Can International Refugee Law Be Made Relevant Again?

James C. Hathaway

University of Michigan Law School, jch@umich.edu

Available at: https://repository.law.umich.edu/articles/706

Follow this and additional works at: https://repository.law.umich.edu/articles

Part of the Human Rights Law Commons, Immigration Law Commons, and the International Law Commons

Recommended Citation

International refugee law rarely determines how governments respond to involuntary migration. States pay lip service to the importance of honoring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders. Although the advocacy community invokes formal protection principles, it knows that governments are unlikely to live up to these supposedly minimum standards. The United Nations High Commissioner for Refugees (UNHCR) shows similar ambivalence about the value of refugee law. It insists that refugees must always be able to access dignified protection, even as it gives tacit support to national and intergovernmental initiatives that undermine this principle. So long as there is equivocation about the real authority of international refugee law, many states will feel free to treat refugees as they wish, and even to engage in the outright denial of responsibility toward them.

Ironic though it may seem, I believe that the present breakdown in the authority of international refugee law is attributable to its failure explicitly to accommodate the reasonable preoccupations of governments in the countries to which refugees flee. International refugee law is part of a system of state self-regulation. It will therefore be respected only to the extent that receiving states believe that it fairly reconciles humanitarian objectives to their national interests. In contrast, refugee law arbitrarily assigns full legal responsibility for protection to whatever state asylum-seekers are able to reach. It is a peremptory regime. Apart from the right to exclude serious criminals and persons who pose a security risk, the duty to avoid the return of any and all refugees who arrive at a state’s frontier takes no account of the potential impact of refugee flows on the receiving state. This apparent disregard for their interests has provided states with a pretext to avoid international legal obligations altogether.

The Demise of Interest-Convergence

Much of the debate during the drafting of the Refugee Convention [of 1951] was devoted to how best to protect the national self-interest of receiving states. The Convention grants states wide-ranging authority to deny refugee status to criminals and persons perceived to endanger national security. Perhaps most fundamentally, there was agreement that international refugee law would not impose a duty on states permanently to admit all refugees who arrive at their borders. Instead, refugees are to be afforded protection against refoulement. States are required only to avoid returning refugees to an ongoing risk of persecution. If and when the risk of serious harm ends, too, does refugee status. In this sense, refugee law is clearly based upon a theory of temporary protection.

The absence of a duty to grant permanent residence to refugees was critical to the successful negotiation of the Convention. While willing to protect refugees against return to persecution, states demanded the right ultimately to decide which, if any, refugees would be allowed to resettle in their territories. While the refugee flows of post-war Europe were felt to be logistically and politically impossible to stop, the formal distinction between refugee status and permanent residence reassured states that their sovereign authority over immigration would be respected.

Despite this legal prerogative to admit refugees only as temporary residents, many developed states initially believed their domestic interests would be served by granting permanent resident status to refugees. Because refugees seeking protection in the years following the Second World War were of European stock, their cultural assimilation was perceived as relatively straightforward. Refugees also helped to meet acute post-war labor shortages. The reception of refugees opposed to Communist regimes moreover reinforced the ideological and strategic objectives of the capitalist world. This pervasive interest-convergence between refugees and the governments of industrialized states resulted in a pattern of generous admission policies.

The reasons that induced this openness to the arrival of refugees have, however, largely withered away. Most refugees who seek entry to developed states today are from the poorer countries of the South: their “different” racial and social profile is seen as a challenge to the cultural cohesion of many developed states. The economies of industrialized states no longer require substantial and indiscriminate infusions of labor. Nor is there ideological or strategic value in the admission of most refugees. To the contrary, governments more often view refugee protection as an irritant to political and economic relations with the state of origin. In these circumstances, it is not surprising that governments have rejected the logic of con-
Politics of Non-Entrée

Instead of embracing the Refugee Convention's solution of temporary protection, the response of developed states to the end of the interest-convergence between refugees and receiving states has been to avoid receiving claims to refugee status altogether. Most Northern states have implemented non-entrée mechanisms, including visa requirements on the nationals of refugee-producing states, carrier sanctions, burden-shifting arrangements, and even the forcible interdiction of refugees at frontiers and in international waters. The simple purpose of non-entrée strategies is to keep refugees away from us.

Non-entrée is an explicable, if reprehensible, response to the breakdown of the social and political conditions that previously led industrialized states to assimilate refugees. Seeing no need to accept the risks assumed to follow from a generalized temporary protection system, states have taken the more brutal (yet less visible) step of keeping refugees as far away as possible from their territories.

The “Right to Remain”

Northern governments have recently extended their prophylactic program by championing the refugee’s “right to remain” in his or her own state. The “right to remain” is superficially attractive. After all, the best solution to the refugee problem is obviously to eradicate the harms that produce the need to escape. It is such a seductive notion that even the UNHCR has joined in the call for a redefinition of refugee protection to focus on what the Report of the United Nations High Commission for Refugees (1995) called “preparedness, prevention and solutions.”

In reality, however, no international commitment exists to deliver dependable intervention to attack the root causes of refugee flows, clearly a condition precedent to the exercise of any genuine right to remain. There is no credible evidence that intervention will ever evolve into more than a discretionary response to the minority of refugee-generating situations that is of direct concern to powerful states. The interventions in both Iraqi Kurdistan and in the former Yugoslavia were responses to the clear risk of refugee flows toward the developed world. Most perniciously, these two examples of intervention to enforce the “right to remain” suggest that this so-called “right” is essentially a means to rationalize denying at-risk persons the option to flee. Each UN intervention was inextricably tied to border closures that left no way for would-be refugees to access meaningful safety abroad.

Relegation of Burdens to the South

This blunt assault by the North on refugee migration has reinforced the confinement of most of the world’s refugees to their regions of origin in the South. Africa shelters more than half the number of refugees protected in all of Europe, North America, and Oceania combined. The Ivory Coast alone protects nearly twice as many refugees as are presently in the United States of America. In desperately poor countries like Jordan, Djibouti, Guinea, Lebanon, and Armenia, the ratio of refugee population to total population is about 1:10. Yet refugee law establishes no burden-sharing mechanism to offset the enormous contributions made by these reception states of the South.

Some degree of solidarity is achieved by “good offices,” UNHCR assistance, ad hoc regimes such as the Comprehensive Plan of Action for Indochinese Refugees, and the like. But because these efforts are orchestrated outside international refugee law, in the realm of discretion or voluntarism, there are few guarantees of meaningful support for the states of the South. With assistance from the developed world normally provided after the fact and on a situation-specific basis, Southern governments are increasingly turning away from traditions of hospitality toward refugees. While they normally lack the resources and sophisticated border control systems used by the North to enforce non-entrée, the governments of less developed countries have coerced refugees to return to their countries of origin. Some also engage in absolutely blunt refusals of access, such as the decision by Zaire simply to close its border to Rwandan refugees.

Principles for a New Paradigm of Refugee Protection

International refugee law's unilateral imposition of absolute responsibility on the asylum state is not problematic if, as during the post-war era, there is a pervasive interest-convergence between refugee and host populations. Absent such a natural symmetry, however, refugee law can function only if there is a mechanism in place to mitigate the burdens of receiving states. The plight of Tanzania — faced with massive, immediate, and potentially destabilizing refugee flows from Rwanda and Burundi — raises starkly the absurdity of a refugee protection regime in which obligations are not adjusted to take account of circumstances in states of destination. While less profound, the perceived impact of refugee flows on societies in industrialized countries ought also to be factored into the protection equation. Refusal to balance the claims of refugees with those of receiving states simply invites a continuation of present trends toward en bloc refusals of access.
The time is right to focus on preserving the essence of international refugee law as a system for the protection of persons whose basic human rights are at risk in their own state, until and unless it is possible for them to return in safety and dignity. A reformulation of the mechanisms of refugee law should be dedicated to securing this fundamental goal, taking into account the real circumstances of an increasingly self-interested world. Four basic principles are suggested to govern this transition.

First, refugee protection should not be bartered away as part of the current upsurge of interest in addressing the “root causes” of involuntary migration. While intervention may or may not evolve as a more practical and globally accessible answer to human rights abuse, refugees ought not to be guinea pigs in that experiment. Until and unless there is a dependable response to the risk of human rights abuse, the autonomous right to seek protection outside the frontiers of one’s own state should not be compromised.

Second, we should be open to the enhanced flexibility that a robust system of solution-oriented, temporary protection could provide. To be attractive to states, temporary protection will need to be constructed with a strong emphasis on preparation for return. Return itself will be a realistic option only if supported by an empowering process of reparation and development assistance. So conceived, temporary protection could regularly regenerate the asylum capacity of host states.

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. Dignified temporary protection is not simply a matter of meeting the minimum standards set by international human rights instruments, but rather requires full respect for the needs and reasonable aspirations of refugees. It must also be finite. It would not be reasonable to allow a “temporary” protection regime to force refugees to wait indefinitely before being allowed to rebuild their lives for the long-term. If it incorporates these critical safeguards, temporary protection can be a meaningful response to involuntary migration.

Third, we ought to dispense with the Refugee Convention’s unnecessarily rigid definition of state responsibilities. Beyond a common duty to provide first asylum, there is no reason to expect every state to play an identical refugee protection role. Some states will be willing to provide temporary protection, but not be disposed to the permanent integration of refugees. Traditional immigration countries could readily serve as sites of permanent resettlement for those refugees whose countries remain unsafe at the end of the period of temporary protection. Still other states will be in a position to admit special needs cases that should be diverted from the temporary protection system. There will also be governments that assume a mix of these roles, or which provide major financial or logistical support to the refugee protection system. A renewed international refugee law based on this kind of common but differentiated responsibility toward refugees would provide a principled yet flexible framework within which to reconcile the needs of refugees to the legitimate concerns of states.

Some will argue that a shift to equitable, open-textured obligations would weaken international refugee law. This criticism does not take into account, however, that the practical value of formal refugee law has been decimated by policies of non-entrée and the containment of refugees in their country of origin. I believe that it is morally irresponsible to insist on the sanctity of traditional legal standards that we know do not in fact constrain the self-interested conduct of states. If the international protection of refugees is to be meaningfully regulated, then we must temper the demands of moral criticality to meet the constraints of practical feasibility. International law is, after all, a consensual system of authority among states. If states are not convinced that their interests are taken into account by international refugee law, then in practice — despite whatever formal standards are proclaimed — international law will not govern the way refugees are treated.

Fourth and finally, the institutions of international refugee protection need to be retooled to promote and coordinate a process of collectivized responsibility. UNHCR’s recent efforts to prove its relevance to governments have, regretfully, lent credibility to the politics of non-entrée and to the containment of refugees. UNHCR should instead focus on the development of dependable mechanisms equitably to share-out responsibility for the protection of refugees among states. By proposing the standards and mechanisms to implement common but differentiated responsibility toward refugees, UNHCR could prove that international law is still an effective framework within which to manage involuntary migration.

Critical Thinking is Required Now

Refugee law serves fewer and fewer people less and less well, as time goes on. Refugee law as traditionally conceived is being undermined by a combination of non-être tactics and disingenuous insistence of the "right to remain." We should seize the moment actively to promote a new paradigm of refugee protection that is both human rights-based and pragmatic. Refugee law should be redesigned to take account of the legitimate state preoccupations that have undermined the value of law in governing refugee protection, but without compromising the essential commitment to protection.

A renewed model of international refugee law, built on the principle of common but differentiated responsibility, would allow most good to be done for more refugees than is possible under the present regime. The small minority of refugees that presently finds solace in protection in developed states may see a reduction of its relative privileges under such a system, but a reduction in the Cadillacs of the few could, I believe, provide bicycles for the many. It is time to reconcile the need for a secure and dignified refugee protection system to the legitimate interests of the countries in which refugees are sheltered. Refugee law so conceived would regain its relevance.

Professor of Law James C. Hathaway, who joined the Law School faculty this year, is an internationally recognized authority on refugee law. He formerly taught at Osgoode Hall Law School of York University, Canada. At Osgoode Hall, he was Associate Dean of Law, Founding Director of the Refugee Law Research Unit, and Co-Director of the Intensive Program in Immigration and Refugee Law. The author of Reconciling International Refugee Law (Kluwer Law International, 1997) and The Law of Refugee Status (Butterworths and Co., 1991), he currently is writing a book on refugee rights in international law. He holds J.S.D. and L.L.M. from Columbia University and an L.L.B. (Honors) from Osgoode Hall. Hathaway was appointed Senior Visiting Research Associate at Oxford University's Refugee Studies Program.