

# Saving International Refugee Law

Professor James C. Hathaway  
University of Michigan Law School

My concern...

The singular importance of international refugee law is profoundly misunderstood.

- Governments in the developed world: using the language of burden-sharing to further an only mildly attenuated global apartheid regime where most refugees remain in the less developed world.
- Refugees in the less developed world: living in conditions generally rights-abusive and often literally life-threatening.

## Rhetorical distortions:

- An obligation of “last resort.”
- Illegal refugee entry.
- Harsh treatment justified by resource allocation elsewhere – e.g. resettlement for “those most in need.”

No duty on a refugee to seek protection either in the first country of arrival or, more generally, within his or her region.

“The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that *asylum should not be refused solely on the ground that it could be sought from another state*. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he may *if it appears fair and reasonable* be called upon *first* to request asylum from that State”

(emphasis added)

- UNHCR Executive Committee Conclusion No. 15 (1979).

Once a state exercises jurisdiction over a refugee (including on the high seas), he or she is entitled to the benefit of the Refugee Convention.

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

- Refugee Convention, Art. 31(1).

Completely inappropriate to stigmatise refugees arriving without visas as law-breakers when a treaty states have freely signed provides exactly the contrary.

## Maldistribution of responsibilities:

- More than 80% of refugees remain in the less developed world.
- 1 refugee : 100 citizens – Chad, Iran, Jordan, Lebanon, Pakistan, Saudi Arabia and Syria.
- 1: 460 – Canada.
- 1: 1,900 – US, EU.
- 1: 41,000 – Japan.

## Maldistribution of resources

- About US\$.50 per day for refugees under direct UNHCR care in poorer states.
- Developed states: US\$20,000 each.
- One hundred times more per refugee in developed world.

# Refugees per dollar of per capita GDP

Pakistan 745:1, DRC 592:1, Zimbabwe 527:1, Syria  
244:1, Kenya 237:1, Chad 234:1, Bangladesh 164:1,  
Ethiopia 142:1, Uganda 113:1, Nepal 101:1

VS

Germany 17:1 (highest ratio in the developed world)

Reallocation argument convincing, but it must be  
(1) much more significant, and (2) binding.

“Today, neither the duty to receive refugees nor the real costs associated with their arrival are fairly apportioned across the world. Distribution of State responsibility is based on accidents of geography and the relative ability of States to control their borders. The entire system survives tenuously on undependable funding and vague promises of cooperation...We believe that... we must pave the way for equitable and consistent responses to all refugee situations in all parts of the world. Developing countries who put at risk their fragile environment, economy and social fabric to provide refuge to millions are in reality the largest ‘donors’ to the refugee cause.”

- Statement by Mr. R. Margabandhu, M.P., of India to the UNHCR Executive Committee, Nov. 12, 1998.

- Mandatory encampment policies: breach of both Refugee Convention and ICCPR.
- Failure to promote goals of refugee safety, autonomy, and self-reliance at the heart of the Refugee Convention.

“... [T]he 1951 Convention gives refugees a solid basis on which they can progressively restore the social and economic independence needed to get on with their lives. Host States should make every effort to assure to refugees the rights envisaged under the 1951 Convention, particularly those rights which relate to income generation. This includes the right to freedom of movement enabling refugees to market their goods and access the labour market. Equally important is refugees’ ability to access education, health care and other social services where available.”

- UNHCR, “Local Integration and Self-Reliance,” U.N. Doc.

EC/55/SC/CRP.15, June 2, 2005, at para. 11.

# Resettlement

- Today: numerically insignificant opportunities from a fraction of the world's developed governments (128,000 total in 2009).
- Not generally for “those refugees most in need,” but according to country selection criteria.

“UNHCR aims to ensure predictability and global consistency in the application of resettlement criteria according to identified needs and priorities. However, the country of resettlement makes the decisions concerning who to admit on the basis of national policies and requirements.”

- UNHCR, “Measuring Protection by the Numbers: 2005” (2006), at 19.

Disingenuous to market resettlement efforts as fundamentally needs-based, much less as a needs-based alternative to asylum.

- Dishonest to stigmatise those refugees who seek protection where they believe they will be treated fairly, where their children can learn, and where they are free to think and speak as they wish.
- What would you choose?

## In sum...

- Refugees not required to seek protection in country of first arrival or in their own region.
- Refugees not acting unlawfully through failure to obtain entry approval.
- Goal of equitable burden-sharing not served by discretionary system sustaining non-rights regarding local responses.

## Need for refugee advocacy community to acknowledge that:

- International refugee law does not require states to admit refugees as permanent immigrants.
- A state is not required unilaterally to implement these human rights responsibilities – the burden and responsibilities of refugee protection may be shared appropriately.

# Why is refugee law worth saving?

- Provides a trump card to migration control *because* it is reconcilable to the self-interest of states.
- Rejects arbitrariness.
- Is a principled means by which to pursue the practical end of migration control.
- Overall assists border control.

How do we reinvigorate the international refugee law regime in a way that states continue to see it as in their self-interest without compromising the right of refugees to access true protection?

- Duration of risk in country of origin.
- Refugee protection is a human rights remedy, not an immigration path.

- Acknowledge that governments may allocate the responsibility to protect refugees between and among themselves.
- A genuine rights-regarding allocation of responsibility.
- Operational flexibility must not override core commitments to protection embodied in the Refugee Convention.

- Common but differentiated responsibility.
- A form of “collective insurance.”
- A binding obligation to shift protection dollars to where protection most needs to happen.
- Different protection roles for different countries.
- Meaningful oversight.

# My proposal

- Still a Convention-based regime.
- Ensures meaningful protection of refugees.
- Recognizes state interests – the interests of ALL states.

Refugee law is a powerful sign of solidarity with the world's most severely at-risk people; it is the only international human rights remedy which can be engaged directly and immediately by at-risk persons themselves; and most important of all, it is a fundamentally practical remedy which can be reconciled to the most basic interests of states. It is, in sum, a uniquely valuable asset.