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RESPONSES TO HATHAWAY

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Hang a lantern aloft in the belfry arch ...
And I on the opposite shore will be,
Ready to ride and spread the alarm

'The Landlord's Tale: Paul Revere's Ride'
Henry Wadsworth Longfellow

Jim Hathaway is loudly sounding the alarm bell; his urgent warning—to rethink how we might resist the recent assaults on refugee protection—is especially resonant to anyone familiar with the crisis in refugee policy in the 1990s. In this response, I want to elaborate further on his metaphorical construct of the abusive household and its implications for the protection of refugees.

In Hathaway's metaphor of spousal violence, the core assumption is one of rights; the fundamental right at stake is the right not to be abused. But the concept of rights is incomprehensible without the notion of duties (Locke 1993; Pufendorf 1991; Wilson 1967). Hathaway fails to fully identify that, in his paradigm, the husband also must have a corresponding duty to recognize and honour that right. He too has the same right not be abused, as she has the same duty.

Further, the connection between rights and correlative duties is not simply reciprocal—or dyadic—but also triangular. If the husband refuses to fulfil his duty and abuses his spouse (thus violating her rights), then a third party—the state—intercedes to exert its authority to protect her. Each of us cedes rights and coercive powers to the state on the assumption that it will play precisely this role (see Hobbes 1994; Smith 1986). Therefore, Hathaway's model really assumes a triangulated relationship between two parties with a reciprocal relationship of rights and duties and an over-arching third party with a duty to enforce that relationship.

This perspective on Hathaway's analogy assists us in extending his metaphor from the domestic violence realm to that of the abuse of individuals by states. The picture gets more complex, but I believe his basic analogy leads compellingly to a re-affirmation of the norms of refugee law.

A core assumption of the international law system is that each person has a home where she enjoys the protection of the state. The Universal Declaration of Human Rights and other human rights instruments embody the rights which the state has a duty to protect. One way of theorizing the 'right to remain' is that it is merely an overly simplified restatement of the fundamental right to enjoy protection and freedom from abuse in one's state. Hathaway is critical of this notion because, in his view, the 'right to remain' is preoccupied not with human rights protection but with deterring refugee flows and forcing people to remain in abusive situations. But the current refugee legal regime is not concerned with the causes of refugee displacement. In order to assess whether a person is a refugee, the human rights situation in the refugee's country of origin is evaluated, not to redress that situation, but solely to determine if the refugee is deserving of international protection.

But as with the domestic violence metaphor, the 'right to freedom from abuse' (or the 'right to protection') has no coherence without fully considering the duty to insure those rights. When the state no longer protects a citizen—either because it abuses the citizen's rights or does not prevent others from doing so—then the state is not honouring its duties. At that point, it becomes imperative for an over-arching third party, with the capacity to enforce the protective relationship, to step in and fulfil the duty owed to the rights abuse victim. This entity, analogous to the state in the domestic violence paradigm, is the community of nations, expressed through its collective organ, the United Nations.

But now the analogy becomes more murky. While it is clear that the state has the legitimacy and coercive power to intervene to protect the rights of the battered spouse, wherein lies the legitimacy and coercive power of the community of nation-states to intervene to fulfil its duties towards victims of state abuse? I want to suggest that this coercive power is expressed in the granting of refugee status. While there have been occasional instances of interventions against state sovereignty in order to protect victims of rights abuses, the accepted norm has been the implementation of international refugee law – the protection of victims of human rights abuses outside their state of origin.

How does all of this relate back to Hathaway's argument? The thrust of Hathaway's recommendations is to strip away the rhetoric, raise the warning lanterns about the sorry state of refugee protection, and then to attack the violations of human rights at the root of the external displacement of victims. Of course, there can be no quarrel with this aspiration. But that involves seeing the United Nations as actively playing the role that the state assumes in the abusive family metaphor. Just as the police can and should come crashing through the front door to protect the abused wife, so Hathaway

suggests that the United Nations—and its specialized organs—knock down the doors of national sovereignty. But if there are any lessons in the two greatest human rights tragedies of recent memory (Bosnia and Rwanda), it is the shocking and shameful refusal of countries effectively to intervene. Failing the will to make those interventions in a timely and decisive fashion, the only 'coercive' form of international involvement is the implementation of refugee law norms.

The problem here, as Hathaway resoundingly alerts us, is that the community of nations has been fleeing from its duties in this triangulated relationship—to intercede in the event of a failure of state protection and to provide refuge to victims elsewhere. The impact of these practices is to continue to force the countries of the developing world to provide refuge to desperate people. Witness, for example, the response of Zaire, which suffered dramatic environmental as well as political and socio-economic impacts by accepting refugees, to the influx of hundreds of thousands of Rwandans last year. This example contrasted starkly to the response of the United States to the influx of Haitians while the murderous Cedras government was still in power. The US interdicted Haitian boats while the Zaireans fed and housed thousands. Nevertheless, I would raise the question whether, in the world of the 1990s, we can more effectively mount pressure for the types of interventions that Hathaway (and all of us) desire or lobby the wealthier nations to reconsider and reverse their flight from their duties towards refugees. Failing a Cold War in which national interests led competing superpowers to intervene to help others and to protect refugees from their opponents' orbit, and failing an international consensus that would commit vast resources of troops and money to stop human rights abuses, it is difficult to imagine a successful implementation of the type of strategy that Hathaway advocates.

The task of pressuring nations to fulfil their refugee-granting duties may be no less daunting. But, unlike the interventions that Hathaway demands, it is much less taxing. It does not raise the issue of violating national sovereignty. And it is rooted in the fundamental norms that have been recognized and honoured over the past fifty years. So, when Hathaway raises the 'lantern in the belfry arch', we must respond with a 'cry of alarm'. But I would ask if the midnight ride should not be to our own officials, reminding them that the community of nations must reaffirm its duty to safeguard the rights of victims of state abuse through the refugee protection system.

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Globalization and Refugee Blues

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The Hathaway thesis that international refugee law is in crisis can hardly be disputed. It is manifested, as he evidences, in the growing tension between the language of protection and the reality of rejection and the increasing concern with 'internal' as opposed to 'external' asylum. The crisis has its roots, firstly, in the end of the Cold War; refugees no longer possess ideological or geopolitical value. Secondly, at a deeper level, it can be traced to the globalization process which is extending and deepening the reach of late capitalism across the globe.

For globalization is a dialectical process harbouring mutually opposing tendencies: for example, it is generating in the same movement both forces of integration and fragmentation. Its contradictory dynamics is sharply reflected in the growing North/South divide. We know that today at least 1.3 billion citizens in the South—that is one in five—live in total abject poverty without shelter, clothes or food, emphasizing the fact that the mere intensification of interdependence between states and peoples does not necessarily translate into international justice. Yet nerves fail most liberal political philosophers when they approach the problem of international justice. A most recent example is that of Rawls in his essay 'The Law of Peoples' in which he all but wipes it off the ethical map (Rawls 1993). As Ackerman has noted in response: 'his deference to existing practice seriously compromises his vision. Most notable, there is the matter of state boundaries—our nasty habit of drawing magic lines and excluding those unlucky enough to be born beyond the pale' (Ackerman 1994: 378).

The dialectics of the globalization process has engendered a 'power-geometry' of time-space compression in which the power over mobility of some groups goes hand in hand with the incarceration of others. Those fortunate enough to be born in the affluent North now live in constant fear of deprived humanity; xenophobic and parochial sentiments are coming to replace ideologies of solidarity. While the dawn of the post-modern age has long been announced, which we are told is a time of incessant choosing, the reality is the complete absence of choice for those enslaved by poverty and entrapped by a flawed modernity. Indeed, the new vocabulary of 'preventive protection', the 'right to remain' and 'safety zones' has been invented to eliminate the choice of those who seek to escape its more brutal moments. The politics of language here deserves emphasis. Take, for instance, the concept of safety zones. By calling the particular space a 'safety' zone, despite all contrary evidence in the case of both former Yugoslavia and Iraq, it contrives to remove all other spaces, genuinely safer, from view (Chimni forthcoming). Counter-discourse is thereby trapped in a polarity—of safe and unsafe zones—which the discourse to be countered posits and reproduces, eliminating possibilities of introducing other spaces into the debate.

In brief, a new architecture of control is being constructed in the aftermath of the Cold War in order to sustain a deeply problematic globalization process, and international institutions are seriously implicated in its articulation and implementation. The UN Security Council is, I submit, the modern day Benthamite Panopticon monitoring appropriately created subjects (as for example, 'safety zones') in a bid to ensure, *inter alia*, the immobility of people seeking to bridge the North/South divide. The UNHCR, lacking even the semblance of financial autonomy, is being forced to endorse the coerced immobility of the oppressed body amidst shrinking dignity zones in the underdeveloped world.

In all this the contention is not that the state in the underdeveloped world is free of responsibility for violation, often gross violation, of human rights. Neither is it that under all circumstances the operative criterion must be sovereignty, overlooking the concern for the preservation of human rights. The problem is that the invocation of the cause of human rights is selective, often a pretext for attaining incompatible ends, and is advocated by powers which author global policies irreconcilable with any conception of human rights. In other words, the contention merely is that unless exploitative interdependence is replaced by ethical interdependence we cannot hope to generate a consensus in which rights trump sovereignty. Till that point of time I could not agree with Hathaway more that the autonomous right to seek safety through refugee law remains a critical moral imperative.

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Comments on 'New Directions to Avoid Hard Problems'

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Although Jim Hathaway rightly castigates UNHCR's donors, upon which it depends for funding, for widening its mandate to promote preventative protection as an 'in-country solution', he could have expanded his discussion to include another one, repatriation.

It should by now be recognized that the minimal economic and social integration required to live in dignity in the country of the asylum is not a luxury for the refugees, it is a political imperative for the host as well as the country of origin. Repatriation is not the best solution for everyone. Rather than promoting repatriation, UNHCR should be promoting permeable borders, refugees' right to free movement, rights to employment, ownership

of property, even dual citizenship, all solutions which will be required to resolve the case of the Palestinians in the host states of the Middle East.

The destabilizing effects of repatriation on the country of origin are writ large in the case of Rwanda. Given the conditions under which the Tutsi were forced to live in Uganda (for decades, in camps, without hope for a future), already in 1986 they were talking about going home by force. Yet in 1992, as part of its activities to 'promote' repatriation, UNHCR funded research aimed to investigate attitudes towards return.

The study in Uganda and Zaire was carried out by the then head of UNHCR's Africa Bureau, himself a Tutsi from Burundi. At the invitation of a consulting company in the UK, the Refugee Studies Programme executed the study in Tanzania. We have never seen the results from Uganda or Zaire, but our own investigation found that over half those interviewed had started or completed the process of naturalization, and *none of those interviewed were thinking of repatriation as a solution.* They were most concerned about integration in Tanzania.

It is difficult not to believe that this UNHCR-implemented research was instrumental in hardening the attitudes of those who had no chance of ever being incorporated into Ugandan society or living a less than hopeless existence in the camps. Certainly, it is not without significance that the invasion came from Uganda—not from Tanzania. If, years ago, UNHCR had used its resources to develop southwest Uganda; if it had sought to support Museveni's wish to naturalize the refugees in Uganda in 1986; if, through the decades of their exile, UNHCR had continually reminded the Ugandan government of the rights of refugees and supported it in providing education, encouraged free movement, and so on, the situation now facing the world in Rwanda might never have happened.

That no lessons have been learned is clear in the handling of the present crises in the surrounding states. Tanzania's offer to disperse the refugees has been rejected. Organized (meaning coerced) repatriation is to be the international response. However progressive and reconciliatory the new Rwanda government may be, this will not be a solution if a rehabilitated peaceful Rwanda is the goal.

A Comment on the Distortion of the Palliative Role of Refugee Protection

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The grant of asylum to a person in need of protection is fundamentally an act of assistance, of compassion, of charity to a fellow man. A humanitarian act, in modern English. This explains its universal aspect from the early ages of

mankind until today. It also explains the subjacent emotion underlying the reaction of sophisticated jurists—and of many other persons—when the granting of asylum, the policy or the very concept of asylum is jeopardized by the contemporary turn of events.

The reaction of James Hathaway to the 'distortion of the palliative role of refugee protection' proceeds directly, to my mind, from his adherence to the humanitarian nature of asylum. His reaction is permeated, however, by political considerations.

Whilst the contemporary expressions 'political asylum' and 'political refugee' are very often used (of course, not by Hathaway) in an erroneous and confusing manner, as they generally refer to 'territorial asylum' and to 'refugee in the meaning of the 1951 Convention and 1967 Protocol', it is obvious that many refugee situations are political problems. Problems where the global situation, the global policy of States tend to control the matter and very often to prevail over humanitarian considerations.

The political preoccupations of requested States proceed mainly from three aspects: the numbers of asylum seekers, their geographical origin (read: less acceptable ethnic groups), and the interference of economic migrants. A fair, let alone liberal implementation of the Convention and Protocol is unlikely to satisfy the political preoccupations of requested States. Hence their search for solutions avoiding the classical grant of asylum, e.g. temporary protection, or preventing altogether the requests of asylum: the 'safe country' policy, 'protection through prevention', 'in country protection', the 'right to remain'.

The same preoccupations have led requested States—particularly States Members of the Executive Committee of the High Commissioner's Programme—to put pressure on the High Commissioner for Refugees to find, develop, apply and propagate the above mentioned 'innovative responses' to 'emerging issues in protection' (UNHCR 1993). The currents and undercurrents within UNHCR and the relations between requested States and UNHCR would require a separate, fascinating study.

Professor Hathaway rightly refers to the enforcement of human rights in countries of origin, to 'the business of making the rights which have already been articulated real and present in the lives of people'. However, recent experiences (in Afghanistan, Somalia, ex-Yugoslavia—to quote only three examples out of many) have shown the limits of UN endeavours to enforce the observance of human rights.

It is generally agreed that such observance obtains only after a period of economic and social development, a period of sufficient well-being which lowers social tensions and permits the establishment of institutions and practices compatible with the Universal Declaration of Human Rights of 1948 and the International Covenants of 1966. Although a few States (such as Germany and Sweden) have developed initiatives towards a targeted development co-operation, we are still far away from an overall systematic policy of the North on behalf of the South. At any rate, the human rights

results of such a policy could not be expected before a few decennia. Few asylum seekers could wait that long.

There is no excuse for not applying asylum law (whatever its weaknesses) and refugee law in all situations where numbers are acceptable or should reasonably be considered acceptable. But large numbers of asylum seekers coming to a given country will continue to require ad hoc measures, on the understanding that humanitarian practices should prevail. This is not a new conclusion reached in the 80s or the 90s. At the end of a major survey of refugee developments between World War I and World War II, the chapter 'Solutions' starts with a subtitle 'Prevention' and the following sentence:

> Prevention is better than cure, and international action must be directed to prevent the emergence of new refugee movements by easing those tensions, political and economic, which threaten to produce unplanned migration movements (Hope Simpson 1939).

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The Downside of Post-Cold-War Complexity: Comments on Hathaway

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Hathaway's parable is a striking illustration of the risks involved in several of the major new directions of international refugee policy. Its principal message is that an emphasis upon 'the right to remain', combined with a preference for certain types of preventive measures, could undermine the essential principles upon which international protection for refugees has been based. He also highlights other problems including UNHCR's reliance upon voluntary funding for most of its work, the weakness of the UN's human rights regime, and the problems flowing from the blurring of functions performed by UNHCR and other agencies.

In many respects the magnitude of the refugee challenge is a result of the changes wrought by the end of the Cold War and the irrevocable loosening of the iron grip of communist and other authoritarian regimes around the world. Ironically, some of the problems that Hathaway describes in relation to the functioning of international agencies are, in large part, a result of those same changes. Many of the international community's humanitarian instincts were solidly underpinned by a deep-seated conviction that competing ideological systems were evil. In the face of such wickedness, states felt morally as well as politically obligated to bear their share of the burden, whether in relation to

refugees, the provision of aid or the support of human rights initiatives. The elimination of such simplistic, stereotypical portrayals of the motivations of other actors left states free to pursue a much more pragmatic and unprincipled set of policy responses to those challenges. In the terms of Hathaway's parable, it is as though the spouse protectors had been motivated by a feminist solidarity based upon a belief in the wickedness of men in general. As soon as it was revealed that the men were capable of both good and evil, the simplistic ideological incentive to provide protection was removed and the community's motivation was radically diluted.

But perhaps the more important impact of the end of the Cold War in this context has been the undermining of the limited and specialized roles that international agencies had carved out for themselves in a world conveniently, even if not rationally or constructively, shaped by the certainties of East-West and North-South divisions. Thus UNHCR dealt with refugees. It was not involved with human rights, nor with internally displaced persons and its 'operational' role was a limited one. Similarly, human rights actors, notably the Commission on Human Rights, had little to do with refugees (the 1981 study of root causes undertaken by Sadruddin Aga Khan being the notable exception in this era) and had no field presence worthy of the name. Special rapporteurs were relatively few, their tasks were largely seen in terms of prosecutorial functions, their chances of gaining access to the situations under study were limited, and the likelihood of any operational follow-up either to monitor or to remedy the situation was very small. The final part of the equation, for present purposes, was that the principle of non-intervention was far less flexible and more assiduously respected than is the case today. Thus peace-keeping was limited to situations where the UN was more or less invited and the role of the 'blue helmets' was a determinedly passive one.

All of this has changed. UNHCR has become an operational agency. It recognizes the importance of the human rights dimensions of its work while at the same time seeking to keep that dimension at arm's length. It is neither a development nor a humanitarian relief agency in a technical sense, but it is drawn more and more deeply into those roles. Its specialist and clearly understood protection function, or palliative role as Hathaway calls it, is thus diluted. The result is that both its capacity and its willingness to carry out that function are at the mercy of a much broader set of calculations. Precisely the same phenomenon has occurred because of the increasingly operational roles of the High Commissioner and Centre for Human Rights.

The irony is that during the Cold War era many critics rightly called upon both the UNHCR and the Commission on Human Rights to adopt more integrated approaches. Now that integration is increasingly being pursued, the pitfalls from a protection perspective are becoming increasingly obvious. Any agency that needs to raise more and more voluntary funds, to obtain better and easier access to situations, to win the confidence of competing actors, and to promote compromise solutions, is not well placed to stand up for principles that are less and less popular. Such stands can only come at a cost in terms of

funding, of access, and of the ability to be fully operational. It may thus be time to undertake a fundamental re-examination of the desirability and feasibility of expecting protection functions to be carried out effectively by agencies that are ill-funded and heavily dependent upon voluntary largesse, and that are also expected to be heavily involved in field operations.

Two other important issues raised by Hathaway warrant a mention. The first is 'the right to remain'. This is not *per se* a human right, whatever efforts UNHCR and others might make to establish it as one. It is at best a legitimate means by which to seek to ensure respect for the human rights of displaced or vulnerable populations, but it can never trump rights such as the right to seek asylum, the right to freedom from torture, or the right to live in dignity. In some circumstances, remaining *in situ* might best promote those rights, in others it patently will not. The right to remain can therefore not be seen as a human right *per se* and it should certainly not be promoted as such.

The second observation is that Hathaway's parable serves to underline the need for a far better and more comprehensive approach to the protection of internally displaced persons, and certainly one which does not assume that their right to seek asylum should be traded for a temporary and often illusory security. There is a need for clearer principles and guidelines and there is a need for the human rights organs to monitor their plight with a view to providing protection. While the Representative of the Secretary-General on internally displaced persons, Francis Deng, has done an excellent job, his approach is consensus-based and solution-oriented. That is how it should be, but there is a clear need to develop a separate protection mandate which will ensure that the whistle is blown on any violations of the rights of internally displaced persons.