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### Temporary Protection of Refugees: Threat or Solution?

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## Chapter 2

### Temporary Protection of Refugees: Threat or Solution?

James C. Hathaway<sup>1</sup>

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#### 1. Introduction

While many of us in the refugee protection community have traditionally seen temporary protection as something to be resisted, I believe that temporary protection could, in contrast, be a profoundly important part of a **solution** to the international refugee protection crisis. To make my argument that the *right kind* of temporary protection could be an important means to give new life to international refugee protection, I will briefly address three issues.

First, I would like to suggest why it is that states around the world, in the North and increasingly in the South as well, are refusing to live up to their international legal duties to refugees. Second, I will argue that two kinds of reform are vital if refugee protection is to survive, and hopefully to prosper: the system of refugee protection must embrace a more collectivised system of state responsibility toward refugees, and it must become seriously solution-oriented. Third, I will sketch the basic elements of a *rights-regarding* and *solution-oriented* approach to the temporary protection of refugees, which I believe should be at the heart of this reform of the mechanisms of international refugee law. The temporary protection which I see as part of a *solution* is not the same as the *temporary* protection practised in so many countries today, which is often not temporary but indefinitely prolonged, and less about **protection** than it is an excuse to warehouse and to deny the human dignity of involuntary migrants.

#### 2. Explaining the Crisis in International Refugee Protection

As a starting point, we must be candid about the roots of refugee law. Notwithstanding the rhetoric of humanitarianism that abounds in our field, the hard truth is that refugee law exists because it is a pragmatic and politically acceptable means of maximising border control in the face of recurrent involuntary migration. By embracing, channelling, and legitimating essentially unstoppable flows, refugee law sustains and validates the protectionist norm. In this sense, refugee law functions as a sluice gate in the dam of immigration control.

Critically, the Refugee Convention imposes no obligation to grant permanent admission, but rather requires only protection against refoulement and protection of basic human rights for the duration of the risk in the refugee's country of origin. Nonetheless, the domestic policies of many states equate recognition as a refugee with a right to permanent residence. Assimilationist policies of this kind were embraced *not* out of a sense of international legal obligation, but because they were perceived to be in the interest of the receiving states.

Specifically, refugees were permanently integrated in the North because of an acute post-war labour force shortage, coupled with the Cold War ideological "brownie points" to be earned via the enfranchisement of the "enemies of one's enemies." In Africa, *apartheid-era* political solidarity, and the pattern of ethnic ties across colonially imposed borders led states to acquiesce in the assimilation of refugees. Whether in law or simply in practice, the assumed solution that followed from the "interest-convergence" between refugees and the states that received them was to allow refugees permanently to join the community of the asylum state. This pattern of domestic laws or practices must not, however, be equated with an international legal *duty* permanently to admit refugees. No such duty exists. The legal obligation remains only to host refugees for so long as return presents a risk of persecution, and to honour their human rights during that risk-defined period of asylum.

We are today presented with a fundamental challenge. The interest-convergence which dictated the assimilation of refugees to permanent residents has largely withered away. As inter-continental transportation and hence migration became more generally accessible, developed states of the North were confronted by the arrival of persons from "different" racial, cultural, political, economic, and social backgrounds. Their claims, while often serious from a human rights point of view, didn't quite "fit" the traditional European notion of a "refugee." The economies of most developed states have fundamentally evolved with the aid of technology to a point where there is unlikely to be the need for substantial and indiscriminate infusions of labour. There are in any event many people who would like to immigrate to developed states, and who can be "screened" for their social and economic suitability as immigrants in a way that refugee law does not allow. Nor are there ideological brownie points to be scored from the admission of refugees: if anything, refugee protection has often been seen as an irritant to political or economic relations with the states of origin. Thus, the symbiotic relationship that initially dictated substantial openness to refugees by developed states, and which allowed for the development of the "refugee protection as permanent admission" mode of thinking, is fast disappearing.

While states of the South have rarely equated refugee status with a right of permanent residency, *de facto* permanent admission was nonetheless frequently afforded in practice to refugees. Yet here too, refugees are now less welcome than they once were. As in the North, the assimilation of refugees is least likely to be pursued where there is a lack of ethnic or other affinity between refugees and the communities to which they travel. This is true not only in East Asian states such as Brunei, China, Japan, and Malaysia, where racism is as profoundly entrenched as in the North, but also in traditional "good citizen" asylum states. India, for example, which once welcomed the Tibetans and Sri Lankan Tamils, now deals harshly with Jumma, Chin, and Chakma refugees. Benin opened its arms to Togolese refugees, but confines refugees from Chad, Congo, and the Central African Republic behind barbed wire. Countries such as Guinea and the Ivory Coast have attempted to force refugees away by severe cutbacks in food rations. The illegal return by Tanzania of 600,000 Rwandan refugees

in December 1996, and the *refoulement* by Ivory Coast, Ghana, Sierra Leone, and Togo of the Liberian refugees aboard the *Bulk Challenge* similarly attest to the depth of the present protection crisis in all parts of the world.

As states of both the North and South have withdrawn from their duty to protect refugees, UNHCR's answer was promotion of the noxious notion of the refugee's "right to remain" in his or her own state. The "right to remain" is a superficially attractive idea: after all, the best solution is obviously no need to flee at all. In fact, however, the so-called "right to remain" has operated to keep people trapped in situations of imminent danger, since the *quid pro quo* of a credible "right to remain" - namely, consistent, universal, and effective intervention to eliminate the source of harm - has never been forthcoming. Nor is there any sign that the international community is mobilising to provide that dependable and universally accessible commitment to intervention. The "right to remain" is in essence not a right of refugees at all, but is the right of governments to avoid confrontation with the needs of refugees.

Given that the largely self-interested goals that led states to assimilate refugees to permanent immigrants during the 1950s to early 1990s have largely disappeared, I believe that this is the moment for a decisive and practical reinvigoration of refugee law. It should at least provides the basic rights set by international law, namely solid protection for the duration of risk in the state of origin. The first priority must be to find a constructive and sustainable alternative to both denials of protection and the containment of refugees in unsafe situations - like the Kurdish "no fly zone," Bosnian Muslim "safe havens," or the illusory security of the Kibeho refugee camp in Rwanda.

### 3. Contemplating Reform

In sum, insistence on the traditional means of implementing international refugee law serves fewer and fewer people, less and less well, as time goes on. Refugee law as traditionally conceived is being undermined by denials of protection and disingenuous insistence on the "right to remain." If we wish to counter this trend, we need to think seriously about why it is that governments are withdrawing from their protective responsibilities.

I believe that the decision of most states to withdraw from the duty to protect refugees is not just a matter of bad faith on the part of governments, or of large numbers of fraudulent asylum-seekers (although clearly each is to some extent a problem). More fundamentally, the breakdown in international refugee protection can largely be explained by looking at two fundamental shortcomings in the way refugee law is presently implemented.

First is the **problem of individuated state responsibility**. Under the current international regime, refugees who arrive in an asylum state are solely the legal responsibility of that state. As such, the distribution of state responsibility towards refugees is based primarily upon accidents of geography and the relative ability of states to control their borders. Any assistance received from other countries or the UNHCR is a matter of charity, not of obligation. This system of unilateral, undifferentiated state obligations is unfair, inadequate, and ultimately unsustainable. As states have no reliable means of looking to their neighbours or the international community at large for assistance and solidarity, there is a perverse logic to the option of simply closing borders and pre-emptively avoiding any responsibility for providing protection.

Second is the **absence of a meaningful solution orientation** in refugee protection today. Governments are simply not going to support a refugee protection system if they perceive it to be an uncontrolled and non-selective immigration scheme. If every refugee admitted to protection must be allowed to stay in the host state indefinitely, governments that are financially and logistically able to prevent the arrival of asylum-seekers in the first place will likely choose that option.

This means, in my view, that the mechanisms of refugee protection need to be re-tooled to become fundamentally solution-oriented. By this I do not mean that refugee law should be expected to generate solutions to refugeehood itself. Refugee status only comes to an end when the violence or other human rights abuse that induced flight is eradicated. The refugee protection system was never intended to be a mechanism that generates solutions, but is instead a palliative regime that protects desperate people until and unless a fundamental change of circumstances makes it safe for them to go home.

While not a source of solutions, refugee protection should nonetheless be oriented in a way that takes full advantage of opportunities for solutions. Because the interest-convergence that allowed most refugees to be assimilated to immigrants has disappeared, I believe that it makes sense to promote a system of rights-regarding *temporary* protection, and to facilitate repatriation when and if conditions in the country of origin are genuinely secure. Governments today will not support a vision of refugee law that amounts to a back-door route to permanent immigration. Our choice is therefore either to accommodate that reality in our approach to protection, or to hold fast to an outmoded equation of refugee status with permanent entry. If we adopt the latter approach, we risk encouraging governments either to prevent the arrival of refugees in the first place, or to force refugees away by brutality.

This is where I see the possibility for temporary protection to be a key part of the solution to the present proclivity of states to withdraw from their refugee protection responsibilities. The promotion of dignified and rights-regarding temporary protection underscores the logic of refugee status as a situation-specific trump on immigration control. Because international law guarantees refugees the right to meaningful protection only until and unless it is safe to go home, there is no need for refugee law to be undermined by a difficult debate about the right of states to decide how their body politic should be redefined through immigration.

Some will resist this approach, arguing that anything less than the routine admission of all refugees to permanent residency is inadequate. Such a stance, in my view, holds refugees hostage to a major project of social transformation. We need instead to accommodate the need of refugees to flee with the prevalence of often narrow understandings of community inspired by the rise of ethnic nationalism and the demise of Cold War and apartheid-era interest-convergence. This accommodation will clearly not amount to a complete recognition of the right of the present inhabitants of states to exclude all outsiders. Yet the terms upon which refugees enter a foreign state could be qualified to prevent refugees from becoming pawns in the internal struggles of asylum states over the meaning of community. In particular, I believe that we should make clear that a solid and dependable system of refugee protection need not have any enduring impact on the receiving state's communal self-definition. It could instead be oriented to ensuring that, at least in most cases, refugees ultimately repatriate to their own country when conditions permit.

I want, however, clearly to distinguish the kind of temporary protection I am talking about from the temporary protection that is prevalent today. Temporary protection as practised by most Southern states, for example, rarely converts to permanent status, regardless of the amount of time that passes. In fact, some refugees in the South are never even granted a secure form of temporary status, as has been the case, for example, with Mauritanian refugees in Senegal.

I am also not talking about temporary protection as implemented in much of Europe. Temporary protection was resorted to there not on the basis of a principled, solution-oriented policy decision, but instead because the arrival of Bosnians was politically, and in some cases logistically, impossible fully to stop. Temporary protection in Europe, in other words, has been little more than a fallback strategy, resorted to because *non-entr e* policies did not work as well as many governments had hoped they would. Most states in Europe responded to the arrival of Bosnians by granting them a kind of temporary protected status that entails rights below the requirements of international law. Many states, with the unfortunate acquiescence of UNHCR, have mistakenly suggested that the rights guaranteed by the *Refugee Convention* and international human rights law do not govern the treatment of refugees protected on a temporary basis. This is not the case. The international rights regime applies, and provides a solid framework for the delivery of effective protection.

Rather than denying the rights guaranteed to all refugees, including temporarily protected refugees, the self-interest of governments should be understood to be served by fulsome respect for the rights of the *Refugee Convention*. Indeed, governments ought sensibly to embrace policies that go *beyond* the requirements of the *Refugee Convention* to make temporary protection an empowering experience that lays the groundwork for solutions. If it is to be solution-oriented, refugee protection needs to be delivered in a manner which prepares for the eventual return home of refugees. Rather than isolating refugees and denying them opportunities for meaningful employment and education, a solution orientation requires that refugees use their time abroad to develop skills and abilities that will enable them to play productive roles in their home countries.

In particular, repatriation will often be unsuccessful where family and collective social structures of refugees have not been sustained during the period of protection abroad, if refugees are denied opportunities to develop their skills and personalities in the asylum state, or when the place of origin sees the return of refugees as a threat. In such circumstances, repatriation efforts may lead only to poverty, violence, and even further flight. To develop the potential for repatriation continually to regenerate asylum capacity, it is essential that refugee protection be dignified, and that it be coupled with an effective system of repatriation and development assistance.

The social and collective structures of refugee communities should be supported, not viewed with suspicion, so that there continues to be a meaningful bond to the traditions and beliefs of the country of origin. Successful repatriation requires efforts to maintain ties between the refugee and stayee communities, the provision to refugees of clear and accurate information regarding conditions in their country of origin, and guarantees of grassroots-focused repatriation aid and development assistance. In all these ways, protection must anticipate the needs and challenges of repatriation and reintegration in a way that empowers both refugees and their communities.

If protection is delivered in a rights-regarding and solution-oriented manner, there is reason to believe that significant numbers of refugees will want and be able to return home safely and successfully. This, in turn, will encourage states to live up to their protection responsibilities, rather than avoid them.

To advocate the value of temporary protection is not to argue that immigration is bad: it is simply not the same as refugee protection. While the admission of outsiders to permanent residence in a state may be a matter of legitimate debate for each country's body politic, the basic protective role of refugee protection should not be a captive in that debate. Simply put, the human rights function of refugee law does not require a routine linkage between refugee status and immigration. If the protection of refugees is both durable and respectful of human dignity, it need not be permanent.

#### **4. The South African Green Paper**

The South African Green Paper on International Migration strongly endorsed a commitment to the dignified and empowering protection of refugees of precisely the kind I have just described. The Green Paper was unequivocal in insisting upon fulsome respect not only for formal refugee treaties, but also for other domestic and international human rights standards. If its proposals had been adopted, the definition of persons entitled to seek protection in South Africa would have been broadened beyond simply "refugees" as formally understood. Refugees so defined would have been guaranteed every internationally and domestically codified refugee right, including to freedom of movement, to work and to education. Perhaps most important, the Green Paper linked its generous understanding of the scope of refugee protection to an activist commitment to share the responsibility for refugee protection with South Africa's neighbouring states of the Southern African Development Community (SADC). In short, the Green Paper proposed a model of formal refugee protection for South Africa of a breadth and quality beyond that which has been achieved in any other country.

Yet the drafters of the Green Paper were aware that it would be foolhardy simply to propose a model system that lacked the resilience to respond to the challenges of South Africa's unique geopolitical position. Continuing instability in much of Africa presents the risk of future mass arrivals of refugees. South Africa's relative stability and prosperity, as well as its clear commitment to respect for the rule of law, make it an attractive place in which to seek protection. In the view of the drafters of the Green Paper, South Africa's approach to protection had to take account of these practical constraints.

There were thought to be three key risks. First, if the refugee status verification procedures were not streamlined, experience in other countries suggested the inevitability of a backlog of cases waiting to be heard, leading to retrenchment from a scrupulous adherence to norms of procedural fairness in the interests of bureaucratic efficiency. Second, if South Africa - in contrast to all of its neighbouring states - were immediately to grant a right of permanent residence to all refugees, the volume of claims received would likely rise sharply. The system could be put under stress by even the arrival of large numbers of genuine refugees. But by far the greater risk was the magnet effect of such a system for non-genuine refugees inclined to exploit a fair status assessment system for reasons having nothing to do with their need for protection. Third, and as a consequence of the first two risks, it was thought important

to reconcile the needs of refugees to the critical importance of not losing public support for their protection. There was concern to distinguish an unstinting commitment to the high quality protection of genuine refugees from an open invitation to all who wished to migrate in search of a better life in South Africa.

The Green Paper married its commitment to the highest quality of protection for a broadly defined group of refugees to its awareness that this commitment would be of no value to real refugees if not practically sustainable. It did so by recommending a scrupulously fair but speedy determination process, with only one review on the merits. It also insisted that refugee protection should be understood as a mode of human rights protection, not as an alternative immigration path. Thus, with the exception of particularly vulnerable groups - torture victims and unaccompanied minors, for example - a grant of permanent residence would be delayed for refugees for up to five years. Permanent residence in South Africa would, in other words, be a residual solution for refugees. The norm would be a system of temporary protection, in which refugee status would come to an end if and when the cause of flight was brought to an end. But the Green Paper insisted that temporary protection would be fully rights-regarding and empowering, and also that where return was not possible after five years, there would be a guarantee of permanent residence in South Africa. No other African state had ever made such a clear and binding commitment to the permanent integration of refugees.

The Green Paper proposal was, however, seriously misunderstood. Objections were voiced in particular by some non-governmental organisations, which embraced an absolutist commitment to the immediate permanent integration of all refugees arriving in South Africa. Much more tragically, however, the official response of the United Nations High Commissioner for Refugees (UNHCR) was unabashedly Euro-centric in its orientation.

The UNHCR comments on the Green Paper appeared to be taking issue with an understanding of temporary protection rooted neither in African practice nor in the proposals of the Green Paper itself. Referring to temporary protection as “a fundamental contradiction,” UNHCR argued against “replace[ment of] the principle that international protection should be provided for as long as needed.” Yet temporary protection recognises precisely that principle. Indeed, the Green Paper’s commitment was that “[i]f and when the risk that gave rise to refugee status comes to an end... refugee status may legitimately be withdrawn, and mandated repatriation pursued. Cessation of status can only be pursued when there has been a change of circumstances in the country of origin that eradicates the ‘root cause’ of flight, and which is durable.” If there were no such fundamental change of circumstances during the period of temporary protection, refugees would be guaranteed access to permanent resident status. UNHCR’s criticism of the model for promoting “premature repatriation” is particularly ironic since the formal cessation standard set by the Green Paper is a significantly higher standard than that embraced by UNHCR itself in other contexts.

Virtually all of UNHCR’s concerns in relation to the proposed model of dignified and solution-oriented temporary protection similarly failed to join issue with Green Paper’s real recommendations. It criticised the model for not insisting on the economic rights of refugees during protection, even though the Green Paper actually argued that the development or enhancement of skills during temporary protection was a critical means of “...allowing the

refugee population to remain vital..." UNHCR suggested that the Green Paper advocated the permanent confinement of refugees to camps, notwithstanding the Paper's unambiguous affirmation of the right to freedom of movement set by the Refugee Convention. It condemned the Green Paper's commitment to enabling refugees to remain in contact with communities in their state of origin as "controversial." Yet UNHCR's own experience shows that the viability of return is enhanced when there has been a process of reconciliation, healing, confidence building, and settlement of property rights at the community level with those who remained behind. Moreover, sustainable reintegration will be enhanced by a process that lays the groundwork for development programmes directed jointly to returnees and to the stayee and internally displaced communities.

UNHCR was even more stinging in its criticism of the Green Paper's commitment to sharing burdens and responsibilities with neighbouring countries. The agency was seemingly oblivious to the Refugee Convention's preambular recognition "that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution... cannot therefore be achieved without international co-operation." UNHCR argued that South Africa should go it alone on refugee protection, even suggesting that South Africa bears a heightened responsibility because it is (presumably in contrast to some un-named others) "a member of the community of civilised nations." In fact, the Green Paper clearly showed that South Africa was firmly committed to assuming responsibilities commensurate with its freely assumed obligations and its own standing in the world. South Africa has proposed to do what no other government in any region has been prepared to do, namely to implement a system of dignified and empowering refugee protection which exceeded the requirements of international law, and equitably to share the burdens and responsibilities of refugee protection with its neighbours. It is difficult to conceive of a response more genuinely warranting the attribution of leadership status in refugee protection.

In the end, the non-governmental and UNHCR critiques undermined the carefully integrated approach of the Green Paper. While South Africa adopted a temporary protection regime, the system now established only vaguely resembles the Green Paper model. Instead of the Green Paper's administratively lean refugee status verification process, South Africa has established a multi-layered, bureaucratically cumbersome system for refugee status assessment. The cost of this shift to legal formalism was very high. In particular, the broader refugee definition recommended was not agreed to. The model of empowering and solution-oriented temporary protection proposed by the Green Paper was not established. Nor is there any commitment by South Africa to share protection responsibilities with its neighbours. Even individual rights have been compromised, in particular by the decision of the Minister of Home Affairs to insert into the new legislation a clause that allows him to order the detention in camps of refugees arriving in large numbers, while they await their (inevitably delayed) asylum hearings. In short, just as the drafters of the Green Paper predicted, demands for a Eurocentric procedure for refugee status assessment provoked reductions in both the scope and quality of protection.

## **5. Conclusion**

If refugee law is to survive as vital and dependable system for the protection of involuntary migrants around the world, I believe that its goal must be clearly recognised to be protection-

not immigration. It is in the interests of refugees to affirm clearly that refugee protection is a human rights remedy, which should be de-linked from broader immigration policies. In the public eye, refugees frequently are grouped together with all other manner of migrants, be they legal or illegal, skilled or unskilled, law-abiding or undesirable. Lost is the very fundamental distinction between refugees and other migrants, namely the involuntary nature of the refugee's journey. Public opinion is left with no real sense as to the very different and special needs and circumstances of refugees.

As the lines continue to blur, the public is less inclined to think separately, and perhaps more compassionately, about refugees. This exposes refugees to heightened levels of intolerance, which might otherwise be softened somewhat by a more informed understanding of their motives and their plight. Advocates have demanded that governments take steps actively to remind the public that refugees are not like other immigrants, and that they have been forced to flee their homes. A commitment to temporary protection, backed up by policies which will lead normally to repatriation, would go some way toward de-linking refugee protection and immigration policy in general, thereby restoring the focus of attention to the human rights basis of refugees' presence in host countries.

Most refugees cherish a hope of return. Protection, if carefully designed and delivered, is the critical complement to root causes intervention. Even as states give increasing attention to efforts intended to end the need to flee, we must not fail to renovate the means by which we protect those who cannot wait for our efforts to succeed. A more collectivised system of solution-oriented temporary protection offers the best hope of keeping the institution of asylum alive.

The endorsement of this important balancing exercise is not a defeat, but is rather an opportunity to assert refugee rights in a context that behoves states to take our positions quite seriously. In contrast, the moral absolutism of those who will accept no form of protection less than the routine and automatic permanent integration of all refugees can be — and is — readily dismissed by governments that are justifiably concerned to ensure the well-being of their own body politic. We must never accept the inevitability of the deterrence, maltreatment, or containment of refugees. But these invidious practices are best combated not with rhetorical absolutism, but by reliance on the kind of principled pragmatism, which a policy of rights-regarding, and solution-oriented temporary protection could provide.

1 Professor of Law and Director, Program in Refugee and Asylum Law, University of Michigan; formerly Legal Adviser to the Southern African Migration Project, Cape Town. This article draws on work previously published as "Can International Refugee Law Be Made Relevant Again?", [1996] *World Refugee Survey* 14, and "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," (1997) 10 *Harvard Human Rights Journal* 115 (with A. Neve).