining in the decades prior to 1993. In the 1960s, it was 163,200; in the 1970s, 151,750; in the 1980s, 113,277.[69] However, after the 1990s, these figures began to increase sharply. In 1990, the UK accepted 43,625 refugees, and the 1990s saw a decade average of 88,505. This was the first time that this figure at the start of a decade was *higher* than the 10-year average. Throughout the 2000s, the average number of refugees accepted in the UK averaged at

[63] Gibney and Hansen (n 3).
[64] Mayblin (n 3) 19.
[65] Gibney and Hansen (n 3) 1.
[66] It is important to note that this type of refugee had existed for decades, 'newness' refers only to their increased presence in Europe.
[67] Mayblin (n 3) 26.
[68] ibid 16.
[69] 'United Kingdom Refugee Statistics 1960–2023' (n 17).

272,146, peaking in 2005 at 303,163.[70] Between 1990 and 2005, there was a 695% increase. This, combined with and likely leading to a growing hostility towards refugees, led to British asylum policy transforming, in tandem with the rest of the West, into a '*non-entrée* regime', focused on 'containing refugees in the developing world'.[71] The chief goal of Western states since the early 1990s was to prevent the arrival of asylum seekers.[72] Between 1993 and 2013, nine pieces of asylum legislation were introduced in the UK, making it harder for refugees to achieve and retain asylum status, while also reducing the assistance that came with asylum.[73] In comparison, three pieces of legislation were introduced in the previous two centuries.[74]

The *non-entrée* regime was continued with the Immigration Acts of 2014 and 2016 respectively, which introduced penalties for airlines who failed to prevent the entry of 'irregular entrants'. Practices like these are known as 'border externalisation', whereby the barriers to entry into a country do not begin on the geographic boundaries of the sovereign state.[75] While the Coalition Government (2010–2015) ostensibly committed itself to taking in refugees in response to crises in North Africa and the Mediterranean, only a 'fraction' of the 20,000 quota was ever accepted.[76] Asylum seekers became indistinguishable from migrants in popular discourse,[77] and were continually painted as 'illegal' entrants, both in the UK and in the wider Western world.[78]

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[70] ibid.
[71] Orchard (n 47) 20–21.
[72] Gibney and Hansen (n 3) 5.
[73] Mayblin (n 3) 16–18.
[74] ibid 8.
[75] Alison Mountz, *The Death of Asylum: Hidden Geographies of the Enforcement Archipelago* (University of Minnesota Press 2020) 7–8.
[76] Mayblin (n 3) 18.
[77] Lamis Abdelaaty and Rebecca Hamlin, 'Introduction: The Politics of the Migrant/refugee Binary' (2022) 20(2) J Immigr Refug Stud 233–239.
[78] Mountz (n 75).

Since 2012, annual figures for refugee intake in the UK have been less than half that of the peak between 2004–2008.[79] In fact, the average number of refugees accepted in the UK in the decade preceding 2021 was 17% lower than it was in the decade following the UK's ratification of the Refugee Protocol. Despite this, the hysteria around asylum seekers has continued to pervade public discourse. The resurgence of right-wing populist and nationalistic debates in Europe resulted in the use of the phrase 'refugee crisis' to describe the influx of asylum seekers from the Middle East in 2015, described by Krzyzanowski and others as 'unnecessarily alarmistic' and 'intentional and purposeful'.[80] The 'refugee crisis' fed into the ongoing debate about the UK's membership of the EU, which itself was fuelled by racial tensions and anti-immigrant rhetoric.[81] The UK's exit from the EU in 2019 has made it more difficult for asylum seekers to arrive in the UK due to an increase in border checks.[82] Ultimately, as a result of a concerted wave of legislation and government policy aimed at stifling the arrival of asylum seekers, the period of 1993–2019 has seen the enlargement of already huge barriers for asylum seekers who do not have the resources to arrive in the UK through conventional means.

3.4 Channel Crossings

The *non-entrée* regime has not prevented asylum seekers arriving in the UK, but it has made it significantly harder for many to do so safely, as demonstrated by the proliferation of asylum small boats across the Channel. The number of people making this journey annually has

[79] 'United Kingdom Refugee Statistics 1960–2023' (n 17).
[80] Michał Krzyżanowski, Anna Triandafyllidou and Ruth Wodak, 'The Mediatization and the Politicization of the "Refugee Crisis" in Europe' (2018) 16(1-2) J Immigr Refug Stud 3.
[81] Valeri Modebadze, 'The Refugee Crisis, Brexit and the Rise of Populism: Major Obstacles to the European Integration Process' (2019) 5(1) JLIA 86–95.
[82] Thom Davies and others, 'Channel Crossings: Offshoring Asylum and the Afterlife of Empire in the Dover Strait' (2021) 44(13) Ethn Racial Stud 2308.

increased from around 300 in 2018 to 45,755 in 2022.[83] During this time, the death toll has risen year on year, with 209 known to be dead or missing between 2014 and 2022.[84] The so-called 'Channel crossings' have become the epicentre of anti-immigration rhetoric in the UK, despite representing a relatively low proportion of overall immigration; for example, only 3% of visas enabling extended stays were given to asylum seekers arriving by small boat in 2021.[85] It also bears mentioning that these asylum seekers, like those in the decades prior, are coming from the Global South; the overwhelming majority coming from the Middle East or Africa.[86]

It is essential to emphasise that those making the journey across the Channel are not conventional migrants. A sobering number of people have died in pursuit of asylum; at least 203 migrants have died or gone missing trying to cross the English Channel since 2014,[87] including an infant child who drowned in 2021.[88] Furthermore, 98% of those making the journey in small boats across the Channel claim asylum upon arrival in the UK.[89] The UK Government has seemingly refused to

[83] BBC, 'How many people cross the Channel in small boats and where do they come from?' 29 March 2023) <https://www.bbc.co.uk/news/uk-53699511> accessed 9 April 2023.

[84] Missing Migrants Project, 'English Channel to the UK' (2022) <https://missingmigrants.iom.int/region/europe?region_incident=4061&route=3896&year%5B%5D=2503&year%5B%5D=2502&year%5B%5D=2501&year%5B%5D=2500&year%5B%5D=10121&incident_date%5Bmin%5D=&incident_date%5Bmax%5D=> accessed 2 June 2023.

[85] Home Affairs Committee, 'Channel crossings, migration and asylum—Report Summary' (July 2022) <https://publications.parliament.uk/pa/cm5803/cmselect/cmhaff/199/summary.html> accessed 2 June 2023.

[86] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

[87] Missing Migrants Project, 'English Channel to the UK' (n 84).

[88] 'Drowning of 27 migrants in English Channel is worst disaster on record: IOM' (*UN News,* November 2021) <https://news.un.org/en/story/2021/11/1106562> accessed 2 June 2023.

[89] Peter Walsh, 'Q&A: Migrants crossing the English Channel in small boats'.

acknowledge the latter of these facts. Instead, its rhetoric, and deployment of military personnel, has insinuated that arrival of asylum seekers via Channel Crossings is tantamount to an invasion by economic migrants.[90] Asylum seekers are painted as criminals, with the Home Office using language like 'intercepted', 'caught', and 'detained'.[91] 'Migrants are criticised for not following due process—for "exploiting" loopholes, entering "without notifying authorities", using "unseaworthy vessels", and "choosing" reckless routes'.[92]

3.5 The Rwanda Plan

In July 2021, the UK Government published its 'New Plan for Immigration', which stated its intention to 'overhaul' the current asylum system.[93] The centrepiece of this overhaul is the Rwanda Plan which is comprised of a bilateral agreement with Rwanda, the Memorandum of Understanding (MoU) and the Nationality and Borders Act. Despite being presented as a 'new' direction, the Rwanda Plan is in every way an extension of the *non-entrée* regime which has existed in the UK since the 1990s. The MoU between the UK and Rwanda is an agreement that asylum seekers, whose claims are not being processed by the UK, may be sent to Rwanda on the basis of mutual consent between the state parties. The MoU confirms that Rwanda will uphold the human rights of asylum seekers who are transferred in accordance with the Refugee Convention of which it is a state party.[94] It further states that Rwanda will ensure asylum seekers

[90] Davies and others (n 82).
[91] Joseph Maggs, 'The "Channel Crossings" and the Borders of Britain' (2020) 61(3) Race Cl 78–86.
[92] Emma Jacobs, "'Colonising the Future": Migrant Crossings on the English Channel and the Discourse of Risk' (2020) 4(4) Brief Encounters 42.
[93] Home Office, 'Consultation on the New Plan for Immigration: government response (accessible version)' (29 March 2022) <https://www.gov.uk/government/consultations/new-plan-for-immigration/outcome/consultation-on-the-new-plan-for-immigration-government-response-accessible-version> accessed 2 June 2023.
[94] UNHCR, 'States parties, including reservations and declarations, to the 1951

are not returned to their country of origin at any personal risk or be subject to any cruel or degrading treatment.[95] It also elaborates a generous arrangement for those whose asylum claims are unsuccessful; asylum seekers whose claims are rejected are still eligible to apply for permission to remain in Rwanda 'on any other basis in accordance with its domestic immigration law'.[96]

The Nationality and Borders Act changed British asylum law to establish two groups of refugees. To be considered 'Group 1', a refugee must have entered lawfully or shown good cause for their 'illegal' entry.[97] Any refugee failing this condition is considered a 'Group 2' refugee.[98] Group 2 refugees are eligible for 'removal to a safe third country'. The Nationality and Borders Act amends previous asylum legislation—the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants, etc) Act—to send asylum seekers to Rwanda before their asylum claims are processed in the UK.[99]

3.6 Routes to Legal Entry

Given the Rwanda Plan's emphasis on the illegality of entry, it is significant to consider how few legal routes to asylum there are. To claim asylum in the UK, an asylum seeker must be physically present in the country.[100] There are very few avenues for this to happen legally; the UK does not offer 'asylum visas' except in specific cases, meaning the only legal routes are for those able to achieve other visas such as

Refugee Convention' <https://www.unhcr.org/media/38230> accessed 8 August 2022.

[95] Memorandum of Understanding (n 1) 9.1.1.

[96] ibid 10.2.

[97] Nationality and Borders Act 2022, s 12(1)(a), (2), (3)

[98] ibid 12(1)(b).

[99] ibid sch 4.

[100] Immigration Act 1971, art 11(1).

students or tourists, an option not available for many asylum seekers.[101] Because of the difficulty to secure 'legal' arrival, it has long been the case that most asylum seekers have arrived in the UK 'illegally'; 62% of asylum claims in the year ending in 2019 were made by 'illegal' entrants.[102] The UK sometimes opens legal routes to entry using ad hoc asylum arrangements in response to international crises. At present, there are three such arrangements: the Ukrainian schemes; the Hong Kong British Nationals (Overseas) Route; and the Afghan Citizens Resettlement scheme.[103]

The Ukrainian refugee programs (referred to as the 'Ukraine schemes' by the UK Government's website) are substantially more relaxed than the others mentioned, reminiscent of the UK's historic preference for European refugees. There is no limit on how many Ukrainian refugees the UK will accept.[104] At the time of writing, over 185,00 visas have been issued to Ukrainian refugees, with over 125,000 arrivals.[105] To

[101] The Migration Observatory, 'Asylum and refugee resettlement in the UK' (updated 27 January 2023) <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/%20> accessed 2 June 2023.

[102] Home Office, 'New Plan for Immigration: Policy Statement' (2021) 8 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708-001_Sovereign_Borders_Web_Accessible.pdf> accessed 2 June 2023.

[103] Home Office, 'New Plan for Immigration: legal migration and border control (accessible)' (n 93) 24.

[104] Home Office, 'Guidance: Apply for a Ukraine Family Scheme visa' (*GOV.UK*, 2022) <https://www.gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa> accessed 1 March 2023. Home Office, 'Immigration information for Ukrainians, British nationals and their family members (accessible)' (*GOV.UK*, August 2022) <https://www.gov.uk/government/publications/immigration-information-for-ukrainians-in-the-uk-british-nationals-and-their-family-members/immigration-information-for-ukrainians-in-the-uk-british-nationals-and-their-family-members> accessed 2 June 2023.

[105] Home Office, 'Ukraine Family Scheme, Ukraine Sponsorship Scheme

qualify, Ukrainian refugees must either have family in the UK or be able to find a sponsor (someone willing to house them).[106]

The Hong Kong asylum scheme is analogous to the Ukraine schemes in terms of scale, but fundamentally very different. Hong Kong was a British colony from 1851 until 1997 before the jurisdiction of Hong Kong was handed back to China. Conscious of the huge political differences between British Hong Kong and China, when negotiating the hand-over, the UK successfully negotiated the Sino–British Joint Declaration, whereby Hong Kong would be governed under a 'one country, two systems' framework, and would be afforded a high level of political and economic autonomy.[107] The UK now argues that China has breached this agreement, eroding Hong Kong's autonomy to such an extent that, as a co-signatory of the Sino–British Joint Declaration, the UK is compelled to take action to uphold its promises to former British citizens.[108] The British Government states that the Hong Kong asylum scheme is one way that it continues to support Hong Kong citizens. Only those who lived in Hong Kong when it was a British colony are eligible under the Hong Kong scheme.[109] The rationale for

(Homes for Ukraine) and Ukraine Extension Scheme visa data' (n 16).

[106] UK Visas and Immigration, 'UK visa support for Ukrainian nationals' (*GOV.UK*, August 2022) <https://www.gov.uk/guidance/support-for-family-members-of-british-nationals-in-ukraine-and-ukrainian-nationals-in-ukraine-and-the-uk> accessed 2 June 2023.

[107] National Legislative Bodies/National Authorities, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984 <https://commonslibrary.parliament.uk/research-briefings/cbp-8616/> accessed 2 June 2023.

[108] UK Foreign, Commonwealth and Development, 'Guidance: Six monthly report on Hong Kong: 1 January to 30 June 2022' (*GOV.UK*, 2023), <https://www.gov.uk/government/publications/six-monthly-report-on-hong-kong-january-to-june-2022/six-monthly-report-on-hong-kong-1-january-to-30-june-2022> accessed 2 June 2023.

[109] UK Visas and Immigration, 'Guidance: Hong Kong British Nationals (Overseas) welcome programme—information for local authorities'

the Hong Kong scheme—that the UK has an obligation to reintegrate its former subjects given the breaching of an agreement that the UK signed—cannot be applied to Ukraine.

The Afghanistan scheme exists on a fundamentally different scale to the 'blank cheque' of the Ukraine schemes. The Afghanistan scheme is limited by a quota (capped at 20,000) and prioritises 'those who have assisted the UK's efforts in Afghanistan' and vulnerable people such as women or children.[110] Many Afghan asylum seekers continue to seek asylum in the UK via irregular means and may be affected by the Rwanda Plan.[111] For instance, over 10,000 Afghani asylum seekers crossed the English Channel in 2022.[112] That Afghani asylum seekers are likely to be affected by the Rwanda Plan should the plan ever come into practice means that the argument being presented in this article about Ukrainian asylum seekers cannot be extended to Afghani asylum seekers.

Since WWII, the UK has sought to reduce its intake of asylum seekers from the Global South using an immigration policy called a *non-entrée* regime. Despite ever-growing barriers, the UK has not been able to prevent 'unwanted' asylum seekers from arriving on its shores. As the *non-entrée* regime has made entry into the UK more difficult for asylum seekers, they have been forced to opt for more dangerous routes, leading

(*GOV.UK*, 2021) <https://www.gov.uk/guidance/hong-kong-uk-welcome-programme-guidance-for-local-authorities#introduction> accessed 2 June 2023; UK Visas and Immigration, 'British National (Overseas) visa' (*GOV.UK*, 2022) <https://www.gov.uk/british-national-overseas-bno-visa> accessed 2 June 2023.

[110] UK Visas and Immigration, 'Guidance: Afghan citizens resettlement scheme' (*GOV.UK*, 2021) (https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme> accessed 2 June 2023.

[111] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

[112] BBC, 'How many people cross the Channel in small boats and where do they come from?' (n 83).

to the proliferation of Channel crossings. Facing backlash from the Channel crossings, the UK Government drafted and introduced the Rwanda Plan in 2022, creating a pathway for the UK to remove 'unwanted' asylum seekers. The Rwanda Plan stands in stark contrast to the Ukraine schemes, whereby Ukrainian asylum seekers experience vastly fewer barriers to entry to asylum in the UK compared with asylum seekers crossing the Channel, the vast majority of whom are of African or Middle Eastern origin.

4 The Right to Asylum

The right to asylum was first invoked in the Universal Declaration of Human Rights (UDHR)[113] which, though not legally binding, is the organising document of human rights treaties adopted by the UN.[114] The right to asylum was formalised by two international legal instruments which apply specifically to asylum seekers and refugees—the 1951 Convention Relating to the Status of Refugees (the Convention)[115] and the 1967 Protocol Relating to the Status of Refugees (the Protocol).[116] The UK is a party to both.[117] The UK has also ratified other international documents which are relevant to the rights of refugees and asylum seekers, such as the 1984 Convention Against Torture (CAT)[118] and the 1965 Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[119]

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[113] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Resolution 217 A(III) (UDHR), art 14.

[114] Ed Bates, 'History' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2017).

[115] UN Refugee Convention.

[116] UN Refugee Protocol.

[117] UNHCR, 'States parties, including reservations and declarations, to the 1951 Refugee Convention' (n 94).

[118] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

[119] International Convention on the Elimination of All Forms of Racial

The 1951 Convention establishes that anyone fulfilling the definition of a refugee is entitled to asylum.[120] The Convention initially offered a limited definition of who could be considered a refugee—with temporal and geographical limitations—but this was rectified by the 1967 Protocol so that it could theoretically apply to anyone fleeing persecution.[121] The Convention defines what 'asylum' status consists of—an extensive layer of legal protection including welfare, employment rights, housing, and the right to remain.[122] However, as suggested by the name, asylum 'seekers'—the foci of this article—are those aspiring for refugee status but who have not had their claims accepted yet.

4.1 Morality

It is essential to first establish what is meant by morality to weigh the moral justifications for rules and obligations. For Dworkin, morality 'is the study of how we must treat other people'.[123] Personal morality begins with the idea of self-respect and then leads to respect for others. Dworkin terms this the 'Kant principle', stating that achieving dignity and self-respect requires one to regard their own life as being of intrinsic value, and this in turn requires one to recognise that the lives of others also hold intrinsic and objective importance.[124] This theory means accepting the equal importance of the lives of all human beings.[125] To be moral, 'we try to decide what we must do for—and not do to—other people by asking what behaviour would fail to respect the equal

Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

[120] UN Refugee Convention.

[121] ibid art 1; UN Refugee Protocol, art 1.

[122] UN Refugee Convention.

[123] Dworkin (n 34) 13.

[124] ibid 19, 255.

[125] ibid 260–261.

importance of lives'.[126] Everyone is entitled to well-being, however, what this means is subjective. 'Someone's well-being is not a commodity that can be measured. It is a matter of having a good life, and we have no appropriate way to measure or compare the success of different lives.'[127]

What of political morality? Political morality, as conceptualised by Dworkin, is the collective's articulation of personal morality.[128] It is the political community's propensity to treat 'all of its members as equal, that is, with equal concern and respect'.[129] Questions of political morality ask which 'rights, liberties, distributions of resources and governance structures are necessary to ensure equality for everyone pursuing the good life'.[130]

4.2 The Moral Basis of the Right to Asylum

To reiterate the interpretivist account of law outlined earlier, law is partially constituted by political morality. Insofar as legal practice is justified by political morality, legal instruments must be interpreted in a way that respects the equal importance of individuals' right to pursue the 'good life'. From this moral basis, we can conceptualise what IRL requires. The Convention protects the right of refugees to seek asylum, and finding sanctuary in another country. The Convention, amended by the Protocol, defines a refugee as anyone who is persecuted for their identity, and for that reason, cannot return to their country of nationality.[131] This definition is instructive as to the moral justification of the right to asylum. To qualify as a refugee under the Convention and Protocol, an individual must be facing an existential threat to life for

[126] ibid 271.
[127] ibid 273.
[128] Green (n 40) 12.
[129] Ronald Dworkin, '*Sovereign Virtue*, Revisited' (2002) 113(1) Ethics 106.
[130] Green (n 40) 11.
[131] UN Refugee Convention, art 1(a)(2), with text amended to reflect changes made by the UN Refugee Protocol, art 1(2).

reasons they are unable to escape within the confines of their country. There is no definitive conception of 'the good life', but it is logical to argue that the persecution of a person would threaten whichever version of the good life they choose to pursue. Simply, one cannot pursue a 'good' life if one's life itself is threatened. IRL is thus justified by political morality as it is an attempt by the collective to treat everyone's life equally.

5 Non-Discrimination

At the pre-interpretative stage of analysis, all the relevant legal instruments on non-discrimination must be gathered. At this stage, it can be observed that the principle of non-discrimination is present in virtually every major human rights treaty,[132] including in Article 3 of the Convention.[133] " Human rights literature recognises numerous types of discrimination, such as that driven by gender and sexuality, but this article focuses exclusively on racial discrimination. An instructive legal instrument on the legal definition of racial discrimination is the ICERD, which the UK has ratified.[134] The ICERD defines racial discrimination as 'any distinction, exclusion, restriction, or preference based on race, nationality, or ethnicity, which has the effect of impairing the equal recognition, enjoyment or exercise of human rights'.[135] Significant for our investigation is the stipulation that, for an act to constitute racial discrimination, it must result in the differential treatment of individuals which has the effect of impairing the enjoyment of a separate right. The notion of the impairment of another right is also found in Article 3 of

[132] Daniel Moeckli, 'Equality and Non-Discrimination' in Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2017) 3.1.

[133] The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin. UN Refugee Convention, art 3.

[134] OHCHR, 'Status of Ratification' (2020) <https://indicators.ohchr.org/> accessed 2 June 2023.

[135] International Convention on the Elimination of All Forms of Racial Discrimination 1965, art 1(1).

the Convention. As such, Article 3 'becomes relevant only if another provision of the 1951 Convention is affected, as it is an *accessory* prohibition of discrimination'.[136] A qualifying feature of discrimination, therefore, is that the alleged act must affect another part of the Convention.

What moral justification exists for the principle of non-discrimination? It has already been established that the right to asylum itself is justified by the moral principle that all individual lives should be treated as equally valuable, and the necessary preconditions of being a refugee mean that one's life itself is endangered. A political system which privileges one refugee over another cannot be seen to treat the lives of everyone as equally valuable. Non-discrimination in the enjoyment of the right to asylum is therefore morally justified by the notion of equal treatment of and regard for the lives of individuals.

The principle of non-discrimination in the right to asylum obliges states to regard the lives of refugees equally. States must do so by treating refugees without discrimination. The social and moral facts which comprise discrimination in IRL mean that a state has discriminated if each of the following tests are met. First, the subjects of the alleged discrimination must be refugees, else our initial moral justification is irrelevant. Second, the relevant action of the state must treat refugees differently, thus failing to recognise the equal value of their lives. Third, this differential treatment must affect the enjoyment of a right or fulfilling of an obligation stipulated in the Convention, therefore impeding the ability of the refugee to achieve asylum. These are the criteria which must be adopted when weighing whether the Rwanda Plan is discriminatory.

[136] Reinhard Marx and Wiebke Staff, 'Article 3 1951 Convention' in Andreas Zimmermann (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (OUP 2011) 647.

5.1 Is the Rwanda Plan Discriminatory?

5.1.1 Are Those Affected by the Rwanda Plan Refugees?

The first test requires us to ask whether the Rwanda Plan will affect refugees. It is clear that the Rwanda Plan affects asylum seekers. The Rwanda Plan targets those crossing the English Channel in small boats, 98% of whom claim asylum.[137] The important question is whether or not asylum seekers can be considered refugees. There is some ambiguity here as the phrase 'asylum seeker' is not mentioned in the Convention or the Protocol because this term only exists in the domestic sense.[138] The UK Government argues that the majority of asylum seekers arriving in the UK in small boats are not 'genuine' refugees, rather most are economic migrants.[139] Conversely, UNHCR argues that most *are* refugees.[140] Home Office statistics create a blurry picture; 34% of all asylum applications (including legal entrants) between January 2018 and June 2022 were successful, whilst 36% were rejected.[141] The remaining 32% were either provided with a different form of protection, such as humanitarian protection, which has slightly different eligibility

[137] Walsh, 'Q&A: Migrants crossing the English Channel in small boats' (n 89).

[138] Aimee Chin and Kalena Cortes, 'The Refugee/Asylum Seeker' in Barry Chiswick and Paul Miller (eds), *Handbook of the Economics of International Migration* (Elsevier 2015) 585.

[139] HC Deb Monday 22 November 2021, vol 704.

[140] Rajeev Syal, 'Clear majority of people crossings Channel are refugees, says UNHCR' *The Guardian* (London, 2022) <https://www.theguardian.com/uk-news/2022/jun/02/clear-majority-of-people-crossing-channel-are-refugees-says-unhcr> accessed 2 June 2023.

[141] Home Office, 'Asylum applications, initial decisions and resettlement—Asy D02' in 'National statistics: how many people do we grant protection to?' *(GOV.UK,* 2023) <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/how-many-people-do-we-grant-asylum-or-protection-to> accessed 2 June 2023.

parameters to asylum,[142] relocated, or withdrew their application.[143] This suggests that 'only' a third of asylum seekers arriving in the UK are refugees.

However, accounting for nationalities typically associated with small-boat crossings, this ratio is significantly higher. Between 2019 and 2021, 79% of small boat crossings were made by asylum seekers from Iran, Iraq, Eritrea, Syria, Sudan, and Afghanistan.[144] A weighted average based on these six nationalities demonstrates that for every 100 asylum seekers arriving from these countries, 80 are accepted as refugees. Compare this to the 34% success rate for all asylum claims, and it can be seen that asylum seekers crossing the Channel are substantially more likely to be accepted as refugees than other asylum seekers.

The purpose of IRL is to protect those fleeing from persecution. Clearly, a significant number of those who could be affected by the Rwanda Plan are genuine refugees. Therefore, it must be accepted that the Rwanda Plan involves refugees as designated by IRL. This statement is reinforced by the fact that the UK has tacitly acknowledged that subjects of the Rwanda Plan *are* eligible for asylum status, or else they could simply be deported rather than sent to Rwanda in an altogether more complex arrangement.

5.1.2 Differential Treatment Based on Nationality

The Rwanda Plan makes it more difficult for refugees coming to the UK through 'illegal' means to achieve asylum status in the UK. By

[142] UK Visas and Immigration, 'Indefinite leave to remain (refugee, humanitarian protection or discretionary leave)' (*GOV.UK*) <https://www.gov.uk/settlement-refugee-or-humanitarian-protection> accessed 9 April 2023.
[143] ibid.
[144] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

specifically targeting those making small-boat crossings, the Rwanda Plan will disproportionately affect refugees from the Middle East and Africa. Between January 2019 and June 2022, of the 51,582 people making this journey, 71% were Middle Eastern, and 16% were African.[145]

Meanwhile, the UK has opened legal routes for Ukrainian refugees. By adopting the Rwanda Plan and the Ukrainian refugee schemes concurrently, the UK is now operating parallel systems which lead to different outcomes depending on the nationality of the refugee. It can thus be concluded that the UK is treating asylum seekers differently based on their country of origin.

5.1.3 Does the Rwanda Plan affect a separate human right?

The fundamental effect of the Rwanda Plan is that some refugees will not be deemed eligible for asylum in the UK. This means that they would be prevented from enjoying any of the rights stipulated in the provisions of the 1951 Convention. Furthermore, by opening a legal pathway for Ukrainian refugees, the UK Government has enhanced their ability to be considered refugees lawfully residing in the UK. This directly affects 10 Articles of the Convention.[146] By not reciprocating this legal avenue for refugees from Africa or the Middle East, barring a small number from Afghanistan, the UK has effectively prevented those refugees from the enjoyment of the provisions of those Articles where it has been promoted for others. Both the Rwanda Plan and the Ukrainian refugee schemes affect how the UK applies the provisions of the Convention, fulfilling the third test for discrimination.

In 2022, the UK has effectively introduced a ‘pro-asylum’ policy for Ukrainian refugees and an ‘anti-asylum’ policy for Middle Eastern and African refugees. The effects of these two policies are that, once again,

[145] ibid.
[146] UN Refugee Convention, arts 15, 17–19, 21, 23, 24, 26, 28, 32.

white European refugees are given preferential access to asylum in the UK over refugees from the Middle East and Africa. This directly affects the UK's application (or lack thereof) of the provisions of the Convention to those refugees. Thus, it has been shown the UK is discriminating amongst refugees based on nationality and thus is violating Article 3 of the Refugee Convention. For the same reason, it also violates Article 2 of the ICERD.[147]

Perhaps without the war in Ukraine, a sceptic might have argued that it is simply the case that most refugees come from Africa and the Middle East, and thus the effects of the Rwanda Plan are not discriminatory, rather they just reflect the realities of refugee flight. Whilst this assertion would not have been completely unfounded—over a quarter of the world's refugees come from Syria alone, for example—it is fundamentally flawed.[148] First, it oversimplifies; where do Chinese Uighurs, Burmese Rohingya, or Venezuelan refugees fit into this characterisation? Each of these groups feature prominently in recent UN refugee statistics and none are from Africa or the Middle East.[149] Second, it is blind to history, and indeed now the present day; the UK has been and continues to be more welcoming to certain refugees than others. That different policies exist for refugees fleeing Russia's invasion of Ukraine and the enduring crises in Africa and the Middle East offers a stark demonstration of this fact.

Interested as this article is in morality, it is worthwhile briefly discussing the UK Government's moral argument for differentiating between refugees. It has been argued that the Rwanda Plan is necessary to prevent 'illegal' entry into the UK, and that legality under domestic law, rather than nationality, is the defining feature of asylum seekers

[147] International Convention on the Elimination of All Forms of Racial Discrimination 1965, art 2.
[148] UNHCR, 'Refugee Data Finder' (2022) <https://www.unhcr.org/refugee-statistics/> accessed 2 June 2023.
[149] ibid.

entering the UK in small boats.[150] The UK Government has rightly argued that 'illegal' routes such as via small boat are dangerous,[151] but the notion that this morally exonerates the Rwanda Plan is entirely false. The idea that the Rwanda Plan distinguishes purely between 'legal' and 'illegal' entrants is a transparent veneer; the UK Government has the power to define and redefine what 'legal' asylum seeking is under domestic law, as indeed it did twice in 2022 with the Rwanda Plan and Ukraine refugee schemes. These categories are demonstrably changeable. Why selectively change the law for refugees of certain nationalities if not to deliberately manifest an asylum policy which reflects a (dis)preference for those nationalities? If the safety of asylum seekers was paramount, why refuse to open safer and legal routes for asylum seekers who, it is known for a fact, will risk their lives otherwise?

6 Non-Refoulement

The principle of non-refoulement is protected in Article 33 of the 1951 Convention and is regarded as so fundamental that it is considered both customary international law and *jus cogens.*[152] Customary international law are rules which are not only consistently practiced by states but also as *opinio juris* accepted as law.[153] *Jus cogens* are rules which are so fundamental to the international community that it 'binds all states regardless of whether they have ratified [relevant treaties]'.[154]

[150] Patel, 'World first partnership to tackle global migration crisis' (n 5).
[151] ibid.
[152] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (n 107); Jean Allain, 'The *jus cogens* nature of *non-refoulement'* (2001) 13(4) IJRL 533–558.
[153] United Nations, Statute of the International Court of Justice (1946), art 38(1)(B); UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (n 107).
[154] Christine Chinkin, 'Sources' in Moeckli and others (eds), *International*

Paragraph 1 of Article 3 states that 'no Contracting State shall expel or return […] a refugee […] to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[155]

Non-refoulement means that states may not send a refugee to a country or territory where their life or freedom may be endangered. This includes the country from which the refugee came. In the sense of the Convention it applies to refugees but in wider international human rights law it applies to every migrant.[156] Non-refoulement creates a positive obligation whereby states must ensure that the destination of relocation is safe, a stipulation contained in Article 3 of the CAT.[157] The moral justification for non-refoulement is simple. States are morally obligated to respect and protect human life; by 'refouling' a human being, a state would have collaborated in the persecution of a human being. Thus, refoulement is morally prohibited.

Non-refoulement requires all states to uphold their duty to respect human life by ensuring that they do not relocate an asylum seeker to a country or territory where there is a risk of serious endangerment of life or freedom. Because states must factor in the likelihood of risks, it logically follows that they must ensure that they have appropriate monitoring mechanisms to procure the necessary information to make risk-related judgements. Danger, in the sense of IRL, does not include incidental dangers such as poor health or accidents. Instead, danger refers to serious and intentional risks owing to the identity of the asylum seeker.

Human Rights Law (3rd edn, OUP 2017).

[155] UN Refugee Convention, art 33.

[156] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (n 107).

[157] Convention Against Torture 1984, art 3.

6.1 Does the Rwanda Plan Violate the Principle of Non-Refoulement?

The question as to whether the Rwanda Plan violates non-refoulement is essentially whether the UK can legitimately argue that asylum seekers will not be persecuted in Rwanda. In the MoU, Rwanda has committed to upholding the human rights of all asylum seekers relocated there.[158] The MoU also established a Joint Committee which will allow the UK to monitor the implementation of these assurances.[159] However, there are many relevant factors which could be taken into consideration such as abuse of asylum seekers, abuse of LGBTIQ+ persons, and the possibility of human trafficking of women. These will be discussed by providing an overview of recent human rights issues, and the UK Government's response to each problem.

Rwanda faces accusations of the maltreatment of asylum seekers, which is highly concerning given that those affected by the Rwanda Plan will continue to be asylum seekers in Rwanda. The human rights situation of every country is reviewed through the Universal Periodic Review (UPR) mechanism of the UN Human Rights Council. The most recent UPR for Rwanda reveals that Amnesty International raised the concern that during a protest over food rations, 12 asylum seekers in Rwanda were shot and killed by police, 66 were arrested, some of whom remain under detention.[160] The UK Government notes this, but fails to explain which measures have been established to avoid this happening again other than to allude to 'greater care' being taken. [161] The UNHCR has

[158] Memorandum of Understanding (n 1).
[159] ibid 10.6.
[160] UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (n 8) 20.
[161] Home Office, 'Country policy and information note: Rwanda, general human rights, May 2022 (accessible)' (*GOV.UK*, 2022) <https://www.gov.uk/government/publications/rwanda-country-policy-and-information-notes/country-policy-and-information-note-rwanda-assessment-may-2022-accessible> accessed 2 June 2023.

also raised concerns specifically about the arbitrary detention of asylum seekers who have been 'denied access to asylum procedures'.[162] As has been established, access to asylum is a fundamental human right, the deprivation of which would constitute a serious risk to freedom. On the issue of access to asylum, the UK Government has said that there are insufficient grounds to believe there would be a 'substantial risk' to persons relocated to Rwanda.[163]

There are reasonable grounds to believe LGBTIQ+ asylum seekers in Rwanda will face persecution. *Africa News* has reported that an LGBTIQ+ Ugandan refugee was tortured due to his sexuality.[164] Human Rights Watch reported that nine LGBTIQ+ people were arbitrarily detained by Rwandan police.[165] Additionally, in a submission to the UPR, the UNHCR stated that some LGBTIQ+ asylum seekers faced discrimination and were unable to register their asylum claims.[166] Given that some of these concerns specifically affect refugees and asylum seekers, these are extremely worrying reports and should be regarded as such. The UK Government has responded to concerns about the treatment of LGBTQ+ people, saying that 'despite several sources' stating the LGBTIQ+ people, and in particular asylum seekers, have faced discrimination, it has not been able to verify the extent or scale.[167]

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[162] ibid 18.

[163] ibid.

[164] 'Rwanda's LGBTQ+ community still faces discrimination' (*Africa News*, 2022) <https://www.africanews.com/2022/06/01/rwanda-s-lgbtq-community-still-faces-discrimination//> accessed 2 June 2023.

[165] Human Rights Watch, 'Rwanda: Events of 2021' (2021) <https://www.hrw.org/world-report/2022/country-chapters/rwanda> accessed 2 June 2023.

[166] UNHCR, 'Rwanda: UNHCR Submission for the Universal Periodic Review—Rwanda—UPR 37th Session (2021)' (2020) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/282/37/PDF/G2028237.pdf?OpenElement> accessed 4 June 2023.

[167] Home Office, 'Country policy and information note: Rwanda, assessment, May 2022 (accessible)' (n 161).

Instead, the UK Government argues that Rwanda's commitment to the MoU is sufficiently compelling to believe that LGBTIQ asylum seekers sent under the Rwanda Plan will be safe in Rwanda.[168]

There are also concerns about the status of trafficked people, particularly women, who are sent to Rwanda. As widely observed, some of those who enter the UK 'illegally' are the victims of human trafficking. This is of special concern as victims of trafficking are especially vulnerable to being re-trafficked; 'trafficked persons are highly vulnerable to re-trafficking immediately after having exited a trafficking situation and en route to assistance'.[169] There is a documented presence of trafficking in Rwanda.[170] On this, the UK Government has acknowledged 'that there is some risk of trafficking abuse' but argued that 'this does mean it is systemic such that women in general are at real risk of [trafficking]'.[171] As noted by the UK Government, Rwanda is ranked as 'Tier 2' by the United States Trafficking in Persons report, meaning it 'does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so'. [172]

There are other issues which asylum seekers may encounter, but those mentioned provide a sufficient overview of the problem at hand. Recent human rights complaints show that on numerous occasions in recent years, asylum seekers, refugees, or trafficked people in Rwanda have been subject to discrimination and danger because of reasons owing to

[168] ibid.
[169] Alison Jobe, 'The Causes and Consequences of Re-trafficking: Evidence from the IOM Human Trafficking Database' (IOM, 2010) <https://publications.iom.int/books/causes-and-consequences-re-trafficking-evidence-iom-human-trafficking-database> accessed 2 June 2023.
[170] OHCHR, 'Summary of Stakeholders' submissions on Rwanda' (2021) 55 <https://digitallibrary.un.org/record/3894160?ln=en> accessed 2 June 2023.
[171] Home Office, 'Country policy and information note: Rwanda, assessment, May 2022 (accessible)' (n 161).
[172] ibid.

their identity. The UK's answer to these reports is that these cases are insufficient to indicate systemic persecution. However, the UK's answers to these potential risks do not demonstrate that it has fulfilled all the necessary obligations under the non-refoulement. In particular, it is now clear how the UK has established that previous problems will be avoided in the future, for instance by elaborating specific protections for women who are vulnerable to trafficking, or the scale of discrimination towards LGBTQ+ asylum seekers. This article concurs with the UNHCR's analysis that the Rwanda Plan poses a risk of refoulement.

The question of non-refoulement is intrinsically a difficult question because it requires speculation on not only the conditions which asylum seekers might face but also on the good intentions of politicians in both the UK and Rwanda. The UK has frequently emphasised that to the letter of the MoU, Rwanda will be obligated to uphold human rights in line with international law. However, the obligations of international law have already existed in Rwanda, and seemingly the issue has not been the commitment to those standards but the execution of them. It is not clear how the UK will ensure that human rights standards are maintained, and thus ultimately, this article has argued that the Rwanda Plan does not fulfil the necessary conditions of risk-aversion which the UK is legally obligated to uphold.

7 Conclusion

In this investigation, it has been asked whether the Rwanda Plan, a policy whereby asylum seekers arriving unlawfully in the UK may be relocated to Rwanda, is compatible with international refugee law. Deploying an interpretivist methodology, a legal argument has been developed in the light of the moral justifications which lay behind the 1951 Refugee Convention and 1967 Protocol, the written documents which comprise IRL, and the right to asylum. It has been argued the Rwanda Plan fails two fundamental principles of the right to asylum: non-discrimination and non-refoulement.

The effects of the Rwanda Plan will disproportionately affect asylum seekers from Africa and the Middle East, making it substantially harder for them to achieve asylum in the UK. Taken in the context of the Ukrainian refugee schemes, the UK now has preferential asylum policies which differentiate based on nationality. To correctly interpret the principle of non-discrimination, it must be understood in light of the moral principle that human lives are of equal importance. Given the Rwanda Plan does not treat human lives equally, it is constitutive of discrimination under international refugee law and therefore violates Article 3 of the Refugee Convention.

There are reasonable grounds to suggest that asylum seekers sent from the UK to Rwanda may experience persecution. Despite assurances from both the UK and Rwandan Governments, recent human rights violations towards asylum seekers, LGBTIQ+ persons and women demonstrate that there is a serious element of risk to the life and freedom of asylum seekers sent to Rwanda. Morality compels us to interpret the principle of non-refoulement in a way which prioritises the value of human life, and as such, the Rwanda Plan violates Article 33 of the Refugee Convention.

For those reasons, the Rwanda Plan is not compatible with international refugee law. If the UK continues with the policy as planned, it will violate the right to asylum, and as such, would be in open rebellion against IRL. Previous legal critiques of the Rwanda Plan, such as those offered by the UNHCR, have focused almost entirely on non-refoulement. By arguing the Rwanda Plan is discriminatory, this article has built a legal critique which is not entirely reliant on the poor human rights conditions in Rwanda. In and of itself, this is an important discussion; if there were an imaginary scenario where Rwanda, or perhaps another nation, did not pose the risk of refoulement, would it be moral for the UK to send asylum seekers there? If that situation had come to pass, would it be morally acceptable to suggest that there was no other legal basis to challenge the UK? It is my opinion that neither

of those statements is true. For this reason, it is crucial that the legal critique of the Rwanda Plan is not solely contingent on non-refoulement, but also on a critical examination of the UK and its discriminatory asylum policy. The Rwanda Plan represents a seismic juncture in the history of British asylum policy, and may drastically alter both the nature of refugeehood in the UK, but also the UK's relationship with international refugee law.