

Commentary and Q&A on the Current Migrant Crises¹

The current crises -- regarding refugees in, or in transit to, Europe, and undocumented immigrants in the United States -- are huge international news stories, but reporting has mostly left out some crucial details that would help sway both public opinion and, perhaps, those in power, to alleviate the suffering. In regards to the refugees fleeing Syria, Iraq, Eritrea and Afghanistan, for example, the focus has been upon the uneven treatment they are receiving in host countries such as Hungary, Germany, Greece and the United Kingdom. The emphasis therefore has been upon Germany's generosity, and the UK's resistance to doing their fair share to address the suffering, which has the overall effect of turning this debate into one about which countries are most charitable towards people in unfortunate situations, and which countries are exercising their right to secure borders against the impending flow.

What is missing in such discussions is that efforts to admit and settle refugees isn't charity or benevolence: it's the law. The United States joined the international refugee regime by ratifying the 1967 Protocol relating to the Status of Refugees (Protocol) in 1968, and in the Refugee Act of 1980, Congress pointedly brought U.S. refugee law into line with our international legal obligations. An examination of Article 1 of the 1951 Convention, relating to the Status of Refugees (Convention) and the U.S. asylum provisions, §§ 101(a)(42)(A) and 208 of the Immigration and Nationality Act⁵ (INA), shows the degree to which US law has been brought into line with international standards. The crucial definition to keep in mind as regards this international refugee regime is as follows: A refugee is someone who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

This definition, despite its relative narrowness (most notably, it doesn't recognize as refugees those people who have fled their country for reasons of economic hardship, or for discrimination on the basis of sex or sexual orientation), nonetheless pertains to millions of people worldwide. And in the case of those fleeing into Europe at this moment, most would be admissible under this definition, and all of them would have the right to at least cross into host countries and make claims. The refugee determination process is very intensive, and considerable effort is exerted to ensure that claimants aren't criminals, terrorists, or people in flight for reasons other than persecution according to the Convention. This raises a crucial point: countries that are anxious to investigate those entering onto national territory are far better served to open up their borders, so that all crossings are done legitimately, legally, and without the intervention of smugglers.

This is one of the ways in which the current refugee situation in Europe resembles the one facing undocumented people in the United States, and it points to a crucial finding in all of my research (Barsky 1994; Barsky 2001; Barsky 2016): a policy of open borders, in which people can exercise their legal rights to make refugee claims, in the case of persecuted people, would allow for adjudication of claims according to international and domestic legal norms. My most recent work, focused upon undocumented people, goes further. It is the

¹ This commentary is based on interviews for Venture Nashville, WMOT NPR station in Murfreesboro TN, Southern Metropolis Daily in China, and Metro World News.

case that many undocumented people in the US would be eligible for refugee status, because many of them have been persecuted according to one of the Convention's categories. But beyond that, we would be far better off to allow people from Canada, Mexico, and indeed all of the Americas, to legally enter the US, legally work, and benefit from the rights accorded to, for example, citizens of member countries in the European Union. By ensuring legal flows of people across borders, we eliminate smugglers, coyotes, and other profiteers, while ensuring that everyone on our territory feels part of the nation where they reside, rather than fearful of its authority.

The United States is signatory to NAFTA, just as (say) France is signatory to the European Union; the difference is that NAFTA permits the smooth flow of goods, but doesn't allow for an equally smooth flow of labor, which is a natural component of free trade agreements. This means that not only are Mexicans "illegal" if they enter without proper documents to the US, they are also trapped in the US, because their illegality is always with them, as long as they are on US territory. So if they'd like to go home, they run the same risks as when they entered the country, suggesting that the walls we erect are keeping people in, as well as out. In Europe, like in the US, people are going to enter one way or another, and in the current crisis, we're seeing people take every greater risks to cross borders, which is resulting in border deaths on ever-growing scales, just like what we see in (say) the no-mans' land where some migrants try to pass borders into the US.

In short, the crisis in Europe is a legal one, for which there is a legal solution; people in flight must be admitted, adjudicated as Convention refugees, and, if found credible, settled. There are of course questions of where they should be settled, and the EU should allocate the resources to ensure that migrants are distributed to appropriate host countries. This also means that the US, an important contributor to agencies involved in settlement and resettlement (UN, UNHCR, OIM) needs to maintain and increase its financial contributions to international organizations, and it should also help settle large numbers of claimants. But in the longer run, the solution to the crisis of undocumented people in the US, and the refugee crisis in Europe, is to soften and not harden borders, to ensure compliance to international norms, to eliminate dangerous smugglers and middlemen, and to allow people to exert their right, ensconced in the 1948 Declaration of Human Rights, to cross borders freely. It's a privilege enjoyed by the privileged, but should instead be a right that is enjoyed by everyone.

Q&A on the current refugee crisis

Q: An estimated 800,000 asylum-seekers from Syria and other countries will arrive in Germany this year. Fareed Zakaria said Germany's road to redemption shines amid Europe's refugee debate. What's your comment on Germany's generosity?

RFB: I wouldn't use the term "generosity" because admitting, adjudicating and settling refugees is an international obligation, ensconced in international law. People fleeing persecution in their own countries have the right to claim refugee status, and there is not stipulation in the Geneva Convention of 1951 or the Protocol of 1967 that there should be limits on the number of claimants a particular country accepts. In other words, anyone who qualifies as a refugee according to the rules set forth in the Convention should be accorded the protection described therein. The Convention was signed in the face of massive displacement of people during and following World War II, and the beneficiaries of

that Convention were people affected by those events, notably Europeans. Now, new waves of refugees are seeking status in Western nations, and they should be admitted and, if they meet the criteria, which most of those in the current wave would, then they need to be settled. Europeans enjoy "open borders" inside of the EU, and now they need to relax border restrictions at EU borders with other countries as well, in order to ensure safe passage of people exercising their international right to claim status. If they did so, we wouldn't have the horrors of illegal and dangerous smuggling, or bolstered borders that send potential claimants into ever more dangerous routes to cross borders to safety.

Q: Germany has set a good example or that Germany broke the rule of EU?

RFB: The rule of the EU has to be to help persecuted people claim refugee status, which means that Germany is simply fulfilling its international responsibilities, and that all countries need to follow suit. Again, this isn't charity, it's not benevolence, it's not kindness, it's the law.

Q: Some argued that USA should accept more refugees. What's your opinion?

RFB: The US should of course accept its own responsibility for the unrest that has led to the flight of refugees from, for example, Iraq, Afghanistan, and Syria, and it must facilitate, rather than hinder, the passage of people to the US. In relative terms, the US is very generous but it doesn't take a huge number of refugees, even though it could afford to do so. The United States is however, an important contributor to international organizations, most notably the UN, the UNHCR and many NGOs involved in refugee issues. Other countries need to do their share as well, since UN agencies and NGOs are on the front lines of assisting persecuted people find safe haven. The US, and all other countries, need to also contribute to ending the horrendously vicious war in Syria, and contribute to supporting peaceful initiatives that respect international rules and the rights of suffering people.

Q: What steps should be taken to overcome this crisis?

RFB: This crisis is rooted in a series of lingering tragedies, the foremost of course being Syria. The steps that need to be taken to address it in the short term is to use the existing tools from international law, most notably the Geneva Convention. Much is being made about the enormity of the crisis, and the pressures that this is placing upon host countries, but the Convention was specifically designed to address crises like this one, and we must honor those agreements no matter how large the current flow. This means that all countries have to play by the rules, including the United Kingdom, which is refusing to honor its obligations, a violation of the Convention. David Cameron has insisted that the crisis be addressed at its source, which means that a solution needs to be found to the on-going tragedy in Syria, which is of course true, but this is going to take time. Thirdly, the settlement of the refugees needs a more forward looking coordination from the European Union, as well as from neighboring countries, which means that we need more international support for the UN, the UNHCR, the OIM, NGOs, and other organizations involved in these efforts. Currently there is a massive funding crisis facing these organizations that could be addressed if countries (such as China, India, Russia) contributed a sum that is appropriate given their GDP.

Q: How the situation with EU migrant crisis will develop, in your opinion?

RFB: There are likely to be many negative initiatives, as we've seen in the UK, that are given legitimacy by the crisis. Helping people who have fled their countries is not charity, it's the law, and we need to make this clear to domestic populations. There is a strong anti-immigrant backlash brewing that will bring out the worst elements in populations, notably nationalism, racism and xenophobia. We have witnessed massive crises in the past, this one has to be understood as part of a continuum so that extreme measures to hinder flows of desperate people are not put into effect. Much is being made of Germany's current stance, which is an appropriate one in the sense that the government is insisting upon honoring its commitments; this must continue while longer term solutions are worked out. My new book, *Undocumented Immigrants in an Era of Arbitrary Law*, documents the incredibly levels of discretion that lead to abuse by authorities of host countries. Rather than finding ways of closing borders, the emphasis instead should be upon loosening borders, honoring international agreements, and providing the means to properly settle people in need of new homes.

Q: Who's going to take leadership? (Hungary is blaming Germany, etc.).

RFB: Leadership can emanate from a groundswell of ordinary people all across the world who are made aware both of the crises, and also the legal mechanisms set up to address them. The media is especially important at this juncture to make people aware of the international refugee regime, and the many organizations that exist to support people facing such crises. People need to realize for example that the 1951 Convention and 1967 Protocol were designed for such eventualities, and that we therefore have the legal means to address the situation. With this mindset in place, appropriate support can be offered to help with the massive settlement efforts. Everyone is talking about the magnitude of the current crisis, and this is true, but it's a variation on the same kinds of flows we've seen before. Desperate people are fleeing their homeland, for reasons relating to poverty, violence, suffering, environmental issues, or the destruction of their livelihoods. One of my books on refugee issues, called *Arguing and Justifying* (Ashgate 2001), describes the findings of a study that showed that people flee their homeland with great reluctance, and that their experiences in host countries are incredibly difficult, stressful and scary. Rather than making suffering worse, we need to focus upon addressing the causes of the flows, and, moreover, providing proper means for successful settlement of people. We need to imagine that borders should be crossed, and that people have the right to flee, or even just to relocate, and that host countries derive equal benefit by provide the means to do so. In the long term, looser border restrictions en route to open borders would offer lasting solutions by addressing the need for mobile workforces, the logic of people fleeing violence or environmental catastrophes, and the basic rights that people have to move within and beyond the borders of the countries they inhabit.

Q: what would it take to solve this crisis?

RFB: It may be the case that some of the migrants won't fit into the Convention definition of the refugee, and it is also the case that refugee determination is a laborious process if undertaken in a spirit of ill-will. To respect international human rights, and to address the suffering of migrant people, it's appropriate that those who consider themselves persecuted

should be allowed to claim and be offered status if they meet the general criteria of the refugee. In the longer term, though, the answer is open borders, for as we see in the EU context, the issues exist at the outer border of 'fortress Europe', where people are forced to take ever greater risks to gain access to a space of safety, which defies the very point. To address the real issues is to realize that free movement of people across borders, with of course the obvious criminal checks when necessary, addresses the root issue of labor flows and the need or desire for people to move around, and be welcomed where they arrive.

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