

2016

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Recommended Citation

Mary Ellen O'Connell, *International Legal Protections for Migrants and Refugees: A Response to Father Brennan*, 39 B. C. Int'l & Comp. L. Rev. 89 (2016).

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INTERNATIONAL LEGAL PROTECTIONS FOR MIGRANTS AND REFUGEES: A RESPONSE TO FATHER BRENNAN

MARY ELLEN O'CONNELL*

Abstract: Father Brennan's Essay, "Human Rights and the National Interest: The Case Study of Asylum, Migration, and National Border Protection," is a complex legal and ethical analysis of refugee law. This Commentary focuses on one aspect of the international law relevant to the Essay, namely, state obligations to migrants. Father Brennan's main argument that migrants and refugees may be turned back, so long as the action respects human rights law, is consistent with the human right to life. Justly stopping migrants and refugees requires states to stop them before they enter either international waters or the state's territorial waters. Further, Father Brennan is right to critique some of the more extensive claims for state duties toward migrants and refugees. Where the advocacy community could direct their efforts more fully is to the causes of forced migration. Addressing these issues is the only way to sufficiently respect refugees and properly preserve national borders.

INTRODUCTION

It is a privilege to comment on this case study of asylum, migration, and national border protection. Father Brennan is a true expert on the law most relevant to the study—international refugee law. Refugee law is a highly complex area of international law and not one in which I am expert. Nevertheless, I have been called upon in the past to think about the challenges of implementing, enforcing, and amending refugee law from the perspective of an international law generalist. That is the approach I take again here, hoping it is of some value in thinking about some of Father Brennan's important questions of concern. My focus here will be narrower than his—seeking only to comment on what international law requires when desperate human beings attempt to reach places of safety and prosperity where they are not citizens.

This Commentary makes four points with respect to Father Brennan's approach and international law. First, his conclusion that "stopping the boats is a

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precondition to finding a politically acceptable, compassionate, and fair solution” is consistent with the fundamental legal and moral principle at stake: the human right to life.¹ Second, stopping the boats means stopping them before they leave shore. Once they are at sea, all ships, including those of the Australian Navy, have a duty to save lives based on rules separate from refugee law.² On board an official vessel, the flag state has jurisdiction over the rescued person and is required to apply relevant refugee law and international human rights law.³ Third, in my view, Father Brennan is correct that some in the legal community, although well intentioned, seem nevertheless to exaggerate the extent of state obligations under refugee law and international human rights law. Finally, though I agree with Father Brennan’s analysis and proposals for the short term, I want to add that it is also essential to address the deeper causes of today’s migration crisis—armed conflict and climate change are both linked to why people flee. Responding to these challenges, especially by renewing knowledge and respect for general international law, is an integral part of any effective effort respecting migration, refugees, and national borders.

I. STOP THE BOATS

Father Brennan begins with a confession of error. He believes that he was wrong to support certain changes to Australia’s refugee law in light of the fact that, between 2007 and 2013, some 1200 people lost their lives at sea while attempting to reach Australian shores.⁴ His humility is an example for all. In his Essay, he sets out his new position, which focuses centrally on saving the lives of people who might drown at sea.⁵ He makes a powerful case for stopping the boats as a matter of urgent priority.⁶

I agree and take the same view respecting other places in the world where people are attempting to traverse open seas in small boats or cross vast territory by other risky means of transportation. The *Guardian* has reported that in the first quarter of 2015, 500 migrants drowned in the Mediterranean Sea

¹ Father Frank Brennan, Essay, *Human Rights and the National Interest: The Case Study of Asylum, Migration, and National Border Protection*, 39 B.C. INT’L & COMP. L. REV. 47, 84 (2016).

² See INTERNATIONAL MARITIME ORGANIZATION ET AL., RESCUE AT SEA: A GUIDE TO PRINCIPLES AND PRACTICE AS APPLIED TO REFUGEES AND MIGRANTS 4–5 (Jan. 2015), available at <http://www.refworld.org/docid/54b365554.html> [<http://perma.cc/3MM3-35RJ>] [hereinafter RESCUE AT SEA].

³ See Andreas Fischer-Lescano et al., *Border Controls at Sea: Requirements Under International Human Rights and Refugee Law*, 21 INT’L J. REFUGEE L. 256, 291–92, 296 (2009).

⁴ See Brennan, *supra* note 1, at 49; *Australia’s Prime Ministers*, NAT’L ARCHIVES OF AUSTL., <http://primeministers.naa.gov.au/primeministers/> (last visited Nov. 10, 2015) [<http://perma.cc/JZ43-FKNB>].

⁵ See Brennan, *supra* note 1, at 85.

⁶ See *id.*

alone.⁷ That number is ten times higher than in the same period in the previous year.⁸ Saving lives immediately needs to be the priority, and that means preventing small, inadequate boats from setting out to sea, as well as preventing children from climbing onto moving trains and the like. On this, Father Brennan and I agree. We also agree that prevention can and should be enforced consistently with international law.

II. SAVE LIVES AT SEA

Our position on prevention may put us at odds with some in the international human rights and refugee law community. Any disagreement, however, should not be seen as terribly extensive. Father Brennan is correct that the obligations of the Refugee Convention do not apply extraterritorially.⁹ Rescue ships, even official ones, are not the territory of a state.¹⁰ Nevertheless, other international rules require the extension of Refugee Convention and human rights protections to rescued persons on board official ships.¹¹

Preventing boats from leaving shore will at times fail and unseaworthy vessels will get into trouble or be abandoned by venal captains and crews at sea. At that point, all masters of ships have an international legal responsibility to attempt to rescue all whose lives are in peril.¹² According to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), Article 98(1):

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.¹³

⁷ Patrick Kingsley, *Record Number of Migrants Expected to Drown in Mediterranean This Year*, GUARDIAN (Apr. 1, 2015, 8:00 AM), <http://www.theguardian.com/world/2015/apr/01/record-number-of-migrants-expected-to-drown-in-mediterranean-this-year> [<http://perma.cc/MQ2U-HHEC>].

⁸ *Id.*

⁹ See United Nations Convention Relating to the Status of Refugees art. 40, *adopted* Jul. 28, 1951, 19 U.S.T. 6259, 89 U.N.T.S. 137 [hereinafter *Refugee Convention*]; Brennan, *supra* 1, at 66.

¹⁰ See United Nations, High Comm'r for Refugees, Note on Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/18 ¶ 23 (Aug. 26, 1981), <http://www.unhcr.org/3ae68ccc8.html> [<http://perma.cc/X7E6-849R>] [hereinafter *UNHCR Note*].

¹¹ See *id.*; INTERNATIONAL MARITIME ORGANIZATION ET AL., *supra* note 2, at 4.

¹² See United Nations Convention on the Law of the Sea art. 98(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *UNCLOS*].

¹³ *Id.*

Most provisions of UNCLOS, including this one, are considered binding even on states, like the United States, not party to the convention as rules of customary international law.¹⁴

Once an individual is on board an official vessel of any sort, such as navy, coast guard, or fishery enforcement, the state whose flag the ship flies acquires jurisdiction to a certain extent over the individual.¹⁵ With jurisdiction comes the obligation to extend relevant human rights and Refugee Convention obligations of the state to that individual.¹⁶ Recent cases in the European Court of Human Rights explain that states must respect the human rights of non-nationals beyond a state's borders if the state exercises control over the person or the space where the person is present.¹⁷ The state has both of these forms of control with respect to persons on board official ships.

The most important obligation of international refugee law—and arguably also a rule of customary international law—is not to return individuals to places where they will be persecuted.¹⁸ International human rights law protects people from being returned to places where they may suffer torture or cruel, inhuman, and degrading treatment.¹⁹ In order to ensure that neither will occur, the official ship's state must do at least a basic review of the rescued person's situation and have knowledge of places where rescued persons might potentially arrive by ship.²⁰

The conditions in the place of landing must be known because of duties by the state exercising under human rights law.²¹ The flag state may well have no obligation to admit the person to its own territory. Nevertheless, the flag state may not disembark the person in a territory where he or she might suffer serious human rights abuse, such as becoming a victim of torture.²²

¹⁴ See *id.*; INTERNATIONAL MARITIME ORGANIZATION ET AL., *supra* note 2, at 4; Rear Admiral David W. Titley & Courtney C. St. John, *Arctic Security Considerations and the U.S. Navy's Roadmap for the Arctic*, 62 NAVAL WAR C. REV. 35, 40 (2010).

¹⁵ See UNHCR Note, *supra* note 10.

¹⁶ See UNCLOS, *supra* note 12; Refugee Convention, *supra* note 9; UNHCR Note, *supra* note 10.

¹⁷ See *Al-Skeini & Others v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶ 137.

¹⁸ See Refugee Convention, *supra* note 9, at art. 33; Geoff Gilbert, *Is Europe Living up to Its Obligations to Refugees?*, 15 EUR. J. INT'L L. 963, 966 (2004).

¹⁹ See International Covenant on Civil and Political Rights art. 13, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (1976) [hereinafter ICCPR]; Refugee Convention, *supra* note 9, at art. 33; Universal Declaration of Human Rights, G.A. Res. 217(III) A, art. 5, U.N. Doc. A/RES.217(III) (Dec. 10, 1948); JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 211 (2nd ed. 2015).

²⁰ See ICCPR, *supra* note 19, at art. 13.

²¹ See *Asylum & the Rights of Refugees*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/refugee-law/> [<http://perma.cc/ME62-CP6P>] (last visited Nov. 10, 2015).

²² See Refugee Convention, *supra* note 9, at art. 33; Hathaway, *supra* note 19, at 211.

In the decision that Father Brennan discusses, *Sale v. Haitian Refugee Centers Council, Inc.*, the United States Supreme Court held that Haitians rescued in the Caribbean Sea by United States Coast Guard vessels could be forcibly returned to Haiti with no review of any kind.²³ The decision is simply wrong.²⁴ Scholars may be reluctant to point this out so directly because they are concerned that if states must carry out on-board reviews, states might avoid rescuing migrants. As mentioned at the outset of this section, however, all ships must rescue. Moreover, attempting to pursue policy ends in how we interpret or discuss the law is part of the underlying problem, in my view, regarding international law today. The law is regularly interpreted with an eye to various desiderata and not with regard to what it actually says on the basis of standard interpretation principles and authority.²⁵ This is a growing problem that undermines respect for international law and the sense of the binding nature of international legal obligations. It will be discussed further in the final section of this Commentary.

Finally, we also hear that regardless of the legal obligation, carrying out this dual review is too burdensome.²⁶ This objection, too, should be rejected. Review is the law.²⁷ Although it is true that reviewing the situations of hundreds or even thousands of people on board official vessels will require resources, countries like the United States or Australia clearly have plenty of resources for activities to which they give priority. After all, a single Reaper drone costs \$28 million USD.²⁸

III. ADVOCATING AUTHENTIC INTERNATIONAL LAW

Much of Father Brennan's discussion concerns his worry about inaccurate interpretations of international human rights law and refugee law that represent, in reality, advocacy for more rights for migrants.²⁹ I have observed a similar approach by lawyers trying to expand the category of *jus cogens* norms beyond what the evidence will bear in an attempt to create stronger rights for

²³ See 509 U.S. 155, 155 (1993).

²⁴ See Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], *Decision of the Comm'n as to the Merits of Case 10.675*, ¶¶ 183–188, Report No. 51/96 (Mar. 13, 1997), <http://www.cidh.oas.org/annualrep/96eng/USA10675.htm> [<http://perma.cc/H7YL-L6VW>]; *Asylum & the Rights of Refugees*, *supra* note 21.

²⁵ See Martii Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 5 (1990).

²⁶ See *id.*

²⁷ See *id.*

²⁸ Rosa Brooks, *Drones and Cognitive Dissonance*, in *DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY* 230, 235 (Peter Bergen & Daniel Rothenberg eds., 2015) (measuring the cost of a Reaper drone in 2011).

²⁹ See Brennan, *supra* note 1, at 56–57.

individuals.³⁰ Of even greater concern to me is the attempt to reinterpret the United Nations Charter's prohibition on the use of force.³¹ In recent years, even human rights lawyers have argued that the Charter should be found to allow the use of military force for humanitarian intervention.³² National security lawyers also advocate exceptions and re-interpretation of the prohibition of force to fight terrorism, for arms control, to punish, or to wreak revenge.³³

Unlike Father Brennan, I do not see a "new . . . fundamentalism" in international law.³⁴ Rather, there is a growing tendency to manipulate and misrepresent international law for various agendas—the opposite of strict application of the law. This tendency will lead to international law becoming of little use. When the law is open to subjective claims, it loses the objectivity and stability that critically distinguish law from policy or politics. My response is to revive international legal education. Knowing what the law actually requires and the reasons to value law in the international community will do more to support human rights, the environment, and peace than unsupported claims about state obligations or rights.

IV. RESPOND TO THE CAUSES

The previous comment about reviving knowledge and respect for international law is related to another important point with respect to saving lives. Despite the advocates, international law still prohibits military force against other states and intervention on the side of rebels in civil war.³⁵ Wars, however, are continuing and escalating. War is currently driving a large number of migrants to flee to safety, often on small boats.³⁶ Migrants also flee the economic consequences of climate change: droughts, floods, disease, wars over water rights, fishing rights, grazing rights, and oil.³⁷ People in the United States and Australia who feel no responsibility for migrants seeking refuge apparently fail to see the connection between the unlawful invasion of Iraq in 2003, the dis-

³⁰ See Mary Ellen O'Connell, *Jus Cogens, International Law's Higher Ethical Norms*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 78, 80–81 (Donald Earl Childress III ed., 2011).

³¹ See U.N. Charter art. 2.

³² See Ronli Sifris, *Operation Iraqi Freedom: United States v Iraq—The Legality of the War*, 4 MELB. J. INT'L L. 521, 559 (2003).

³³ See Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151, 160–66 (2013).

³⁴ See Brennan, *supra* note 1, at 87.

³⁵ See U.N. Charter art. 2(4); Geir Ulfstein & Hege Fosund Christiansen, *The Legality of the NATO Bombing in Libya*, 62 INT'L & COMP. L.Q. 159, 162 (2013).

³⁶ See Data Team, *In Graphics: Europe's Boat People*, ECONOMIST (May 19, 2015, 12:11 PM), <http://www.economist.com/blogs/graphicdetail/2015/05/graphics> [http://perma.cc/LJV3-R4WE].

³⁷ See Aryn Baker, *How Climate Change Is Behind the Surge of Migrants to Europe*, TIME (Sept. 7, 2015), <http://time.com/4024210/climate-change-migrants/> [http://perma.cc/5LJ2-FW78].

proportionate use of force in Afghanistan since 2001, the greenhouse gasses poured into the atmosphere in violation of the 1992 United Nations Framework Convention on Climate Change, and other serious violations of international law.

If these leading states had led on international law, how many desperate people would have remained safely at home?

CONCLUSION

Father Brennan's short-term prescriptions are sound. It is imperative that they be based on the most accurate and most dispassionate view of the law. There is a duty to rescue, and there is a duty to extend human rights and refugee law protections to persons under a state's jurisdiction. Strict compliance with international law will redound to the benefit of states. International law forbids the use of military force and it requires protection of the environment. Respect for this law provides the world's best chance for a future in which humanity and the natural world will flourish everywhere.

