

Churches' Refugee Network

An informal network of



Notes of the Churches' Refugee Network Seminar 27 April 2007 Cheneygates, Westminster Abbey

Present

John Alleyne, Michael Bartlet, David Bradwell, Chris Brice, Puck de Raadt, James Hathaway, Kirsten Melling, Noreen Muhib, Kristel Querton, Nicholas Sagovsky, Roger Zetter.

Introduction

Nicholas Sagovsky welcomed all to Westminster Abbey for the discussion on 'Why international refugee law still matters'. He introduced Professor James C. Hathaway, the James E. and Sarah A. Degan Professor of Law at the University of Michigan.

Prof Hathaway spoke first of all about some important issues facing international refugee law. For further details see his *The Rights of Refugees under International Law* (Cambridge University Press, 2005). This was followed by general discussion.

Context

For many years there have been concerns about the state of international refugee law, and how best it might be reinvigorated. Many scholars and policy-makers have been involved in this debate for over a decade.

It is important that NGOs and governments change the way that they engage with these issues. A new approach is needed because the current rhetoric of both NGOs and governments is a 'dialogue of the deaf' – neither side listens to the other, and each only speaks in absolutist terms.

Governments

In a critique of government practices, Hathaway identified three areas:

- The detail of the refugee convention with respect to where refugees find protection has been misinterpreted
- In some circumstances people without documentation are automatically classed as illegal
- Harsh treatment of new arrivals is justified by using an argument that it is better to spend resources to help refugees elsewhere.

In more detail:

1. Under the Convention, there is no duty on a refugee to seek asylum in the first country or region they arrive in. Only when a refugee has 'found protection' do present standards of refugee law allow the rights of refugees to be overruled. Governments may decide refugee status, but refugees can choose where to go, until and unless they have found protection.
2. Any refugee that comes under a state party comes under jurisdiction of that state. Australia (and others) is not complying with the Convention by treating undocumented refugees as automatically breaking the law. This policy is at odds with the treaty.
3. Harshness or stringency for refugees arriving in the developed world are justified by arguing that resources would better spent helping refugees in the developing world. However this is hard to determine.

90% of refugees live in the developing world. In some poor countries there is a ratio of one refugee per 100 citizens. In Europe the average is one for 14,000, and in Japan only 1 in 50,000. On average only US\$0.78 per day is made available for refugees in the developing world, and only 1% of UNHCR funding is guaranteed. In contrast, it costs more than \$20,000 to process a refugee in the developed world.

The treatment of refugees in the developing world is generally poor, therefore there is a strong basis to take the claim of reallocating resources more seriously. However any transfer of funds from services in the developed to the developing world need to be much more significant than at present, and binding. At present when governments reallocate money it often goes to fund refugee camps – which is a breach of the refugee convention and social and governmental rules. For resource transfers to be meaningful they need to be proper and go alongside improving standards in developing countries.

Governments sometimes argue that reallocation could promote resettlement. The numbers of people involved are very small compared to the global refugee population, and so this is not a particularly useful argument to make. Resettlement priority is given to certain groups – usually those most likely to succeed or contribute skills – rather than those with the most need, despite what governments say.

Official rhetoric is largely unhelpful as governments do not understand that:-

- Refugees do not have to go to the nearest country, or stop in the first country they reach.
- Refugees can arrive unauthorised.
- Current reallocation policies are counterproductive.

NGOs

Hathaway then examined the position of NGOs, where he has identified two points of unhelpful intransigence.

1. NGOs need to admit that under refugee law the state is not required to become a permanent residence of refugees. The state only needs to offer protection until and unless the situation in the country improves sufficiently.

Refugee law protects human rights – demanding that refugees should be allowed to become regular immigrants is combative. Were NGOs to break these absolutist ideas they may be able to be more successful in other areas of refugee protection.

2. It is not the case that human rights need to be dealt with unilaterally. The Convention actually tends towards multilateralism. One state can authorise another to implement refugee procedures – it is entirely legal, so long as all states involved comply with the convention. This is often a major part of NGO campaigns, and as such it can be counter productive.

The NGO-Government dialogue of the deaf is one where neither side listens or has shown willingness to compromise. Hathaway is not calling for a review of the Refugee Convention – he believes it is adequate – but what should happen is that mechanisms and practices of the Convention be reinvigorated. Many people believe it is better to deal with the root causes of problems that cause people to become refugees. Whilst there is much to be said for this, there will always be human rights abuses in the world and so there does need to be some effort to create and maintain a good refugee system. In terms of hard realities, history says that some minorities will always want to flee. Some will travel far from their home country to seek protection.

Hathaway believes that we should embrace the fact that governments can and should share responsibilities. This is not dumping people in other countries, but by sticking to the principles of the Convention, it could be much better for all concerned. Refugees cannot be treated as illegal if they arrive without authorisation, and their claim must be treated fairly. Collaboration across borders might help the 90% in the developing world most of all. A system of common, globalised burden sharing should happen on a significant and binding basis.

If developed countries were to introduce such policies, they must contribute all sums saved, and not see it as a charitable handout. In terms of the human dimension, there needs to be responsibility sharing, perhaps with states taking on different roles. Some states could focus on short-term refugees, others at long-term resettlement. No developing country (apart from South Africa) offers permanent resettlement. Resettlement must be needs based, rather than granted to those who could contribute most to the state receiving them.

The UNHCR needs to engage with the reinvigoration of the treat. It is a body that should do more than just handing out blankets.

Summary

- It is the responsibility of those active in this field to know the refugee convention treaty 'cold' – and to understand what flexibility it allows and what it disallows.
- The Convention is in the interest of states.
- There needs to be fresh engagement with a debate which should be serious and honest – even when NGOs insist a government should stop, they need to get away from repeating the same chants.
- The refugee convention is the one and only human rights mechanism that individuals can activate themselves.

- There may be compromises, which raises fears for the life of the treaty in the next ten years – it needs more work on it.

Discussion

The beauty of refugee law is that it rejects arbitrary unilateralism. In the UK there is an inherent arbitrariness in the system. How does refugee law relate to practitioners in the UK?

Day-to-day, low-level decisions will be less good than higher level corrections.

One can only get refugee status outside your country of nationality – sovereignty laws prevent it. Under the Refugee Convention one can become a refugee if one has a well-founded fear under one of the 5 grounds of non-discrimination. The Convention drafters not prepared to write a blank cheque in 1951. Refugees have some rights under other treaties.

The past 15 years has seen considerable change. Now courts have developed the meaning of what it is to be persecuted. The House of Lords and Court of Appeal in the UK have gone further than most places in interpreting international human rights law. A judicial revolution is taking place led by Canada, New Zealand and Great Britain on refugee status, which is becoming accepted by the EU. It is not perfect but it is better than in 1990. This means the process is no longer as arbitrary, rather it is held to international human rights standards, as set out in treaties. There have been some incredible gains in recent years. The Court of Appeal is working on the refugee treaty, and further revolutions are expected.

On the critique of the government, there was general agreement with Hathaway's views on the unacceptability of penalties for undocumented refugees. Criminalising refugees has not been shown to be a disincentive, though there has been an unfortunate trend to legislate this way. Australia has been the worse example, but the UK could be following suit.

NGOs say refugee protection is no longer good protection – in the UK there is no more Indefinite Leave to Remain. In the EU, the Convention sits alongside the ECHR. Article 8 undermines the idea that refugee status is not forever. This makes it harder for governments to remove people.

The Refugee Convention does not cause much problem for governments. It is a balancing mechanism, and in the states interest. ECHR Article 3 (no return to a place where there is torture) creates new difficulties. For instance, what about serious criminals – they do not get refugee status but they are also non-removable. Does ECHR 3 and others preclude removal? Does it affect the flexibility of the refugee convention? Government ministers see the Refugee Convention and ECHR as a package, and look on both negatively. It could require a new model.

There are two groups of people – those who qualify as refugees, and those who do not, but who cannot be send away. Governments see the whole lot together and as a package. The latter can be easier for governments to work with – but they should deal fairly with all people.

People can be at risk from flourishing because of –

- Persecution (five categories)

- War zones (demonstrable risk)
- Terrorist accusations (risk of torture – they become non-removable).

Looking at resources, in the UK in 2006 it cost £270m to support 300,00-400,000 asylum seekers. 'Transit Posting Centres' – oversees funding and support could be a real way forward. It is in the UK Government's interest to contract out responsibilities (e.g. to UNHCR). Is the UNHCR up to the job? There needs to be a way to make sure states are bound in to this institution, and do not just throw money at it and turning a blind eye. There is a will in government to do more on issues to do with mandate and resettlement. More lobbying should be done on this; particularly that resettlement should be done on the basis of need, not on skills or aid to the state. There should be further work done to encourage the UNHCR to want to do more. UNHCR should not just be a humanitarian organisation, but needs also to lobby and use more influence in its relations with states, especially on issues such as resettlement.

A comparison was made between Thomas Aquinas' thinking and legal matters. It appears that often refugee decisions are highly political, and highlights the relationship between law and politics. In 1951 the Refugee Convention was non-political, but nowadays that has eroded and these issues are very political. A revamped UNHCR and an international agency to make protection and responsibility monitoring, and holding states to account, would be helpful.

How much would this vision cost? How do we get there? No government benefits from wanting refugees. No one likes having to maintain a hugely expensive asylum policy. By diffusing political tensions, governments can save more and do better for people in need.

Realpolitik provides a crucial challenge for how law will operate. The issue is of state / sovereignty / migration as a whole. The power of the state is debated – it could be becoming more powerful. The UNHCR is only as powerful as the states will let it be. If we did not have a Refugee Convention, the international community probably would not create one. Perhaps it is a question of idealism versus realism.

Migration and refugees should be disaggregated if possible. States should do refugee protection separately from migration services. Otherwise refugees are subordinate to the success of immigration procedures.

There was discussion about the value of creating a supra-national body for monitoring states. The current regime could cost less, and help more, if it worked properly. Now it is an amorphous idea, with no firm evidence, but if the Convention were reinvigorated, in theory the results will be positive.

There was a question on nomenclature – what is the difference between refugee and asylum seeker? Hathaway pointed to chapter 3 in his book *The Rights of Refugees*. The term asylum seeker is not used outside political circles. There is no obligation on governments to establish the veracity of a claim. Under the Refugee Convention you are a refugee until proven otherwise.

Clarification was asked about the problems between governments and NGOs – a person cannot be excluded from states until they have found protection. Refugees have a right to pick a state, but that state may direct them to go to a third state, so

long as there is zero consequence for protection. The personal preferences of the refugee are not taken into account.

Those in the developed world have an ethical obligation to consider those refugees we do not see as much as those that we do deal with, as far more live in developing countries.

David Bradwell
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