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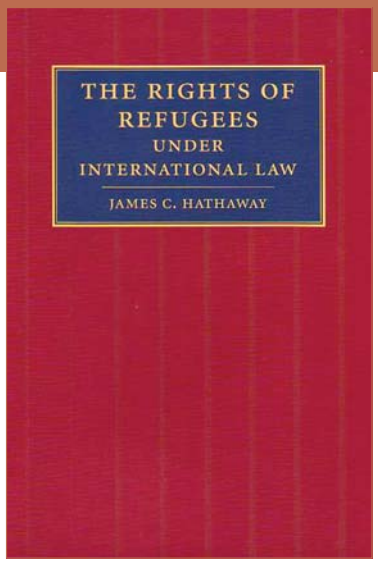


# Refugees' human rights and the challenge of political will

**by James C. Hathaway**

*The following essay is excerpted from the Epilogue to* The Rights of Refugees Under International Law *by James C. Hathaway.* © *James C. Hathaway 2005 (Cambridge University Press). Reprinted with the permission of Cambridge University Press. Totaling nearly 1,200 pages and a decade in the making,* The Rights of Refugees Under International Law *links standards of the UN Refugee Convention to norms of international human rights law and applies this to empirical analyses of some of the world's most difficult protection challenges.*

Governments in all parts of the world are withdrawing in practice from meeting the legal duty to provide refugees with the protection they require. While states continue to proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill, many appear committed to a pattern of defensive strategies designed to avoid international legal responsibility toward involuntary migrants. Some see this shift away from a legal paradigm of refugee protection as a source of enhanced operational flexibility in the face of changed political circumstances. For refugees themselves, however, the increasingly marginal relevance of international refugee law has in practice signaled a shift to inferior or illusory protection. It has also imposed intolerable costs on many of the poorest countries, and has involved states in practices antithetical to their basic political values.

In the face of resistance of this kind, it be must recognized that no international oversight body (or international agency) will ever be positioned actually to *require* governments to implement rights perceived by states as at odds with their fundamental interests. The real challenge is therefore to design a structure for the implementation of Refugee Convention rights which states will embrace, or at least see as reconcilable to their own priorities. Only with the benefit of an implementation mechanism of this kind will governments be persuaded normally to abide by even clear Convention duties; and only when compliance is the norm will it be realistic to expect any supervisory mechanism to be capable of responding dependably and effectively to instances of non-compliance.

To be clear, it is suggested here that the goal should be to reconceive the *mechanisms* by which international refugee law, including the refugee rights regime, are implemented—*not* to undertake a renegotiation of the Refugee Convention itself. Those who favor the latter course seem largely to misunderstand the nature and function of the Convention-based protection regime. The goal of refugee law, like that of public international law in general, is not to deprive states of either authority or operational flexibility. It is instead to enable governments to work more effectively to resolve problems of a transnational character, thereby positioning them better to manage complexity, contain conflict, promote decency, and avoid catastrophe. Indeed, international refugee law was established precisely because it was seen to afford states a politically and socially acceptable way to maximize border control in the face of socially inevitable involuntary migration—an objective which is, if anything, even more pressing today than it was in earlier times. Refugee law has fallen out of favor with many states not because there is any real belief either that governments can best respond to involuntary migration independently, or that the human dignity of refugees should be infringed in the interests of operational efficiency. Rather, there seems to be overriding sentiment that there is a lack of balance in the mechanisms of the refugee regime which results in little account being taken of the legitimate interests of the states to which refugees flee.

- First, some governments increasingly believe that a clear commitment to refugee protection may be tantamount to the abdication of their migration control responsibilities. They see refugee protection as little more than an uncontrolled "back door" immigration route which contradicts official efforts to tailor admissions on the basis of economic or other criteria, and which is increasingly at odds with critical national security and related priorities.
- Second, neither the actual duty to admit refugees nor the real costs associated with their arrival are fairly apportioned among states. There is a keen awareness that the countries in which refugees arrive—overwhelmingly poor, and often struggling

with their own economic or political survival—presently bear sole legal responsibility for what often amounts to indefinite protection.

In short, the legal duty to protect refugees is understood to be neither in the national interest of most states, nor a fairly apportioned collective responsibility. It is therefore resisted.

There are ways to address both of these concerns. As a starting point, there needs to be a clear recognition that refugee protection responsibilities can be implemented without denying states the right to set their own immigration priorities. The refugee regime is not an immigration system; it rather establishes a situation-specific human rights remedy. When the violence or other human rights abuse that induced refugee flights come to an end, so too does refugee status. Equally important, even this right to protection is explicitly denied to serious criminals who pose a danger to the host community, and to persons who threaten national security.

Nor is the duty of protection logically assigned on the basis of accidents of geography or the relative ability of states to control their borders. To the contrary, governments have regularly endorsed the importance of international solidarity and burden-sharing to an effective regime of refugee protection. While collectivized efforts to date have been ad hoc and usually insufficient, they provide an experiential basis for constructing an alternative to the present system of unilateral and undifferentiated state obligations. It is particularly important to recognize that different states have differing capabilities to contribute to a collectivized process of refugee protection. Some states will be best suited to provide physical protection for the duration of risk. Other states will be motivated to assist by providing dependable guarantees of financial resources and residual resettlement opportunities. Still other governments will collaborate by funding protection or receiving refugees in particular contexts, on a case-by-case basis. Under a thoughtful system of common but differentiated responsibility, the net resources available for refugee protection could be maximized by calling on states to contribute in ways that correspond to their relative capacities and strengths.

In short, none of the legitimate concerns voiced by governments amounts to a good reason to question the underlying soundness of responding to involuntary migration in line with the rights-based commitments set by the Refugee Convention and other core norms of international law.

Today, more than ever before, governments are engaged in a variety of serious discussions regarding reform of the refugee law system. Perhaps spurred on by the formal commitment made on the 50th anniversary of the Refugee Convention in 2001, there is clear interest in exploring both the operational flexibility which refugee law affords, and the value of systems to share both the responsibilities and burdens inherent in refugee protection. It is not at all clear, however, that these initiatives are predicated on the central importance of finding practical ways by which to respond to involuntary migration from within a rights-based framework. Poorer states are glad that there is, at last, some realization by governments in the developed world that ad hoc charity must be replaced by firm guarantees to share responsibilities and burdens. Governments of wealthier and more powerful countries are pleased that the UN High Commissioner for Refugees and other states are now prepared to acquiesce in demands that their refugee protection responsibilities not be construed to impose ongoing obligations towards all who arrive at their territory. But potentially lost in the discussions as they have evolved to date is the central importance of reforming the mechanisms of refugee law not simply to avert perceived hardships for states but also in ways that really improve the lot of refugees themselves. It is not enough to find sources of operational flexibility, nor even to devise mechanisms by which to share the responsibilities and burdens. If the net result of these reforms is only to lighten the load of governments, or to signal the renewed relevance of international agencies to meeting the priorities of states, then an extraordinary opportunity to advance the human dignity of refugees themselves will have been lost.

The real challenge is to ensure that the reform process is actually driven by a determination fully and dependably to implement the agreed human rights of refugees, even as it simultaneously advances the interests of governments. There is no necessary inconsistency between these goals; to the contrary, they are actually mutually reinforcing priorities. The Convention's refugee rights regime establishes a framework that can easily lay the groundwork for solutions to the current crisis of confidence in the value of refugee law.