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ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION[▫]

A GLOBAL SOLUTION TO A GLOBAL REFUGEE CRISIS

JAMES C. HATHAWAY*

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ABSTRACT: The author argues that the time is right to change the way that refugee law is implemented. Specifically, Hathaway advocates a shift towards a managed and collectivized approach to the implementation of refugee protection obligations. He contends that while the obligations under the Convention remain sound, the mechanisms for implementing those obligations are flawed in ways that too often lead States to act against their own values and interests, and which produce needless suffering amongst refugees. The author concludes with a five-point plan to revitalize the Refugee Convention.

KEYWORDS: Refugee Convention – asylum – immigration – common but differentiated responsibility – UNHCR.

I. THE REFUGEE CONVENTION'S COMMITMENT TO SELF-SUFFICIENCY

The United Nations Convention relating to the Status of Refugees (Refugee Convention) is increasingly marginal to the way in which refugee protection happens around the world. I believe that this is a bad thing – both for refugees, and for States.

[▫] Starting with its very first issue, *European Papers* intends to keep the on-going, epochal refugee crisis "On the Agenda". The two contributions published in this issue are meant to open a debate which will be followed up in the upcoming issues.

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In introducing the draft of the Refugee Convention some 65 years ago, the UN's first Secretary General explained that "[t]his phase [...] will be characterized by the fact that the refugees will lead an independent life in the countries which have given them shelter. With the exception of the 'hard core' cases, the refugees will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and for those of their families".

II. THE GROUND REALITY OF DEPENDENCY

Yet today, and despite the fact that 148 countries have signed onto the Refugee Convention, the reality is quite the opposite. Most refugees today *are not* allowed to live independent lives. Most refugees *are* maintained by an international organization. And most refugees are emphatically *not* allowed to provide for their own needs.

In order to be able to contribute to meeting their own needs, the most obvious need of refugees is to enjoy freedom of movement. Yet one in four refugees in the world is effectively imprisoned, and at least as many are often subject to serious restrictions on their mobility. In an especially cruel irony, United Nations refugee agency, the United Nations High Commissioner for Refugees (UNHCR), runs more refugee camps than anyone else. Not only is this response unlawful, it is absurdly counter-productive. Refugees become burdens on their hosts and the international community, and are debilitated in ways that often make it difficult for them ever to return home, integrate locally, or resettle. The risk of violence in refugee camps is also endemic – with women and children especially vulnerable to the anger that too often arises from being caged up.

III. DIAGNOSING THE PROBLEM

What went wrong?

One thing that is not wrong is the Refugee Convention itself. Its definition ("a well-founded fear of being persecuted" for discriminatory reasons) has proved wonderfully flexible, identifying new groups of fundamentally disfranchised persons unable to benefit from human rights protection in their own countries.

At least as important, its catalogue of refugee-specific rights remains as valuable today as ever. The underlying theory of the Refugee Convention is emphatically *not* the creation of dependency by hand-outs. It guarantees the social and economic rights that refugees need to be able to get back on their feet after being forced away from their own national community (e.g., to access education, to seek work, and to start businesses).

It was patently obvious to the States that drafted the refugee treaty that refugees could not begin to look after themselves, much less to contribute to the well-being of their host communities, if they were caged up. For this reason, as soon as a refugee has

submitted herself to the jurisdiction of the host country, satisfied authorities of her identity, and addressed any security-related concerns, the Refugee Convention requires that she be afforded not only freedom of movement, but the right to choose her place of residence – a right that continues until and unless the substance of her refugee claim is negatively determined. Respecting this legal guarantee of refugee mobility can dramatically change the policy outcomes of admitting refugees; indeed, a recent study shows that those countries that *do* facilitate refugee freedom of movement are often economically *advantaged* by the presence of refugees.¹

Why, then, do States not routinely liberate the productive potential of refugees?

Part of the reason is that setting up refugee camps is an easy *one size fits all* answer that can be quickly and efficiently rolled out by both the UNHCR and many of its many humanitarian partners. When there is a political imperative to act, the establishment of camps is a concrete and visible sign of engagement. Indeed, even as the regional States receiving the overwhelming majority of Syrian refugees were largely ignored by the rest of the world, international donors stepped forward to finance the building and operation of refugee camps.²

Most fundamentally, though, the detention of refugees is a strategy that appeals to States that would prefer to avoid their international duty to protect refugees. While not willing to accept the political cost of formally renouncing the treaty, States with the economic and practical wherewithal have for many years sought to ensure that refugees never arrive at their jurisdiction, at which point duties inhere. The strategy of deterrence has, however, come under increasingly successful challenge, including before the European Court of Human Rights.³ Poorer States, as well as those with especially porous borders, have of course rarely been able to deter refugee arrivals at all. For States in either situation, restricting the mobility of refugees by detention or similar practices (often accompanied by other harsh treatment post-arrival) is seen as a second-best means for a State to *send a signal* that they are not open to the arrival of refugees.

But why are States so often unwilling to receive refugees?

Safety and security are of course frequently invoked. While such concerns can be real, there is, however, no empirical evidence that refugees present a greater threat of crime or violence than do the many other non-citizens routinely crossing borders, or indeed those already resident in the State, including citizens. In any event, the Refugee Convention takes a very hard line on such cases, *requiring* the exclusion from refugee status of any person reasonably suspected of being a criminal, and allowing States to

¹ A. BETTS, L. BLOOM, J. KAPLAN, N. OMATA, *Refugee Economies Rethinking Popular Assumptions*, in *Humanitarian Innovation Project*, 20 June 2014, www.rsc.ox.ac.uk.

² R.F. SWEIS, *Despite Good Intentions: Vacancies in Refugee Camp in Jordan for Syrians*, in *The New York Times*, 15 March 2015, www.nytimes.com.

³ T. GAMMELTOFT-HANSEN, J.C. HATHAWAY, *Non-Refoulement in a World of Cooperative Deterrence*, in *Columbia Journal of Transnational Law*, 2015, p. 235 *et seq.*

send away those shown to pose a threat to their safety or security, even back to the country of persecution, if there is no other option.

The real concern is instead that most governments believe that refugees who arrive at their borders impose unconditional and indefinite obligations on them, and on them alone. The idea that the arrival of refugees can effectively subvert a State's sovereign authority over immigration is understandably unsettling to even powerful States. For States of the less developed world, which receive more than 80 per cent of the world's refugees, the challenge can be acute. They are supported by no more than the (often grossly inadequate and inevitably fluctuating) charity of wealthier countries, and rarely benefit from meaningful support to lessen the human responsibility of protection. Of the roughly 14 million refugees in the world last year, only about 100,000 were resettled, with just two countries, the United States and Canada, providing the lion's share of this woefully inadequate contribution.

IV. THE CHALLENGE

The challenge, then, is to ensure that refugees can access meaningful protection in a way that both addresses the legitimate concerns of States and which harnesses the refugees' own ability to contribute to the viability of the protection regime.

The irony is that the Refugee Convention itself suggests the way forward. The rights regime established by Arts 2-34 rejects a charity-based model in favour of refugee empowerment. The Refugee Convention is also massively attentive to the safety and security concerns of States: not only are fugitives from justice mandatorily excluded from refugee status, but those shown to be risks to national security are subject to legally sanctioned *refoulement*. The Refugee Convention's cessation clause moreover makes clear that States are not required permanently to admit refugees, but need only protect them for the duration of the risk in their home country. And perhaps most important, the refugee regime was never intended to operate in the atomized and uncoordinated way that has characterized most of its nearly 65-year history. To the contrary, the Preamble to the Refugee Convention expressly recognizes that "the grant of asylum may place unduly heavy burdens on certain countries" such that real global protection "cannot therefore be achieved without international co-operation".

This is not just another tired call for States to live up to what they have signed onto. It is rather a plea for us fundamentally to change *the way that refugee law is implemented*. The obligations are right, but the mechanisms for implementing those obligations are flawed in ways that too often lead States to act against their own values and interests – and which produce needless suffering amongst refugees.

V. A FIVE-POINT PLAN

How should we proceed?

A team of lawyers, social scientists, non-governmental activists, and governmental and intergovernmental officials, drawn from all parts of the world, worked for five years to conceive the model for a new approach to *implementing* the Refugee Convention. We reached consensus on a number of core principles.⁴

V.1. REFORM MUST ADDRESS THE CIRCUMSTANCES OF ALL STATES, NOT JUST THE POWERFUL FEW

Most refugee reform efforts in recent years have been designed and controlled by powerful States: e.g., Australia and the EU. There has been no effort to share out fairly in a binding way the much greater burdens and responsibilities of the less developed world, even at the level of financial contributions or guaranteed resettlement opportunities. This condemns poorer States and the 80 per cent of refugees who live in them to mercurial and normally inadequate support, leading often to failure to respect refugee rights. It is also decidedly short-sighted in that the absence of meaningful protection options nearer to home is a significant driver of efforts to find extra-regional asylum, often playing into the strategies of smugglers and traffickers.

V.2. PLAN FOR, RATHER THAN SIMPLY REACT TO, REFUGEE MOVEMENTS

There is absolutely no need for the refugee system to be captive of a seemingly continuous process of responding in an episodic way to multiple crises, with the inevitable loss of life that a reactive and uncoordinated response entails. The protection system should instead shift to a managed model, with the UNHCR able to act decisively by calling on pre-determined burden (financial) sharing and responsibility (human) sharing quotas. Such factors as prior contributions to refugee protection, per capita GDP, and arable land provide sensible starting points for the allocation of shares of the financial and human dimensions of protection. But, as the recent abortive effort to come up with such shares *ex post* by the EU makes clear, the insurance-based logic of standing allocations can only be accomplished in advance of any particular refugee movement.

V.3. EMBRACE COMMON BUT DIFFERENTIATED STATE RESPONSIBILITY

There should be no necessary connection between the place where a refugee arrives and the State in which protection for duration of risk will occur. Under present norms, and most emphatically under the *country of first arrival* norm enshrined in the Regulation (EU) No 604/2013, the so-called Dublin Regulation, a refugee will nearly always be

⁴ J.C. HATHAWAY (ed.), *Reconceiving International Refugee Law*, The Hague: Kluwer Law International, 1997; J.C. HATHAWAY, R.A. NEVE, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, in *Harvard Human Rights Journal*, 1997, p. 115 *et seq.*

allowed to stay in her State of arrival.⁵ It thus makes sense for refugees to travel often far from home (and, in the EU context, to disguise any presence in a State other than the preferred destination) before claiming protection as a means of maximizing economic or social outcomes. If in contrast the country of arrival were no more than the place in which a simplified status assessment (see below) and assignment of protective responsibility occurred, the perverse incentive to decide where to seek recognition of refugee status for reasons unrelated to protection needs would come to an abrupt end. In addition, a system of shared State responsibility for refugees would enable us to harness the ability and willingness of different States to assist in different ways. The core of the renewed protection regime should be common but differentiated responsibility, meaning that beyond the common duty to provide first asylum pending an assignment of protective responsibility, States could assume a range of protection roles within their responsibility-sharing quota (protection for duration of risk; exceptional immediate permanent integration; residual resettlement), though all States would be required to make contributions to both (financial) burden-sharing and (human) responsibility-sharing, with no trade-offs between the two.

V.4. SHIFT AWAY FROM NATIONAL, AND TOWARDS INTERNATIONAL, ADMINISTRATION OF REFUGEE PROTECTION

We advocate a revitalized UNHCR to administer quotas, with authority to allocate funds and refugees based on respect for legal norms; and encouragement of a shift to common international refugee status determination system and group *prima facie* assessment to reduce processing costs, thereby freeing up funds for real and dependable support to front-line receiving countries, including start-up funds for economic development that links refugees to their host communities, and which facilitate their eventual return home. Our economists suggest that reallocation of the funds now spent on the many often very elaborate domestic asylum systems would more than suffice to fund this system. And since as described below positive refugee status recognition would have no domestic immigration consequence for the State in which status assessment occurs, this savings could be realized without engaging sovereignty concerns.

V.5. ACCESS TO PROTECTION, AND TO A SOLUTION

The refugee system relies on migration as the means to protection: while managed entry is sometimes viable, international law prohibits barriers that impede refugees from *voting with their feet* in order to access the protection system wherever they are able,

⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

with no penalty for unlawful entry or presence. But it must be clearly understood that arrival does not entitle a refugee immediately to access permanent immigration. While some cases, e.g. unaccompanied minors and the severely traumatized, will require speedy permanent integration in some State, most refugees should instead benefit from protection for the duration of risk (with full access to refugee rights guaranteed) in order to promote the continual renewal of asylum capacity. Some refugees will ultimately choose and be able to go home. For others, a new commitment to creative development assistance linking refugees to host communities will increase the prospects for local integration. And for those still at risk and without access to either of these solutions at five-seven years after arrival, residual resettlement will be guaranteed, enabling them to remake their lives, in stark contrast to the present norm of often indefinite uncertainty.

If we are serious about avoiding continuing humanitarian tragedy (not just in Europe, but throughout the world) then the present atomized and haphazard approach to refugee protection must end. The moment has come *not* to renegotiate the Refugee Convention, but rather at long last to *operationalize* that treaty in a way that works dependably, and fairly.

