
Immigration Control, Citizenship, the Interplay of Sovereignty and the Vicissitudes of the Hostile Environment in the United Kingdom

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Abstract: In so far as individual States can maintain sovereignty over its internal affairs, they are nonetheless accountable to upholding certain principles and standards in the exercise of sovereignty, thereby calling for a reconciliation of sovereignty with universality of human rights law. In essence, international human rights obligations require States to comply with their treaty obligations regarding the treatment of aliens in their territory. A further implication of the international legal order is that International Bill of Rights is generally insistent on the inclusive applicability and the erosion of distinctions based on citizenship simply for the purpose of rights protection. This paper however finds that international human rights protection has been challenged by the hostile environment policy in the area of rights protection, racism, racial discrimination, xenophobia and intolerance. This paper further finds that behind the veil of the hostile environment are the ideologies of the Far Right and New Right which incubates, elucidates and implements the hostile policy in such an inexplicable way. The implication is that the adumbration of the hostile environment by these ideologies across Europe and the United States has implication for the respect of international human rights law from the time of the codification of the UN Charter to the Universal Declaration of Human Rights and the Bill of Rights in general. As it has been shown, a hostile environment ostensibly created for and formally restricted to irregular immigrants, is in effect, a hostile environment for all racial and ethnic communities and individuals in the UK.

Keywords: Sovereignty, Nationality, Immigration, Hostile Environment, New Right, Far Right, International Human Rights Law, Inclusion and Exclusion

1. Introduction

The exercise of sovereignty has over time affected the plight of non-nationals as the pre-twentieth-century developments illuminated the idea that ‘the alien was literally a non-person’ [1]. But a substantial change occurred in the middle ages due principally to Christianity, which was the prevalent religion in the West that emphasized the inherent dignity and equality before God of all human beings, changing the fact that the alien was no more a non-person [1]. Further development came through the rise of diplomatic protection in the development of international legal doctrine where cognizance was made of the right of the State to protect its citizens abroad-

doctrine with the theoretical underpinning set by Emmerich de Vattel in his 1758 classic treatise *The Law of Nations* where he opined that ‘Whoever uses a citizen ill indirectly offends the State which is bound to protect its citizen’ [2], even though it has ‘no duty to do so if it so chose’ [3]. In the opinion of Dunn, ‘it was not until the nineteenth century that the development of a body of law governing the treatment of aliens really got underway’ [4]. This allows the State to seek redress for the wrong done to its citizens as the citizen in an alien country has no direct right to seek redress with the exposure of three possibilities, namely ‘the attribution of injury to the home State of the injured alien; the attribution of the wrongful act to the State in which the alien resided; and the doctrine of the exhaustion of local

remedies known as State responsibility'[1, 11].

It is nonetheless unarguable to posit that international human rights obligations require States to comply with their treaty obligations regarding the treatment of aliens in their territory. The underlying matter is that international legal regime and its attendant institutions presume that while individual States can maintain sovereignty over its internal affairs, they are nonetheless accountable to upholding certain principles and standards in the exercise of sovereignty, thereby calling for a reconciliation of sovereignty with universality of human rights law. But with the resurgence of nationalism and far right ideologies across jurisdictions in Europe and the United States, the hostile environment has emerged which challenges the relevance and efficacy of the position of international human rights law in the exercise of sovereignty as it concerns immigration.

In the United Kingdom, for instance, the 'hostile environment' came into the lexicon of immigration law by the then British Prime Minister Theresa May, who as Home Secretary in 2012, brought into fruition, which many had argued, was an ostensibly cruel and evidently repulsive approach towards immigration that aimed at making life difficult for irregular migrants in the UK. This, through the instrumentality of the law (Immigration Acts of 2014 & 2016), created misery for irregular migrants by a collegiate denial of their basic needs such as housing, employment, education, banking and healthcare, just to mention but a few. At the heart of the policy is the frustration of irregular migrants to leave the United Kingdom or be detained and expelled if encountered by law enforcement agencies due to their irregular immigration status. The obvious reality is that while citizens enjoy a wide range of human rights, irregular migrants are arguably dehumanized and pilloried, and their fundamental rights trampled, on the skewed basis of nationality.

By engaging in this research, this paper, applying the doctrinal approach, examines the rights of migrants and irregular migrants alike in the somewhat re-emergence of right-wing ideologies and nationalism within the contours of sovereignty and international human rights law. The discussion will hover around nationalism, minimum standard treatment, the Far Right and the New Right ideologies, sovereignty and immigration control alongside the framework of international human rights as it concerns the issue of inclusion and exclusion.

2. Minimum Standard Treatment, Citizenship and the Interplay of Sovereignty

In the first aspect of diplomatic protection expressed above, the attribution of injury is to the home State of the injured alien-rather than the aggrieved individual himself, and to that effect, the Permanent Court of International Justice (PCIJ) in the *Mavrommatis Palestine Concessions* case held:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure, in the person of its subjects, respects for the rules of international law [5].

The difficulty then is that the traditional doctrine of diplomatic protection was not very much about the rights of the alien, strictly speaking, but about the rights and duties of States more especially when the individual and the State has differences as to whether or not to bring a claim and given that the claim belongs to the State, its opinion holds sway [4; 54]. As Lillich remarked 'traditional international law sought to induce States to maintain certain minimal conditions as reflected in the international minimum standard by penalizing them when they fail to do so' [6]. In the opinion of Sohn and Baxter, 'the law has not only protected aliens but has also suggested a desideratum for States in their relationships with their own nationals' [7].

Borchard expressed that 'while equality is the ultimate that the alien may ask of municipal law, which is by no means bound to grant equality, the body of international law developed by diplomatic practice and arbitral decision, indefinite as it may be, represents the minimum which each state must accord the alien whom it admits'[8]. This is regardless of whether it is the fundamental, natural, or inherent rights of humanity in general or the alien in particular; this minimum standard has acquired a permanent place within the ambit of protection in international forums [8]. What the standard did was to set a certain number of basic rights established under international law which States are under obligation to grant to aliens regardless of the treatments accorded to their own citizens, such that violations of this norm triggers international responsibility of the host State that may open the way for international State responsibility by the injured state [9].

By and large, the Minimum Standard of Treatment in international law can be said to have originated from the doctrine of denial of justice from ancient Greece that endured into the early 20th century and forming part of the natural law legacy of the law of nations [10]. The Organization for Economic Co-operation and Development (OECD) thus defines international minimum standard, as 'a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property'[11]. This can be understood in analyzing the ratio of the 1926 decision on the *Neer* claims [12] alongside the *Roberts* claims [13]; these became the landmark case for the international minimum standard.

In the *Neer* claims [12] the victim Paul Neer was a U.S. national who was murdered on his way back from a mine

where he worked. Following this event, his wife filed a claim arguing that the Mexican Government had shown lack of diligence in investigating and prosecuting the murder. The Mexico/ U.S.A General Claims Commission [14] found that even though the murder did not violate the international minimum standard on the treatment of aliens but noted that the authorities should have acted in a more effective way to protect the alien. In the *Roberts* claims [13], Roberts was a U.S. national who had been confined for nineteen months in a small cell along with some other men. The place of confinement had no sanitary facilities, no furniture and no opportunities for exercise. The Mexico/ U.S.A General Claims Commission then declared that although equality is relevant in determining the merits of a complaint of mistreatment of an alien, it is nonetheless, not the ultimate test of the propriety of the acts of authorities in the light of international law. Rather, the test is whether aliens are treated in accordance with ordinary standards of civilization. On facts of the case, the Claims Commission concluded that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment. It is therefore the case that attempts have been made in emphasizing the rights of aliens, synthesizing as it did the concept of human rights and the principles governing the treatment of aliens. This arguably raised the standard, extending to 1945 developments concerning human rights, which have now come to provide a new content for international standard that are solely based on human rights principles, becoming part of customary international law [15].

With further developments which space may not permit here, human rights norms factored in the UN Charter and subsequently engrained in the Universal Declaration of Human Rights in concert with the International Bill of Rights as preempted the treatment of aliens-minimum standards of treatment as a rule of customary international law. In essence, the notion that every State by reason of its territorial sovereignty is competent to exclude non-nationals partly or wholly from its territory constitute a general principle of international law which has been confirmed in myriads of cases in the Strasbourg jurisprudence [16]. However, as Bryan and Langford noted 'although States' prerogative authority in this regard exists, it is rather subject to a cluster of international law and treaty obligations' [16, 194]. This is simply because the international legal regime and its attendant institutions presume that while individual States can maintain sovereignty over its internal affairs, 'they are nonetheless accountable to upholding certain principles and standards in the exercise of sovereignty which calls for a reconciliation of sovereignty with universality of human rights law'[17]. Herein lies the debate, which will be examined by the pages that follow.

Clearly stated, international law allows States in the exercise of sovereignty to lay down rules governing the grant of its own nationality (citizenship). As Harris puts it:

Nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests

and sentiments, together with reciprocal rights and duties, constituting as it may, juridical expression of the fact that the individual upon whom it is conferred, either directly by law, or as a result of an act of the authorities, is in fact more closely connected to the population of the State conferring nationality than with any other state' [18].

More so, nationality according to Sir Robert Jennings and Sir Arthur Watts 'is the principal link between individuals and international law, the right of protection over its nationals abroad [...] and the duty of receiving on its territory its nationals as are not allowed on remaining on the territories of other states' [19]. Put objectively, 'nationals have a special and more permanent tie with the State of their nationality and while they have some obligations towards the State of their nationality, they also have a right of abode' [20] and are entitled to the protection of the State at various levels [21]. Nationality is of 'foremost importance in the life of an individual which will determine his or her right to enter a country and under what circumstances' [20; 6]. The UDHR has expressed that everyone has a right to nationality, and no one shall be arbitrarily deprived of his nationality or even denied the right to change his nationality [22].

2.1. Rights Protection, Inclusive Applicability Versus Core Attachment to Nationality

In Oppenheim's view 'nationality of an individual is his quality of being a subject of a certain state, and therefore its citizen, it is not for international law but for municipal law to determine who is, and who is not to be considered a subject' [23]. Writing on a submission to the UK Parliament on the government's proposal to introduce a system of temporal exclusion orders intended to be applied against British citizens, Goodwin-Gill emphasized that the action 'raises a number international legal issues including responsibility of the States to its citizens and the international community of states at large, stating that there is no justification in international law for the exclusion, even temporarily, of British citizens from the United Kingdom' [24].

Put simply, citizenship is commonly seen as membership in a state [25]. Therefore, citizenship in the language of the British Nationality Act 1948 (BNA 1948) and subsequently extended by the BNA 1981 suggests that citizenship rights held by an individual determine his/her status and the ancillary implication in expulsion matters [26]. As Gibney captures it 'the possession of citizenship therefore offers a unique level of residence in a state' [27]. This means that it is almost difficult if not impossible to deport or expel a citizen except through denationalization [28].

In the *Nottebohm case (Liechtenstein v Guatemala)* [29], the International Court of Justice (ICJ) *inter alia* was called upon to 'adjudge and declare that the Government of Guatemala in arresting, detaining, expelling and refusing to re-admit Mr. Nottenbohm [...] acted in breach of their obligations under international law'[29, 6]. Mr. Nottebohm was a German national, born in Hamburg who later in 1939 applied for naturalization in Liechtenstein. In 1905, he went to Guatemala and took up residence, settling for 34 years

there making it the headquarters of his business activities, while maintaining business connections in Germany. He had some of his friends and relatives in Germany and Guatemala, whom he paid visits, but he later succeeded in naturalizing and obtained Liechtenstein's passport. In answering that question relevant to the admissibility of the case, the ICJ considered that different factors are taken into account and their importance will vary from one case to the other while giving prominence to the 'habitual residence of the individual concerned but also the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children' [29, 6].

Despite the core attachment of nationality (citizenship) Harvey opines that 'international legal order tends to emphasize "all human beings", "every human being", "everyone", "anyone", "all persons", "no one"' [30] which suggests that what is important is the fact of being human which in any event does not vitiate or displace the existence of nationality or citizenship. A further implication of the International legal order as emphasized by Harvey is that "International bill of Rights" is generally insistent on the inclusive applicability and the erosion of distinctions based on citizenship simply for the purpose of right protection' [30, 47].

In her essay, Gil-Bazo expressed the fact that in the light of the 'more comprehensive nature of other international human rights treaties, notably the ICCPR and the ECHR, these IHRMBs [International Human Rights Monitoring Bodies] have had the chance to pronounce themselves on issues regarding the specific attachment-other than nationality-between individuals and States which may, under certain circumstances require the State not merely to refrain from expelling the individual but rather to take positive measures to ensure their stay and integration in the host country' [31]. She asserted that the UN Human Rights Committee had had cause to 'consider extensively the relationship that exists between individuals and States other than nationality, particularly the legal relevance of such significant attachments other than nationality' [31, 34]. In short, the jurisprudence of the HRC and the ECHR have emphasized the importance of factors other than nationality establishing close and strong ties, enduring and durable connections between a person and a country, sufficient to engaging connections that may be stronger than that of nationality thus making the expulsion of the individual disproportionate [32].

The UK's Immigration Rules on its part reflect the importance of ties given that paragraph 276ADE (in force from 09 July 2012) allows a grant of settlement for those who have remained in the UK for over 20 years, whether lawfully or otherwise [33]. In addition, paragraph 276ADE (iv) allows a grant of leave for those who have remained in the UK for less than 20 years discounting any period of imprisonment, but having no ties (including social, cultural or family) in their country of origin [34]. It then follows that ties established in the State by the migrant places the individual in an advantage for the grant of leave with certain other benefits enjoyed by citizens such that any expulsion

from the State ought to take the strong and enduring connections into account. Similarly, Immigration Act 2014, s 19 tagged 'Article 8 of the ECHR: public interest considerations' which replaces Part 5 of the Nationality, Immigration and Asylum Act 2002 (s117A-117B) makes it mandatory for a court or tribunal to have regard to "integration into society" when considering whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life [35].

It could then be surmised that the movement of persons (migration) across international boundaries especially non-nationals (aliens, migrants) raise issues of admission, residence and expulsion. The UN General Assembly has reaffirmed the rights of States to enact and implement migratory policies and border security measures but in doing so cautioned against adopting legislation or measures that restrict the human rights and fundamental freedoms of migrant in complying with their obligations under international human rights law [36]. Consistent with the above is the International Covenant on Civil and Political Rights (ICCPR), Art 12 which states that everyone is free to leave any country, including his own, international human rights law does not recognize a corollary right to enter or reside in another State's territory [37], the Convention on the other hand accepts that International Human Rights Law (IHRL) 'imposes obligations in respect of other treatments towards migrants with respect to measures of border control' [38].

2.2. Socio-Political Dimension of Citizenship and the Interplay of Sovereignty

Viewed from a socio-political dimension, the decision to admit or expel the citizen who had made claim on the sovereign is the test for the performance of the sovereign [39]. As Nyers argues, 'the recognition of citizen/sovereign occurs not exclusively at the border but does include the entry and exclusion decision' [40]. Citizenship is therefore a political identity between state, citizen and territory to the exclusion of all others; it goes beyond a legal status accorded to an individual by a State to active construction by State action [41].

In his contribution to the socio-political dimension, Gibney asserted that 'migration is usually driven by inequalities between states and regions with the cumulative effect of creating non-citizens' [27]. Regardless of this distinction, States under international human rights law (IHRL) are guided by certain standards of treatment meted to persons in their territorial jurisdiction, whether citizens or not. Such standards are codified under various international legal instruments to which states are bound and or by customary international law practiced by the international community. In words of Joppke, 'an emergent international human rights regime protects migrants independent of their nationality, limiting the discretion of states toward aliens and devaluing national citizenship' [42].

In essence, immigration control is a central and arguably a 'necessary feature in the maintenance of liberal democracies

that implies two capacities: one is to block the entry of individuals to a State and the other is to secure the return of those who have entered thereby raising fundamental concerns to liberal democratic ideologies as control may require the forcible expulsion of persons from the national territory; this requires bringing the powers of the state to bear against an individual' [43]. The effect might be 'the complete and permanent severing of relationship between the individual and the State'. Moreover, 'physically removing individuals against their will, from communities in which they wish to remain, effectively cuts the social, personal and professional bonds created over the course of residence with connected degrees of hardship which cannot easily be denied' [43]. The point being made is that the coercive power of States in expulsion destroys the ties, degree of integration, strong connections with the host State usually exemplified by consequent loss of social and cultural ties with the country of origin of the migrant due principally to the length of time in the host State and other relationships developed by migrants during the course of their residence which is not capable of exhaustive definition.

In short, immigration control requires a decision on entry and exit. Gibney and Hansen identify three categories. 'The first category involves those evading port or entrance officials or by using fraudulent documentation, the second involves those that breached their specific terms of entry and residence-overstaying their work permit, tourism or visit visas or those who have committed a crime which may then necessitate enforcement actions against them while the third category involves those who gained entrance or continued residence in the state on the basis of an asylum claim whose application has been rejected' [43, 7]. The phenomenon of irregular immigration in the view of Joppke, reflects the 'gap between restrictionist policy goals and expansionist outcomes which is not actively solicited by States compared to the legal quota of the classic settler nations' [42] with such restrictionist policies playing out in the form of admission and expulsion. Expressively, the process of sovereignty constitutes and identifies the basic or fundamental features of those decisions that are authoritative and controlling with assurance of its continued vitality, relevance and competence under international law [44]. As Arendt observed, 'sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion' [45].

By and large, migration albeit irregular migration, 'is a feature of most liberal democratic states and it is said to be high on policy agendas particularly in relation to border controls where migrants use irregular and undocumented means of entry to accomplish their various motives and aspiration for the migration project' [46] with consequences for international human rights law and lays the foundation for a thematic discussion in the form of hostility and patterns of control.

3. Immigration Control and Hostility

In the UK, the history of immigration control through the

instrumentality of the law 'consists of a complex body of statutes, rules and case law governing entry which did not exist prior to the twentieth century, rather there were numerous provisions controlling the movement of aliens' [47]. In summary, the power to remove or exclude aliens during the previous 200 years required parliamentary approval whether temporary in effect or permanent [47]. The implication here is that exclusion was a key issue that requires parliamentary scrutiny where executive deference in the form of discretion or policies was not permitted. This seems at variance today where there appears to be less parliamentary scrutiny with respect to the enactment of immigration rules [48]. According to Clayton, the issue of hostility even with modern day immigration control in the UK can be gleaned from 'the persecution of the Jews in Eastern Europe towards the end of the nineteenth century' [49]. Commenting on the issue of hostility in the Aliens Act, albeit the 1905 Act, in its 100th anniversary in 2005, Sedon remarked that 'it is depressing that there still exists so much xenophobia and so many negative attitudes about immigration' [50]. In addition, the British Social Attitudes survey on public attitudes towards immigration in 2003 'reflected the negativity surrounding the issue, with public opposition increasing sharply from the already recorded high levels' [51].

The implication for this study is that measures were put in place to secure the State from perceived enemies (alien enemies) and such perception led to hostility. Better still, it was typical that the State was hostile to aliens due *inter alia* to fear of migrants, perceived as a threat or were demonised by the general public and in a bid to control them, the State put in place certain measures that led to the creation of multiple rules in the pattern of immigration control as it will be shown [52].

In 1793, 'a statute was passed to control the entry of aliens, which at this time was directed towards travellers from France, as a result of the French Revolution that was said to have stirred up fervour in England [53]. While some may have remained in certain forms in modern law, by and large the immigration law of the last 100 years as has been reported 'is a very different creature from the Royal Proclamations [54]. The Aliens Act 1905 was the first major piece of modern immigration legislation that marked the inception of the Immigration Act and the appeal system [55]. Hayter notes the significance of the Aliens Act 1905, given that it was the first time since the reign of Elizabeth I that proper immigration control under an established legal framework commenced [56]. As Block and Schuster saw it, 'during the early part of the twentieth century, the Home Office was also involved in the occasional enforced repatriation and expulsion of indigent sailors from Africa and Asia' [57].

According to Wray, the Act's 'commitment to exclusion was partial at the level of policy, law and implementation and while equivocation was more evident than in later periods, due to the novelty of a system of control, a constant factor is the tension between restriction and liberalization and the

inconsistent structures and unofficial purposes to which this gives rise'[55, 303]. This was the beginning of tighter restrictions evidencing the power of the State in immigration control given that the Act has been framed as the major antecedent to Britain's more substantial and enduring legislative moves [...] [58]. Grahl-Madsen has expressed the view that the 'Aliens Act 1905 and its successors of 1914 and 1919 were particularly important stepping-stones in the history of modern aliens legislation'[59] whose effect has left a footprint on State practice in immigration control followed by other Acts that sustained the impetus for expulsion [60].

Furthermore, an integral pattern of immigration control is the introduction and interplay of discretion rather than law itself. An immigration officer had a wide discretion (a plethora of unpublished instructions in the form of guidelines and concessions) under the Commonwealth Immigration Act 1962 Act [49, 6]. The use of guidelines and concessions, as will be seen in the course of this research appears to be a peculiar feature of British immigration law, which relies heavily on unpublished instructions, guidelines and concessions. In the light of the existence of wide discretionary powers during the early days, Chimienti thinks that, 'liberal British migration policy has been in decline since 1962 because of series of Immigration Acts promulgated in order to limit the settlement of certain migrants' [61]. But Dell 'Olio disagrees arguing that 'from 1948-1962, Britain operated one of the most liberal immigration regimes in the world, granting citizenship to millions of colonial subjects as part of a policy aimed to support the ties between Britain and the Old Dominions' [62]. That argument might not hold water given that current UK's State practice in immigration as will be shown in due course evidence tighter controls by the application of discretion as further exemplified by the Immigration Act 1971, s 3 (2) which, under the negative resolution procedure permits the Minister to lay immigration rules in Parliament without a debate. It states:

The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances [...]¹

However, the courts have had to review the exercise of discretion as was aptly demonstrated in *Padfield v Minister of Agriculture* [63] where it was held that no discretion is unfettered and that every discretion is reviewable. Furthermore, in *R v Environmental Secretary ex parte Spath Holme Limited* [64] the issue of discretion came alive again and Lord Nichols considered its import and ramifications and held that the discretion given by Parliament is never absolute

or unfettered stating specifically that 'powers are conferred by Parliament for a purpose and they may be lawfully exercised only in furtherance of that purpose'. The general trend therefore is that immigration control became more restrictive with the general exercise of discretion, which the 1971 Act gave statutory footing. In essence, through the instrumentality of the 1905 Aliens Act and subsequent Immigration Acts and Rules (the 1971 Immigration Act as corner stone), hostility towards aliens took off leading to the nascent expression of the 'hostile environment' which will be discussed in the pages that follow.

4. The 'Hostile Environment' Reloaded

The recent expression of the 'hostile environment' for migrants is the creation of Theresa May, the then Prime Minister (who as Home Secretary in 2012) introduced what was termed a new cruel approach towards immigration aimed at making life difficult for irregular migrants by denying them their basic needs, thereby forcing them to leave the UK voluntarily or be expelled. This idea was then brought into the framework of law by the enactment of the Immigration Act 2014 and reinforced by the Immigration Act 2016 which includes a raft of measures aimed at preventing irregular migrants from accessing employment, healthcare, housing, education, banking and other basic services whilst at the same time creating additional immigration offences [65]. Theresa May said: 'The aim is to create, here in Britain, a really hostile environment for illegal [irregular] migrants' [65]. Operation Nexus, launched in London in 2012 was the central plank of the hostile environment aimed at gathering information about unlawful and unwanted immigrants, identifying as it did, those the Government wants to remove through the process of checking of the immigration status of foreign nationals [66]. The reality is that Theresa May had in practice created a deeply unequal and rigidly divided society where citizens enjoy a wide range of human rights whereas irregular migrants are denied basic needs due to their immigration status.

As Colin Yeo explains 'beginning in 2017, the Home Office started to refer to the hostile environment as compliant environment which only represents a change of label rather than a change of product' [67]. The hostile environment proceeds by criminalizing behavior that is already criminal, further criminalizing and penalizing private individuals and entities who fail to enforce immigration laws in their dealings with members of the public. It is simply the case that there are plenty of aspects of current immigration policy which are very unpleasant and 'hostile' to migrants generally speaking, which finds expression in the astronomically high immigration application fees, the continued indefinite detention policy, the unbridled complex immigration rules, the enforced separation of families with the infamous "Go Home" vans to mention but these few [67]. And 'while enforcement has become tougher, gaining citizenship has become more complicated and more expensive. In fact, it costs thousands of pounds for someone to maintain their

¹ The Immigration Act 1971 Act is complemented by the Immigration Rules HC 395 as amended by subsequent legislations although it can also operate independent of the Rules.

'leave to remain' status' [68].

Therefore, 'the 'hostile environment' policy is the wording often used to refer to a range of government measures aimed at identifying and reducing the number of immigrants in the UK with no right to remain' [69]. An overview of the policy was set out by the House of Commons Home Affairs Committee in the following terms:

Many of the measures designed to make life difficult for individuals without permission to remain in the UK were first proposed in 2012 as part of a 'hostile environment policy'. The aim of the policy is to deter people without permission from entering the UK and to encourage those already here to leave voluntarily. It includes measures to limit access to work, housing, healthcare, and bank accounts, to revoke driving licences and to reduce and restrict rights of appeal against Home Office decisions. The majority of these proposals became law via the Immigration Act 2014 and have since been tightened or expanded under the Immigration Act 2016' [70].

Regardless of this hostile framework, the parameter of measurement had been doubtful to the extent that it is argued whether it was not original intended to reenact the hostility of the immigration control that previously came into being by the interplay of the 1905 Aliens Act in establishing xenophobia and negative attitudes towards foreigners. The paper's argument in this regard is supported by the difficulty in assessing the overall impact of the hostile environment policy, published by the House of Commons Home Affairs Committee in January 2018 [70]. The Committee engaged the Independent Chief Inspector of Borders and Immigration (ICIBI), David Bolt, who informed the Committee that 'the Home Office does not have in place measurements to evaluate the effectiveness' of the hostile environment measures, or of the impact of the provisions brought in by the Immigration Acts of 2014 and 2016 [70, 20]. The House Affairs Committee on its part expressed displeasure and concern with the impact of the policy even on those with a legal right to stay when it observed:

While the hostile environment is currently aimed at non-EU nationals without valid leave to be in the UK, there are regular reports of people with a lawful right to be here (including UK and EU nationals and non-EU nationals with valid leave) being caught up in the system, often via errors in an application process or problems with data retained by the Home Office. An inspection by the ICIBI of data provided by the Home Office to banks found that 10 percent of the 169 cases inspected had incorrectly been included on the list of 'disqualified persons'. People wrongly identified as being in the UK without leave typically receive a letter stating they are liable to removal and must make immediate arrangements to leave the country. This traumatic experience is often compounded by difficulties in contacting the Home Office and a reluctance by the Department to accept that it has made an error. When we put these figures to David Bolt, he said there had been a "conscious shift towards encouraging compliance rather than enforcing" [70].

From the foregoing, it can be seen that the creation of the

hostile environment policy has been turbulent and has even targeted the wrong persons contrary to those it meant to address. By far, the bit that engages the attention of this paper in the main is how the hostile environment policy touches and concerns international human rights law in the area of right protection, racism, racial discrimination, xenophobia and intolerance. This concern has also been expressed by the UN given that on 11 May 2018, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Professor Tendayi Achiume, published a statement on the situation in the UK following her official visit to the country [71]. In her submission, she stated that the policies were not just affecting irregular migrants but has a tinge of racism and affected racial and ethnic minority individual with regular status and many who are themselves British citizens and have been entitled to this citizenship as far as the colonial era [71].

Assessing how the policy fits with international human rights law, she concluded that the broad nature of the policy as it is, could have the resulted in several violations, and she remarked:

To be clear, international law and even international human rights law protect national sovereignty, including in the area of immigration enforcement. However, where the strategy for immigration enforcement is so overbroad, and foreseeably results in the exclusion, discrimination and subordination of groups and individuals on the basis of their race, ethnicity or related status, such a strategy violates international human rights law, and the commitments that the UK government has made to racial equality'[71].

Although the Special Rapporteur praised a number of other policies taken by the Government to tackle racism but she strongly recommended a complete repeal of several aspects of the immigration law and policy framework that permitted immigration enforcement to private citizens, insisting that this was required to tackle racism and discrimination, established by the creation of the hostile environment policy. On the issue of branding of the 'hostile environment' to a 'compliant environment', she warned:

Shifting from the rhetoric of a hostile environment to one of a compliance environment will have little effect if the underlying legislative framework remains intact. Efforts such as eliminating deportation targets can achieve only slight cosmetic changes to an immigration enforcement regime that has permeated almost all aspects of social life in the UK. I wish to underscore that a hostile environment ostensibly created for and formally restricted to irregular immigrants, is in effect, a hostile environment for all racial and ethnic communities and individuals in the UK. This is because ethnicity continues to be deployed in the public and private sector as a proxy for legal immigration status. Even where private individuals and civil servants may wish to distinguish among different immigration statuses many likely are confused among the various categories and thus err on the side of excluding all but those who can easily and immediately prove their Britishness, or whose white ethnicity confer [s] upon them presumed Britishness [71].

But the underlying issue in the whole of this part is that the creation of the hostile environment either from the lens of the 1905 Aliens Act or from the nascent or nuanced expression as configured in the Immigration Acts 2014 and 2016 is repugnant and illiberal within the remit of international human rights law. Unravelling the inherent deep incongruences in the exercise of sovereignty, the discussions in the following part aims at showing that resurgence of nationalism, far right ideologies and quite recently the New Right have emerged, shaping immigration policies without recourse to the purposive application and relevance to the position of international human rights law as it concerns immigration.

5. The Far Right, the New Right and the ‘Hostile Environment’ in the Context of Immigration Control

Far Right ideologies share some common threads. These range from a sense of exclusive nationalism, a belief that national identity is under threat from foreign cultures and to a desire to cut immigration by whatever method available. Schain holds the view that the United States is unique in comparison to most European countries, given that it does not have a prominent radical right party, but strains of this ideology have sprung up in the U.S. Republican Party with immigration as the central plank [72]. The concern of this ideology in this regard can be traced to the changing patterns of immigration, growing ethnic diversity, the integration of immigrants into western societies further compounded by the series of high-profile terrorist attacks in Europe and the USA purportedly perpetrated by individuals with immigration background [72]. Schain opines that the current success and influence of radical right populism is a function of a diverse range of complex and interconnected societal drivers varying across countries of which immigration is a constant factor even if relatively marginal in some ways [72].

Interestingly, migration crises and the engendered resultant chaos appears to enliven support for populist radical-right and anti-immigration platforms as evidenced in the electoral breakthroughs and success of European parties that campaigned on that platform with the scale of arrivals of immigrants-asylum seekers in 2015 and 2016. They argued that their borders are now out of control calling for immediate action including the exclusion of asylum seekers who under international refugee law should be assessed and protected rather than sent back [73]. Therefore, feelings of insecurity became prominent which they linked to migration and underpinned by the terrorist attacks in Europe and the USA even though very few of these attacks have not been linked to foreigners or asylum seekers as the case may be. It is simply the case that populist radical right-wing politicians are now championing restrictions on immigration in such an unfathomable way, creating a hostile environment uncondusive for migrants by several means available to them.

In their view, Geertje Lucassen and Marcel Lubbers, had stressed that ‘even though there might not be any direct link between immigration and support for radical-right parties or policies, there is nonetheless considerable evidence that negative attitudes towards immigrants even if minimal are now strong predictors of how people vote’ [74]. Furthermore, evidence exists as to the differences in attitudes between voters on the left and right are hugely related to two strategic political approaches to immigrants and political mobilization where the right seeks to mobilize voters against immigrants and frames immigration and immigrants as a challenge to national identity. This approach is home to radical-right parties in Europe and even of other right and centre-right parties in Austria, Italy and at times France and the United Kingdom [74]. Whereas the second approach sees immigrants as political resource and focusing on mobilizing voters as a way to change the electoral balance in their favour as used by the socialist and labour parties and the Democratic Party in the USA [75].

In sum, political science scholars are in agreement that the electoral success of politicians advocating populist radical-right positions has affected, albeit indirectly, agenda setting impact on policy which they tag a “contagion effect” given that other actors try to reduce the radical right’s influence by the adjustment of their own strategies [76]. It has been noted that the effect is huge and pervasive that its impact on agenda setting have been noted in countries without a strong radical-right presence [77].

[T]he New Right on its part, is the latest iteration of a reactionary challenge to liberal belief in human universality by those that believe in fundamentally natural inequalities and defined by an internationalism of its own, advocating the linking of nationalist movements to the restructuring of international relations norms’ [78]. It is simply the understanding that ‘their conceptual assemblage and public discourse cohere around themes such as resistance to liberal norms (illiberality) and a reactionary trend within international traditions, by replacing liberal assumptions of universal humanity and its protection through institutions, with the promotion of inequality amongst identities’ [78, 4]. The New Right draw inspiration from classical nationalist discourses that blames modernity and its universal norms, such as identity, gender and individual rights for endangering the nation, framing constitutionalism and liberalism as self-inflicted existential weaknesses [78, 7]. The birth culture axiom remains central to the New Right with the insistence that identity by birth and their consequent disdain for the international principle of *jus solis*, i.e. the granting of citizenship for children born in the Host State [79].

As de Benoist remarked, ‘the immutable and immanent conceptualization of culture grounds the role of birth and history in the New Right identity politics’ [79] and by so doing lays emphasis on the numbers of migrants rather than any other qualifier thereby betraying the logic that migrants have no agency as to their nationality and negative impact as happened in the United Kingdom by cutting net migration [80]. To them, liberal norms do not only erode the capacity of

indigenous cultures to compete but do subsist in their particularity [81]. In essence, the New Right rejects internationalism, such as immigration growth and by opposing universalism, they construct alternate internationalism that embraces particularity as exemplified by the anti-universalist narratives expressed by individuals such as Bannon, Le Pen, Orban, Salvini, Putin, Xi, Erdogan and Modi [79, 118]. In another breadth, the New Right proposes a future stripped of Liberalism's first creation, democracy, whose death is an inevitable consequence of its globalization and subsequent demonstration of liberal ineptitude [82]. In expression of the ideology of the New Right, following his 2018 election victory, Salvini was reported to have closed Italian ports to NGOs rescuing migrants in the Mediterranean, in addition, went ahead to propose a census and register of Roma people in claiming 'to protect Italians' [83]. Donald Trump is in a similar position with Salvini, who seek the exercise of power of the basis of cultural identity by the incarceration of migrant children.

By further endocranial assessment, Donald Trump's 2018 speech to the UN provided a clear expression and articulation of this Reactionary Internationalist vision. In the speech, Trump lauded the UN as a home in which distinct cultures could 'choose independence and cooperation over global governance, control, and domination and the global compact on migration. In doing so, Trump celebrated US trade withdrawal deals, withdrawals from institutions such as the Human Rights Council and even questioned the legitimacy of the International Criminal Court (ICC), rather calling for all embrace the doctrine of patriotism in order to defeat the ideology of globalism. And Trump unequivocally stated 'we must protect our sovereignty and our cherished independence above all and when we do, we will find new avenues for cooperation unfolding before us [84].

A typical example of the existence of how contemporary New Right defines its identity and frames its survival in the internationalism is the UK's Vote Leave campaign between the Brexiteers (those that voted to leave the European Union) and 'Remainers (those that voted to remain in the European Union) seen in the 2016 Brexit campaign. The Right to reject universalism is the core driver of the Vote Leave group that emphasis UK's sovereignty and concerning immigration, they claim that their position is not discriminatory but with a practical solution to reduce immigration numbers as against the dogmatic defenders of European Union's free movement [85]. In driving home his point on the rejection of universalism, Michael Gove, speaking for Vote Leave, elevated the exercise of UK's sovereignty to the right to discriminate or deport by identity to the issue of fundamental liberties and survival [86], with the further claim that migrants drives scarcity in housing, healthcare, school spaces and to green space [87].

Similarly, their counterparts, the Leave. EU evoked, more succinctly, an argument based on indigenous survival, highlighted as they did that other European countries such as Hungary and Slovakia had closed borders and went ahead to blame the 2015 Paris attacks on migration rather than

extremism [88]. Not done yet, Leave. EU blamed the 2017 Westminster terrorist attack on migration with Michael Gove arguing that 'fundamentalist terror' is provoked by Western 'moral relativism'[86, 137]. In France, the Front National's 2017 campaign equally linked specific norms to culturally framed identities and demanded a referendum for what they referred to as 'liberating ourselves from the EU's anti-democratic rules and institutional reform in delivering national priority which they saw as discrimination in favour of French citizens [89]. The 2017 National Front manifesto at the time renewed its commitment to a massive reduction in legal immigration where Le Pen argues that French citizenship should be 'either inherited or merited'. And as for illegal immigrants, she stated that they 'have no reason to stay in France, claiming that these people broke the law the minute they set foot on French soil' [89].

As if that is not enough, in Italy, the Lega's resistance to liberal norms focuses on promoting identity birthrights and in doing so, the party opposed *jus solis* by claiming that numerous pregnant migrants or foreigners alike give birth in Italy in order 'to steal Italian rights' and steal in more migrants. Unsurprisingly, they argue that granting citizenship to infants 'without Italian parents and ancestors' endangered Italians' 'demographic', 'cultural' and economic survival. In turn, Lega blame vast youth unemployment on what they call 'immigrant invasion' and the negativity of human rights ideology with a pledge to carry out mass deportations whilst assistance to refugees and migrants will be outlawed [90].

In short, following the discussion above, it can be seen that the ideologies of the Far Right or the New Right incubates and elucidates in such an inexplicable way, the adumbration of the hostile environment by the application of systems that hitherto outlawed under international human rights law from the time of the codification of the UN Charter to the Universal Declaration of Human Rights and the Bill of Rights in general. As it has been shown, a hostile environment ostensibly created for and formally restricted to irregular immigrants, is in effect, a hostile environment for all racial and ethnic communities and individuals in the UK. It is crucial to posit that the rights civilized nations gathered to protect, are now targets of destruction under the guise of overbearing and burnt out ideas ingrained and supported by present world leaders. It is no longer rocket science to see that universalism is now on gradual decline and due to this, weakness may be inflicted to liberal norms and democracy overtime. This in essence engages the purposive applicability of international human rights law in the area of rights protection, racism, racial discrimination, xenophobia and intolerance.

6. Conclusion

It is trite to posit that international human rights obligations require States to comply with their treaty obligations regarding the treatment of aliens in their territory. But the underlying matter is that international legal regime and its attendant institutions presume that while individual States can maintain sovereignty over its internal affairs, they

are nonetheless accountable to upholding certain principles and standards in the exercise of sovereignty, thereby calling for a reconciliation of sovereignty with universality of human rights law. In this regard, the UN General Assembly has reaffirmed the rights of States to enact and implement migratory policies and border security measures but in doing so cautioned against adopting legislation or measures that restrict the human rights and fundamental freedoms of migrant in complying with their obligations under international human rights law.

It is unarguable that nationality is of foremost importance in the life of an individual which will determine his or her right to enter a country and under what circumstances. Regardless of this core attachment of nationality (citizenship), international legal order lays emphasis on ‘all human beings’, ‘every human being’, ‘everyone’, ‘anyone’, ‘all persons’, and ‘no one’ in the protection of rights-‘being human’ as the denominator which in any event does not vitiate or displace the existence of nationality or citizenship. A further implication of the international legal order is that International bill of Rights is generally insistent on the inclusive applicability and the erosion of distinctions based on citizenship simply for the purpose of rights protection.

International human rights protection has been challenged by the hostile environment policy and this paper has demonstrated that the hostile environment policy touches and concerns international human rights law in the area of rights protection, racism, racial discrimination, xenophobia and intolerance. This concern has also been expressed by the United Nations Special Rapporteur to the United Kingdom in 2018. The Special Rapporteur had stated that the policies were not just affecting irregular migrants but has a tinge of racism and affected racial and ethnic minority individual with regular status.

Behind the veil of the hostile environment are the ideologies of the Far Right and New Right as discussed, supra which incubates, elucidates and implements the hostile policy in such an inexplicable way. The implication is that the adumbration of the hostile environment by these ideologies across Europe and the United States has implication for the respect of international human rights law from the time of the codification of the UN Charter to the Universal Declaration of Human Rights and the Bill of Rights in general. As it has been shown, a hostile environment ostensibly created for and formally restricted to irregular immigrants, is in effect, a hostile environment for all racial and ethnic communities and individuals in the UK.

It is therefore crucial to posit that the rights civilized nations gathered to protect, are now targets of destruction under the guise of overbearing and burnt out ideas (*albeit* ignorant) ingrained and supported by present world leaders. It is heart wrenching to note that populist radical right-wing (Far Right and New Right) politicians are now championing restrictions on immigration in such an unfathomable way, creating a hostile environment unconducive for migrants and by so doing, challenging the universality of human rights.

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