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The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute

James C. Hathaway[1]

In a document released during the summer of 1998, the Austrian Presidency of the European Union formally questioned the continuing value of the United Nations Refugee Convention, and called for the adoption of a new "instrument of speedy assistance in the framework of the political possibilities."[2]

The Austrian proposal would deny most refugees arriving in Europe the legal right to be protected. For the majority, protection would instead become a matter of political discretion. The proposal erroneously asserts that only a small minority of contemporary asylum seekers is entitled to Convention refugee status, in consequence of which a "new approach" should be devised to respond to ensure that other victims of human rights abuse, war, and other threats to human dignity do not come to Europe to seek protection. The new approach would be premised on intensified and carefully orchestrated deterrence, with purely discretionary and regionally exclusive responses as complementary policies. The Austrian Presidency's proposal argues that the Refugee Convention's commitment to both the rule of law and global solidarity is "not at all geared" to contemporary refugee flows.

Happily, virtually all of Austria's EU colleagues voted to reject this extremist view of the future — or non-future — of refugee law. This is, however, no cause for complacency. At least two lessons should be learned from this failed policy initiative.

First, the Austrian proposal makes clear that there is a pervasive failure to understand the real purposes and value of international refugee law. Specifically, it does not recognize that the Refugee Convention is capable of being implemented in a way that reconciles the need of refugees to secure access to protection to the legitimate concerns and aspirations of receiving states.

Second, and most directly related to your daily work as refugee law judges, the Austrian proposal's extraordinarily conservative reading of the Convention refugee definition suggests that there is an urgent need to reinvigorate the substantive content of refugee law, in order to prove that it remains absolutely relevant to the needs of contemporary asylum seekers.

To achieve both these goals, I believe that we need to embrace a vision of refugee law as human rights protection.

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2. Memorandum from the Presidency of the Council of the European Union to the K4 Committee, Doc. 9809/98, July 1, 1998, at para. 102. "Such an approach would allow potential reception and protection States to come up with their offers in a much more flexible and speedy way. It would also release a considerable volume of personnel and material resources... which could be much better used in direct assistance to the persons taken in and to be afforded protection... A new direction of this kind can only be implemented on the basis of a Convention supplementing, amending or replacing the Geneva Convention": *id.*

The Medium-Term Perspective: It is Time for Reformulation of the Mechanisms of Refugee Protection

How can the community of refugee law judges help to ensure that the real value and practicality of international refugee law are clearly understood?

As a medium-term objective, I strongly encourage the International Association of Refugee Law Judges to stimulate governments and the United Nations High Commissioner for Refugees (UNHCR) to embark upon reform of the mechanisms of international refugee law. You are uniquely placed as experts committed to the rule of law to argue authoritatively both that the fundamentals of refugee protection are sound, and simultaneously that the *precise ways* in which we have tended to go about the business of protection — arbitrarily assigned responsibilities among states, the confusion of refugee protection with immigration, the trend to push more and more refugees into discretionary categories where internationally guaranteed rights are not respected — are the logical objects of our concern and efforts. I believe that the objective should be reform of the modalities of protection, *without abandoning the current Refugee Convention*, and without compromising in any way the critical value of a rule-based, rights-defined, and fully accountable system of protection.

International refugee protection is in crisis. As armed conflict and human rights abuse continue to force individuals and groups to flee their home countries, many governments feel unable to receive all refugees who seek their protection. States are increasingly withdrawing from the duty to provide refugees with the protection they require.

Despite the fact that the North protects only about 20% of the world's refugee population, its governments have adopted sophisticated policies of *non-entrée*, designed to keep refugees from ever reaching their territories. Visa requirements for nationals of refugee-producing countries, backed up by carrier sanctions, make it difficult for most refugees to even contemplate travelling to the North. Refugees who circumvent the visa barrier are increasingly deflected back to the countries transited during their escapes, even when these intermediate states are unable to offer them meaningful protection. Others have faced interdiction on the high seas or in artificially designated "international zones." The risk of genuine refugees being turned away continues even for those refugees who manage to reach northern states of asylum. Summary exclusion procedures and restrictive application of the Convention refugee definition frequently result in the failure to recognize the claims of persons entitled to international protection.

The quality of protection provided to even recognized refugees is also weakening. Many recently adopted "temporary protection" policies, for example, abridge basic rights guaranteed to refugees under international law, including rights to internal freedom of movement, employment, and family unity.

The protection picture is similarly bleak in the South. Southern states are struggling to cope with the overwhelming majority of the world's refugees. Particularly when faced with a mass influx, they have often found it impossible to provide for refugees' basic economic needs, or even to guarantee their physical security. In the result, they have increasingly sought to emulate northern efforts to avoid responsibility towards refugees by resorting to border closures and the forcible expulsion of refugees. Patterns of abuse of the rights of refugees are often so serious as to be tantamount to *refoulement*, including the denial of even basic subsistence rights, such as food rations. Refugees may be effectively forced to return home, even when it is not yet safe to do so.

As fewer and fewer states see the reception of refugees to be reconcilable to their own national interests, the focus of international attention has shifted away from the provision of asylum to refugees, and toward the eradication of the "root causes" of refugee migrations. The rhetoric of commitment has not, however, been matched by official action to put down human rights abuse and violence in other than the small minority of countries of origin of strategic importance to powerful governments. Yet under the guise of the so-called "right to remain," refugees are increasingly forced to remain within the boundaries of their own countries in unsafe conditions, as was the case in Bosnia, Kurdistan and Rwanda. Underprotected in defined areas, these concentrations of would-be refugees have provided an irresistible target to enemies.

Because there is as yet no practical commitment on the part of governments universally and immediately to address all risks of violence and other human rights abuse, desperate people will continue to migrate in search of protection. Nor should they be prevented from seeking refuge. Until and unless effective and timely intervention is a dependable reality, the right to solicit safety abroad remains a critical moral imperative, the only truly autonomous response to the violation of basic human rights.

Yet because the economic, political, and strategic reasons that induced an historical openness to the arrival of refugees have largely withered away, there is no longer a guarantee that any state will be prepared to receive those involuntary migrants. The challenge is to reconceive the mechanisms of refugee protection in a way that is reconcilable to the legitimate concerns of modern states, yet which does not sacrifice the critical right of at-risk people to seek asylum.

While largely in agreement with this analysis, contributors to a series of consultations which I organized between 1991 and 1996 urged that the time is not yet right to propose the fundamental renegotiation of the United Nations Refugee Convention itself. Simply put, the risk of a downward spiral in the quality of protection formally guaranteed by international law is too great. This advice convinced me that the welfare of refugees is best served by promoting a new operational framework for the implementation of traditional legal obligations. Two specific concerns appear paramount: problems associated with reliance on individuated state responsibility, and the absence of a meaningful solution orientation.

First and most fundamentally, there is a desperate need meaningfully to share burdens and responsibilities towards refugees. Under the current regime, when refugees arrive in an asylum state, that state is, as a matter of international law, solely responsible for their protection. 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. The present 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.

Closely related to this problem of atomized responsibility is the failure to allocate the fiscal resources available for refugee protection to greatest advantage. Specifically, to the extent that the relatively recent breakdown of refugee protection within southern regions of origin

derives from a scarcity of funds, it is potentially remediable. The amount of money spent in the North to evaluate and process the claims of the 20% minority of refugees it receives dramatically dwarfs the resources available to protect the 80% of the refugee population located in the South. Under a more collaborative approach to refugee protection, the same resources presently spent to receive refugees could be reassigned to where they are most likely to benefit the greatest number of refugees.

In an ideal world, a system to share the burdens and responsibilities of refugee protection would be immediately established at the global level. A universal system could spread the costs of providing asylum among the largest number of states, thereby minimizing the risk of an unacceptably high cost being imposed on any particular government. Most contributors to our consultations, however, recognized with regret that there is presently an insufficient sense of "connectedness" among states at the universal level to generate a formal, binding commitment to collectivize the responsibilities and costs of refugee protection. While not ruling out the potential for a more universal system to evolve incrementally, I have been persuaded that a dependable regime of shared responsibility towards refugees is presently most viable within associations of states at the sub-global level, linked together in a global network by UNHCR's participation in all such groups.

Organizations that already allow states to work effectively together, and to which governments are prepared to make binding commitments (for example, by reason of economic and trading relationships, shared religion or language, common political or legal traditions, or similar security objectives) are logical sites in which to fashion a collectivized approach to refugee protection. Associations that link North and South, and which have a broadly based membership, are best positioned to facilitate a workable regime for sharing the burden of, and responsibility for, refugees.

Enhanced solidarity among states at the sub-global level is, I believe, a practical yet principled means to implement the universal commitment to refugee protection undertaken by state parties to the Refugee Convention. The reformulated approach I propose includes a key role for UNHCR in establishing and implementing sub-global refugee protection systems, and in orchestrating a global network of such regimes.

The decision to look primarily to functional interstate associations as the bedrock for a reconceived approach to the implementation of refugee law may appear less committed to universal co-operation than the present approach. In fact, this may not be so. The present global system of co-operation in refugee protection has relied on vague promises of co-operation among governments, accompanied by often undependable funding. It has proved unable to answer the concerns of front-line receiving states, which have become increasingly and understandably loathe to rely on purely discretionary support. The quality of refugee protection has suffered accordingly.

Because governments have traditionally been prepared to make more dependable commitments at the sub-global level where their influence is greatest and their interests are more directly implicated, the model I propose is positioned to give substance to the rhetoric of interstate co-operation. Security, economic, and other concerns should be invoked to motivate states outside the various sub-global organizations to support the organizations' refugee-protection efforts, albeit generally by a combination of fiscal commitments and guarantees of residual and special-needs resettlement opportunities. To the extent that UNHCR plays an effective role in co-ordinating the work of the sub-global organizations

that undertake refugee-protection responsibilities, a universal protection system can emerge in practice. While my primary objective in promoting sub-global co-operation is clearly to find a way to make refugee protection feasible, this strategy will lay the groundwork for a more reliable form of global co-operation.

Second, refugee protection needs to become seriously solution-oriented. Lip service is paid to the importance of identifying "solutions" to refugeehood. As normally understood, this means ending the violence or other human rights abuse that induced refugee flight, so that refugees can go home in safety. Yet even as states and the United Nations are increasingly aware of the need to intervene against the phenomena that force refugees from their homes, little has been done to re-tool the mechanisms of refugee protection itself to complement this solution-oriented vision.

In particular, even when it becomes objectively safe for refugees to return to their countries of origin, the potential for repatriation is often frustrated by the failure to take effective steps to ensure that the eventuality of return home remains viable. Repatriation will often be unsuccessful where family and collective social structures of refugees have not been sustained during the period of protection abroad, or if refugees have been 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 to further flight. To develop the potential for repatriation continually to regenerate asylum capacity, I have proposed a model of dignified temporary protection, coupled with an effective system of repatriation aid and development assistance.

The proposal is intended to encourage a transition away from traditional ways of thinking about refugee flows and solutions. It is premised on an understanding of refugee law, not as a mode of immigration, but rather as a mechanism of human rights protection for the duration of risk. If we can implement our legal obligations on the basis of a more equitable understanding of responsibility sharing and burden sharing, and if we focus our efforts on achieving a functional system of collectivized and solution-oriented temporary protection, I believe that it will prove possible regularly to replenish at least a substantial part of the world's asylum capacity.

No approach to refugee protection, standing on its own, can eradicate the need for persons to flee from serious harm. My proposed model of protecting refugees neither aspires to be, nor in any sense contradicts, a solid program of timely, meaningful, and apolitical action to bring an end to the causes of refugee flight. My goal, and the goal of refugee protection as conceived in international law, is instead to ensure the availability of solid and rights-regarding protection to refugees until and unless it is safe for them to return.[3]

3. The details of the proposed reformulation of the mechanisms of international refugee law are set out in J. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," (1997) 10 Harvard Human Rights Journal 115-211. The social science background studies which underpin the recommended approach are collected in J. Hathaway, *Reconceiving International Refugee Law* (Kluwer, 1997).

The Immediate Perspective: Injecting Human Rights Law into the Interpretation of the Convention Refugee Definition

Though enduring solutions to the refugee law crisis will, in my view, come only from reform of the modalities of international refugee protection, we must all do what we can to keep refugee law alive during this transition. Governments should be shown that refugee law is worth saving, that it can assist them to make difficult decisions about when exemption from the ordinary rules of border control is warranted in the face of claims of necessity. You as decision makers are uniquely empowered to show in your daily work the inaccuracy of the Austrian EU Presidency's assertion that the Refugee Convention "is not at all geared" to the job of differentiating refugees from other migrants in today's world.

I will focus my comments today on the rationale for a human-rights-based construction of the Refugee Convention's core construct — a well-founded fear of *persecution*. The literal sense of the word "persecution" does not, of course, require consideration of human rights norms by decision-makers.[4] My conviction that "persecution" is most logically defined in relation to core norms of international human rights law derives instead from a determination to work within accepted rules of treaty interpretation in order to ensure the capacity of the Convention to evolve without sacrificing either universality or accountability. It is for this reason that I proposed several years ago that persecution be defined as a sustained or systemic risk to core human rights, demonstrative of a failure of state protection.[5] I believe that reliance on core norms of international human rights law to define forms of "serious harm" within the scope of persecution is not only compelled as a matter of law, but makes good practical sense, for at least three reasons.

First, despite the pontification of many wishful legal thinkers, it remains the case that international law today is, quite simply, whatever states can agree that it is. No more, no less. If our goal is to advance the objects and purposes of the Refugee Convention through a sensitive interpretation of its more ambiguous terms, then intellectual honesty surely compels us to look to *how states themselves* have defined unacceptable infringements of human dignity if we want to know which harms they are truly committed to defining as impermissible. Human rights law is precisely the means by which states have undertaken that task.

Second, beyond being an intellectually honest approach, reliance on clearly accepted international human rights standards is strategically wise. It holds states to a dynamic "dialogue of justification" in which refugee decision makers who use human rights law to define harms within the scope of "persecution" are not combatting the views of governments, but rather relying on the very standards which governments have said to be minimum standards.

4 While some commentators take a rigidly hierarchical approach to the interpretation of treaties, with a consequent fixation on so-called "literal meaning," I believe the approach of Brennan C.J. of the Australian High Court in *Applicant A & Anor v. Minister for Immigration and Ethnic Affairs*, Feb. 24, 1997, is a more accurate interpretation of the approach codified in the Vienna Convention on the Law of Treaties: "In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules... Although the text of a treaty may reveal its object and purpose, or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text."

5 J. Hathaway, *The Law of Refugee Status*, 1991, at 104-105. This approach has been embraced by senior courts in several influential asylum states. *See* James Simeon, "International Association of Refugee Law Judges Human Rights Nexus Working Party, Rapporteur's Report" (1998).

Third, international human rights law provides refugee law judges with an automatic means — within the framework of legal positivism and continuing accountability — to contextualize and update standards in order to take new problems into account. Because international human rights law is constantly being authoritatively interpreted through a combination of general comments, decisions on individual petitions, and declarations of UN plenary bodies, there is a wealth of wisdom upon which refugee decision makers can draw to keep the Convention refugee definition alive in changing circumstances. This malleability or flexibility of international human rights law makes it possible for you to address new threats to human dignity through refugee law, but to do so without asserting either subjective or legally ungrounded perceptions of "what's right, and what's wrong."

If a risk to core, internationally recognized human rights is the kind of risk that is sufficiently serious to amount to persecution, which international human rights instruments ought to inform this assessment? My answer in *The Law of Refugee Status* was the International Bill of Rights, that is, the trio of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[6] The centrality of the International Bill of Rights derives from a combination of its substantive inclusiveness, the extraordinary consensus achieved on the principled soundness of it standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords.

With the benefit of nearly eight years of progress on human rights law, I would not restrict myself today to the norms set out in the International Bill of Rights. But neither would I rush to embrace every new convention on human rights, much less mere declarations or statements of principle, as legally relevant to defining harms within the scope of "persecution." If we believe that the standards relied on should *really* be agreed by states to be authoritative, if we believe in the importance of genuine accountability through a dialogue of justification with governments, in short, if we want refugee status determination to be taken seriously as *law-based* rather than as an exercise in humanitarian "do-goodism," then we have to exercise some responsible constraint on the impulse to embrace every new human rights idea that comes along.

Drawing that bright-line is not a simple task. At a minimum, though, it seems to me that a commitment to legal positivism requires, first, that we focus on *legal* standards — primarily treaties — not on so-called "soft law", which simply doesn't yet bespeak a sufficient normative consensus. While we can logically resort to these evolving standards as a means to contextualize and elaborate the substantive content of genuine legal standards, they should not, in my view, be treated as authoritative in and of themselves.

Second, as among authoritative legal standards, it is important not to rely on treaties that remain short on serious support from states. Until and unless we are able honestly to say that a given treaty enjoys general support, it ought not to be used to interpret a term in what is meant to be a *universal* treaty on refugee protection. In practical terms, one might reasonably consider looking for ratification of a given treaty by a respectable super-majority

6. *Supra* note 5, at 108-112.

— for example, two thirds of the United Nations membership,[7] including some support in all major geo-political groupings. Applying this litmus test, one could today interpret "persecution" by reference to not only the International Bill of Rights, but also by consideration of the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child.

A number of critiques have been advanced against my approach to define harms within the realm of persecution by reference to core norms of international human rights law.

An early concern was voiced by David Martin, who argued against reliance on "the full range of rights listed in the Covenants."[8] Martin sees the logic of reference to risks to the civil and political rights set out in the International Bill, but expresses scepticism that governments will agree to rely on even core socio-economic rights in assessing the existence of a risk of persecution. While it is true that courts in developed countries have more readily relied on civil and political rights norms, there has been clear evidence in recent years of a more expansive understanding of the scope of relevant human rights. For example, the Canadian Federal Court of Appeal in *Cheung* considered the claim to protection of a young child born in contravention of China's one-child policy in these terms:

> . . . [I]f Karen Lee were sent back to China, she would, in her own right, experience such concerted and severe discrimination, including deprivation of medical care, education and employment, and even food, so as to amount to persecution. She was poignantly described as a 'black market person,' denied the ordinary rights of Chinese children.[9]

Not only is this approach intuitively compelling, but more importantly it corresponds to the nature of the legal obligations set by the International Covenant on Economic, Social and Cultural Rights. Not every failure to deliver core socio-economic rights is a violation of international law. Specifically, there is no violation so long as the failure to guarantee the right derives from a genuine absence of resources, and there is no discrimination in the allocation of whatever resources are in fact available. By framing the nature of state obligations in this way, the drafters of the Covenant explicitly took account of the legitimate concerns of states regarding the feasibility of implementing guarantees of socio-economic rights.

If anything, the present trend is to strengthen the place of socio-economic rights in our understanding of basic human entitlements. The General Assembly regularly endorses the indivisibility of all categories of human rights — civil, political, economic, social, and cultural.[10] Moreover, the states represented on the committee charged with supervision of the Covenant on Economic, Social and Cultural Rights have endorsed an understanding of core socio-economic rights at a heightened level of obligation:

7 This standard of assent mirrors that codified in the United Nations Charter for votes on "important questions": *Charter of the United Nations*, 1 UNTS XVI, at Art. 18(2).
8 David Martin, *Book Review: The Law of Refugee Status*, (1993) 87 AJIL 348, at 349-350.
9 *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, at 325.
10. *See e.g.* UNGA Res. 32/130.

> An obligation... to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in the Covenant is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, or basic shelter and housing, or of the most basic forms of education is, *prima facie,* failing to discharge its obligations under the Covenant.[11]

Not every person who faces even a risk of this gravity will, of course, qualify for Convention refugee status. The other components of the refugee definition — in particular, the need successfully to leave one's own country, and the existence of a nexus between the harm feared and one's civil or political status — necessarily limit the class of beneficiaries. But if we are committed to anchoring our understanding of unacceptable harms in the very standards set by states, it seems indisputable to me that equal attention must be given by refugee judges to risks to core socio-economic rights, as to threats to civil and political rights. While socio-economic rights are not yet codified at the same level of exigency as are civil and political rights, they should be taken on their own terms as legally authoritative standards of the minimum responsibility of states to ensure human dignity.

In contrast to the view that my human rights framework for interpreting "persecution" is unduly liberal, I have more recently been accused of unwarranted conservatism on this issue.

First, Hugo Storey argues against the central place I afford the International Bill of Rights on the grounds that it is an hierarchical standard, and therefore runs counter to a commitment to all human rights as interdependent and indivisible.[12] This is not right, in my view. The interdependence and indivisibility of rights does not mean their legal equivalency. Some rights are defined to grant states operational flexibility in their definition and implementation, while others are not. In a positivist legal system, we simply have to learn to accept the imperfection of the global human rights project.

The specific concern — sometimes short-handed as a problem of hierarchy — is that some rights in the International Bill of Rights (such as the prohibition of torture) are absolutely binding and never subject to legitimate exception of any kind for any reason; others (such as freedom of speech and association) are immediately binding, but subject to non-discriminatory suspension in time of genuine and officially declared national emergencies; and other rights, including most socio-economic rights, are enforceable only at the level of a duty of progressive, non-discriminatory implementation, to the maximum of a state's capabilities.

My point was, and is, that a refugee claimant cannot be said to face the risk of a legally unacceptable harm if all that she would encounter upon return is conduct that is within the realm of what is legally defined to be acceptable. Thus, for example, the risk of torture will always be sufficiently serious (because it is a non-derogable right); denial of the right of free speech will usually be sufficiently serious, unless there is evidence that speech is denied non-discriminatorily, and only in the context of a genuine national emergency; and denial of a right to education *may* amount to a sufficiently serious harm, but only if that risk exists

11. Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1990/8 (1991).
12. "The central problem with any hierarchical standard is that it clashes with another contemporary doctrine of human rights law and practice, that of the indivisibility of human rights": Hugo Storey, "Human Rights Nexus – A Critique," Dec. 30, 1997, at 16.

in the context of resource adequacy, or discriminatory implementation (e.g., resource deficiencies prompt the state to grant whites the right to a primary education, but blacks are not allowed to access public schools).

While we may wish that human rights law gave all things to all people on an all-inclusive basis, we're not there yet. I do not believe that it is the role of a refugee judge, charged with the application of an international refugee convention, to decide independently that rights defined internationally can be reconstrued at will — even if that desire stems from a noble inclination.

Second, Jane Coker, Heaven Crawley and Alison Stanley have recently argued that the International Bill of Rights is anachronistic — specifically, that the rights it guarantees do not embody a socially inclusive understanding of human dignity that is equally applicable to all persons.[13] I do not share this view. While I indicated earlier that I see no legal impediment today to a refugee law judge relying on the additional human rights standards set out in widely subscribed treaties, I do not see that these specialized accords are in any sense normatively radical. In virtually every case, the rights guaranteed in the specialized human rights treaties of recent years merely contextualize and add "meat" to the "bones" of the very human rights already declared in the International Bill of Rights. This is not to say that the specialized treaties are not helpful to refugee law judges — to the contrary, I think that they are valuable, especially as interpretive aids. But I have yet to see a single decision that grounds its understanding of unacceptably serious harm in one of the specialized treaties, that could not equally have invoked the International Bill of Rights to achieve the same outcome. Important concerns such as rape, forcible abortion or sterilization and female genital mutilation are all — and appropriately — understood to be within the ambit of the Civil and Political Covenant's non-derogable prohibition of torture, cruel, inhuman and degrading treatment.[14] No specialized conventions, declarations, or other standards are required to justify the recognition of these harms as sufficiently serious to fall within the scope of conduct adjudged persecutory.

My point here is that we should not underestimate the ability of the International Bill of Rights — of essentially unquestioned authority — to do the "human rights job" in relation to claims by traditionally disfranchised groups such as women, children and racial minorities. Second, and because of the International Bill of Rights' flexibility, it is vital that we not rush to invoke human rights standards that are of doubtful legal standing, or which do not enjoy solid support across states — in the process inadvertently undermining the universality and accountability that reliance on the International Bill of Rights provides.

13 "Human rights are not 'universal,' rather the structure and content of international human rights discourse is gendered at a number of levels, not least of which is the ordering of priorities. This criticism can equally be levelled at Hathaway's framework, and suggests the need for a re-characterization of non-discrimination rights as well as civil and political rights and economic, social and cultural rights...": Jane Coker, Heaven Crawley, and Alison Stanley, "A Gender Perspective on the Human Rights Paradigm", May 12, 1998, at 4.

14 In 1997, for example, the UN Commission on Human Rights called upon the Special Rapporteur on Torture "to continue to examine questions concerning torture directed against women and conditions conducive to such torture, to make appropriate recommendations concerning the prevention and redress of gender-specific forms of torture..." UNHRC Res. 1997/38, at para. 21.

To conclude, I believe that it is critically important that we continually reassess the ways in which refugee law and human rights can be mutually supportive, as refugee law really is one of the very few ways in which international law actually engages with the real concerns of real human beings. That is something valuable and worth saving. The refugee rights regime creates a dynamic mechanism of accountability. It enforces a practical "dialogue of justification" in which governments agree to answer for how they address the needs of involuntary migrants.

The implications of this understanding are twofold. In immediate terms, in your day-to-day work as decision makers, it is important that refugee status assessment be shown not to be the anachronism claimed by the Austrian EU Presidency. A human-rights-derived interpretive framework not only promotes accountability, but automatically evolves with new understandings of unacceptable risks to human dignity, and does so in a way that is premised on universality.

Second, at least in the medium-term, the implication of a human-rights-based understanding of refugee law is that the time is right to embark upon a determined effort to accommodate the legitimate interests of receiving states to the continuing need of refugees to be guaranteed access to safety and a dignified existence. As persons committed to rights-regarding protection, I believe that all of us share an ethical obligation to show that this goal can be achieved without sacrificing the accountability and global inclusiveness that come from responding to refugees from within the framework of international law. What is called for is flexibility and creativity in the implementation of existing obligations. By embracing this challenge, we can move beyond the rhetoric of a commitment to human rights, and toward a practical system that will deliver protection on a dependable and universal basis.