

Rethinking International Law's Responses to Refugee Flows

Author : Jaya Ramji-Nogales

Tagged as : [Immigration](#)

Date : May 16, 2016

Tendayi Achiume, [Syria, Cost-sharing, and the Responsibility to Protect Refugees](#), 100 Minn. L. Rev. 687 (2015).

Over the past few months, the world has been transfixed by the flows of Syrian refugees pouring into Europe. These mass movements were, of course, preceded by much larger populations fleeing Syria for neighboring countries such as Jordan, Lebanon, and Turkey; at last count, four million Syrians resided in these three states. Though international law mandates protection against *refoulement*, or return to Syria, for those who fit the definition of a refugee, the UN Refugee Convention says nothing about who should bear the costs of protecting these refugees. This is the gap that Tendayi Achiume seeks to fill in her forthcoming article, [Syria, Cost-sharing, and the Responsibility to Protect Refugees](#).

The question of global cost-sharing for refugees is ground well-trod, perhaps most famously by Prof. Peter Schuck in his 1997 article, [Refugee Burden-Sharing: A Modest Proposal](#). That controversial piece has since framed the debate around the topic. Prof. Achiume steps into this arena with a novel and provocative proposal: to leverage the international legal doctrine known as the Responsibility to Protect (RtoP) in order to frame international coordination around and equitable cost-sharing for refugees. Perhaps best known as the doctrine that enabled humanitarian intervention in Libya, RtoP is not without its critics, as Prof. Achiume readily acknowledges. Her article suggests using RtoP as a tool to address the free rider problem in responding to mass refugee flows while at the same time viewing the situation of Syrian refugees as a tool to rethink potential uses of RtoP on the world stage. Making this case is not a task for the faint of heart; Prof. Achiume's combination of boldness and fine-grained attention to each layer of her complex argument will manage to convince even the most skeptical of readers to rethink their views of refugee cost-sharing and RtoP.

Prof. Achiume frames the situation in Syria as a problem of inequitable distribution of resources rather than a lack of resources. The primary responsibility for supporting Syrian refugees has fallen on its neighbors, who simply cannot bear the burden alone. Lebanon, which has been the hardest hit by the Syrian situation, now hosts approximately one million Syrians, a full quarter of its population. Yet donor countries have failed to provide adequate assistance; as of May 2015, the UN High Commissioner for Refugees' [Syrian Regional Refugee Response Plan](#), focused on assistance to Egypt, Iraq, Jordan, Lebanon, and Turkey was only 20% funded – one explanation for the large secondary flows of Syrians into Europe last summer. Prof. Achiume suggests that international law should frame international assistance for these refugees as obligatory rather than charitable in order to encourage the more equitable distribution of resources.

That law is of course nowhere to be found in the UN Refugee Convention, which studiously avoids the topic of mass influxes of refugees, let alone resources for addressing such flows. Rather than resuscitating the overused and threadbare argument that the Refugee Convention should be amended or otherwise updated to include such obligations, Prof. Achiume offers a novel insight: the situation of refugees is governed by multiple legal regimes. We can therefore locate elsewhere in existing

international legal structures the obligation to equitably distribute resources to protect refugees.

Prof. Achiume steers the reader towards a particular structure: RtoP. This international legal doctrine, endorsed by UN member states and the UN Security Council, consists of three pillars. Pillar One focuses on a state's obligations to its population; Pillar Two on the commitment of the international community to help states meet their Pillar One responsibilities, largely through international assistance and capacity-building; and the infamous Pillar three, which lays out the international community's commitment to respond when a state "manifestly fails" to fulfill its responsibilities under Pillar One, first using pacific and, if those fail, coercive measures. The article focuses on Pillar Two and the role it could play in addressing the situation of Syrian refugees.

As Prof. Achiume recognizes, an RtoP approach is both less and more protective than an approach grounded in international refugee law. RtoP protects populations against only four relevant crimes: genocide, crimes against humanity, war crimes, and ethnic cleansing. While refugees fleeing Syria will be covered by this definition, in other scenarios, refugees who fall within the scope of the UN Refugee Convention definition will not be protected. But RtoP holds tantalizing promise, as Pillar Two is not territorially limited: it protects populations without regard to their geographic location. As long as they face a risk of RtoP crimes, refugees fall within the scope of RtoP wherever they are. Thus RtoP offers space for a nose under the tent of sovereign territoriality, a move that is all too rare when it comes to the movement of people under international law.

Prof. Achiume ends the paper with specific suggestions for implementing an RtoP approach, leveraging theoretical critiques of RtoP to design routes around the political roadblocks. She suggests that the UN Security Council could use its Chapter VII mandate to "maintain or restore international peace and security" to mandate compliance with a Comprehensive Plan of Action designed by the United Nations High Commissioner for Refugees. This is a creative approach, but the paper only gets more interesting from here. Taking on board the arguments of critical and realist skeptics, Prof. Achiume recognizes that both northern and southern states must support an RtoP approach for it to succeed. This is where refugee cost-sharing can revive RtoP – by prioritizing non-coercive measures, the doctrine could win the support of middle powers and southern states. This move also puts northern states in a double-bind; after supporting coercive action in Libya, they are hard pressed to reject non-coercive action. If they do, it will be clear that RtoP is simply, in Prof. Achiume's words, "a Trojan horse for coercive foreign intervention." In other words, this approach serves an information-forcing function that is useful regardless of the outcome. Substantively, northern states might also view the benefits to regional and international security as well as migration management from such an approach as in their self-interest.

Prof. Achiume's article pushes the envelope in numerous exciting directions, not least by describing a mechanism for progressive development of international refugee law that does not require the drafting of a new treaty. While readers may quibble with some of its most ambitious proposals, the piece pushes the engaged reader to re-think deeply-held beliefs about refugee law and RtoP. This is exactly what the best scholarship should do.

Cite as: Jaya Ramji-Nogales, *Rethinking International Law's Responses to Refugee Flows*, JOTWELL (May 16, 2016) (reviewing Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 Minn. L. Rev. 687 (2015)), <https://lex.jotwell.com/rethinking-international-laws-responses-to-refugee-flows/>.