

WHY TO PROTECT REFUGEES?

METALEGAL FOUNDATIONS OF A LEGAL OBLIGATION

**Presented by Boldizsár Nagy
at the Budapest – Vienna Joint Meeting of the
International Law Departments**

INVOCATION

In an address to the [Security] Council by video-link from Geneva, Guterres said [on April 18, that] **400,000 refugees had fled Syria in the last seven weeks**, bringing the population of Syrians registered as refugees or waiting to be registered to **1,367,413**. If current trends continue, he said, then **by the end of the year there may be up to 3.5 million** Syrians refugees, together with 6.5 million people inside Syria who may be in need of help.

<http://www.unhcr.org/517015e26.html> visited 28 April 2013

INVOLVEMENT OF OUR STATES: THE NUMBER OF SYRIAN ASYLUM APPLICANTS, MONTHLY STATISTICS

CITIZEN: Syria
SEX: Total
AGE: Total

TIME	2012M06	2012M07	2012M08	2012M09	2012M10	2012M11	2012M12	2013M01	2013M02	2013M03	
Greece	365	375	380	395	450	480	1,235	1,240	1,230	:	
Hungary	10	25	30	25	25	50	40	65	:	:	
Austria	460	505	540	625	650	705	695	730	775	:	
Finland	135	125	120	125	135	130	120	95	90	:	

THE SCOPE OF THIS TALK

What is dealt with

- alternative arguments leading to the conclusion that refugees have to be protected

The types of the arguments are manifold:

- Political philosophical
- Ethical
- Anthropological
- Sociological

What is not discussed

State policy (the politics of the refugee problem)

The law: what the law (national, European and international prescribes)

THE AIM OF THE TALK

- Enter into dialogue („multilogue”) with colleagues
- To test the strength/scope of the offered arguments (have them challenged and - hopefully – defended)
- Solicit answers to open questions

It is not the aim

*To find the „right” argument, the final word
Arguments *against* the protection duty are
welcome – if consequences accepted*

THE STRUCTURE OF THE TALK

- The problem of elevating moral commands to state policy
- The open border scenario
- The arguments in favour of protection
 - Shared identity
 - Difference based construction of the self
 - Reciprocity
 - Political calculation
 - Bare law
- The „no protection option”

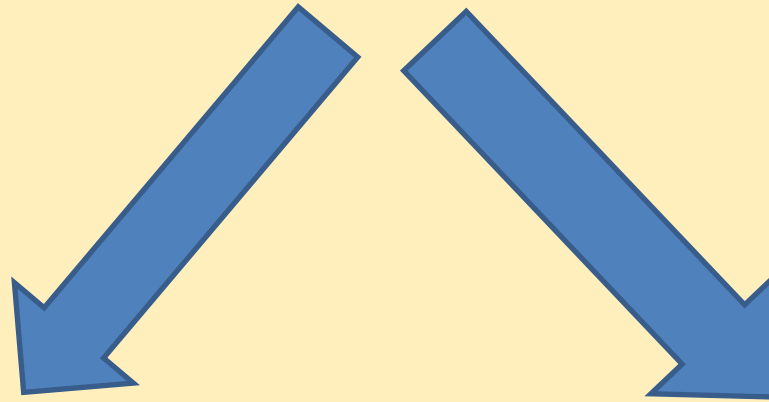
THE ADDRESSEE (BEARER OF OBLIGATION) AND THE TRANSFORMATION PROBLEM

Arguments may be addressed to

- the individual
- community (.e.g. municipality, clan, tribe, ethnic group, nation)
 - the state
- a group of states (mainly: EU)

How will the individual moral obligation be transformed into a (legal) rule of the legislative authority?

TWO ALTERNATIVE ARGUMENTATIVE ROUTES



A right to enter for everyone including asylum seekers and refugees		An exceptional right - against the general ban to enter if entry conditions not met
Migration without borders (or: open borders) scenario		The right to exclude foreigners curtailed by the right of the asylum seeker/refugee to enter even if general immigration criteria not met

WHY NOT EVERYONE WHO IS IN NEED?

- MWB – would allow
 - Arguments for excluding from the exceptional treatment
 - Refugee law: part of the political struggle – alleviating poverty etc – not (Price)
 - Centrality of the human right violated (Hathaway)
 - Communitarianism – migration would put qualitatively larger pressure on the community than refugee admission
 - In fact:
 - root causes,
 - human security,
 - moral duty of development assistance
- lines of thinking all wish to address this, assuming the existence of the moral duty

THE SCHOLARLY CONTEXT OF THE ARGUMENTS FOR REFUGEE PROTECTION

Essentially

liberal universalism (cosmopolitan, or impartialist approach)

v.

communitarian (/ethno/nationalist, partialist) approach

The two most engaged authors (C. Boswell and M Gibney) find the liberal universalist approach practically untenable

Christina Boswell's answer: overcome the dichotomy of liberal and nationalist ethical claims, by „abandoning the universalist foundations of liberalism” and basing the mobilisation on the Western liberal states' own tradition, on the „group's pride in affirming shared liberal values” (Boswell, 2006, p. 676)

THE SCHOLARLY CONTEXT OF THE ARGUMENTS FOR REFUGEE PROTECTION

Matthew J. Gibney's answer is „humanitarianism” or „humanitarian principle”

„Humanitarianism can be simply stated: the principle holds that states have an obligation to assist refugees when the costs of doing so are low. This responsibility recognises, like impartial theories, the existence of duties that stem from membership in a single human community, However, it is less comprehensive in scope than most impartial theories – specifying obligations only to those in great need” (Gibney, 2004, p. 231)

IDENTITY BASED I. SHARED IDENTITY (IMAGINED COMMUNITY)

1. global: altruism – member of human race (liberal egalitarian arguments)
2. ethnically/culturally determined „one of us” (communitarian, ethno-nationalist)
3. „The bank of history”repaying historic debt accumulated by own community (remembering predecessor refugees who found asylum)

**IDENTITY BASED II.
CONSTRUCTION OF THE SELF (IDENTITY) BY SEEING THE
REFUGEE OR HER PERSECUTOR AS „THE OTHER”**

Constructing the self

- by helping the refugee (the other)
- or protecting the refugee as one of us escaping the persecutor, which is then „the other”

IDENTITY BASED II.
**CONSTRUCTION OF THE SELF (IDENTITY) BY SEEING THE
REFUGEE OR HER PERSECUTOR AS „THE OTHER”**

4. Indigenous – foreigner (hospitality)

5. Rich – poor

6. Democratic, law respecting –
persecutory, totalitarian

RECIPROCITY – UTILITARIAN

7. Reciprocity („insurance policy”) Today's refugee may become tomorrow's asylum provider and vice versa

This is a utilitarian, rational choice approach.

- Europe, last 70 years:

Spanish, French, Germans, Austrians, Baltic people, Italians, Polish, Greek, Hungarians, Czechs and Slovaks, Romanians, Russians, Moldavians, Armenians, Azerbaijanians, Georgians, Croats, Bosnians, Serbs, Albanians, (and other nationalities) had to flee

POLITICAL CALCULATION – UTILITARIAN, POLITICAL CHOICE

8/a conflict prevention / domestic political
pressure

8/b window dressing

(utilitarian, state level)

HISTORICAL – NATIONAL RESPONSIBILITY

9. If persons were persecuted by a given state or because of the acts of a given state, then the state who is responsible for the persecution ought to offer protection

(Germany before and after WWII; US, Australia - South Vietnamese)

SEMI LEGAL - NON-REFOULEMENT

10. A wider conception of non-refoulement based on the prohibition to expose to ill treatment by way of return (Article 3 of the ECHR as interpreted by the EctHR and beyond.)

PURELY LEGAL

Duty only to the extent of

- undertaken treaty obligations
- binding customary law
- European law
- national rules

EXCLUSION OF REFUGEES

In order to argue in favour of limiting the arrivals/excluding refugees the actor must:

- be consequently egoist (welfare chauvinist)
- have no historic memory
- blindly trust stability
- be a realist (willing to violate law if it is in the perceived national interest and no sanctions threaten or interests outweigh harm caused by sanctions)

HINTS FOR FURTHER READING

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THANKS!

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