

The Challenge of Humane Protection in a Self-Interested World

There is no right to freedom of movement between states. General principles of international law recognize the right to leave one's country, and to return to it, but impose no duty on other states to permit entry. The International Bill of Rights recognizes only a right of individuals to seek asylum, with no concomitant duty on states to in fact accede to such requests.

Refugee law constitutes a narrow exception to this norm of autodetermination of immigration policy. Refugee law is a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration. Since the early part of this century, governments have recognized that if they are to maintain control over immigration in general terms, they must accommodate demands for entry based on particular urgency. To fail to do so is to risk the destruction to those broader policies of control, since laws and institutional arrangements are no match for the desperate creativity of persons in flight from serious harm. By catering for a subset of those who seek freedom of international movement, refugee law legitimates and sustains the viability of the protectionist norm.

The challenge for states has always been the definition of refugee status — the exception to the rule — in terms which are sufficiently broad to encompass those whose need to move is unassailable, yet simultaneously to tailor and constrain the scope of the refugee class to meet the self-interested preoccupations of asylum states. Perhaps because the Convention was the first refugee accord to attempt this task in a universal political forum, it exhibits acute concern for the protection of the self-defined interests of states, as attested to by the comments of one non-governmental observer to the Conference which adopted it:

The Conference was about to adopt a legal definition of the term "refugee". But in the course of the work it had so far completed it had by inference so defined that term that truth and justice demanded that the general impression thus created should be rectified. . . . Its decisions had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee. The draft Convention had at times been in danger of appearing to the refugee like the menu at an expensive restaurant, with every course

crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances.¹

The result is in many ways lamentable from a protection perspective, as is clear from the Convention's exclusive focus on those who have successfully escaped the jurisdiction of their home state; the provision of asylum only to those who meet objective criteria of risk; the preoccupation with avoiding serious harm, rather than with fully liberating the human person; the deference to effective national protection; the insistence on some form of discrimination or differentiation in assessing risk; and, of course, the denial of status to those who, from the vantage point of the asylum state, do not need or deserve recognition as refugees. The Convention's structure clearly derives from a minimalist commitment of states to the effectuation of guarantees of human dignity. Since there is little to suggest that governments would be inclined to act more generously today, the first purpose of this book has been to suggest ways in which a philosophy of humane protection can reasonably be accommodated within the framework of the definition as adopted.

The second challenge to the Convention's continued viability comes from the dissipation of the cold war, Eurocentric political landscape to which it was initially addressed. As contemporary protection concerns become increasingly distinct from those of post-war Europe, the risk of the Convention definition becoming a mere legal anachronism is real. To some extent, of course, regional refugee arrangements, institutional programs, discretionary national initiatives, and the evolution of customary legal standards have mitigated the significance of the Convention definition's conceptual flaws. Yet because the Convention has been adhered to by two-thirds of the countries of the world, and because so many states have modelled their own protection regimes around it, the Convention definition is of more than mere historical interest. In at least the medium term, the fair-minded and contextually sensitive application of the Convention definition represents the best hope for a universal legal commitment to the security of the forcibly displaced. This book's second goal has therefore been to illustrate the adaptability of the Convention's core precepts to new modes of state disfranchisement which force people to migrate. By linking the substantive concern of refugee law to general international legal standards of fundamental human dignity, an effective parallel can be drawn between the protection needs of contemporary refugees and those of the refugees whose predicament was known to the drafters of the Convention.

There is, of course, no guarantee that even a humane interpretation of those of the Convention's core precepts which remain relevant today can sustain indefinitely the fragile political consensus upon which refugee law is premised. The current system faces potentially irreconcilable challenges from

governments with an ever-narrowing sphere of concern, and from increasing numbers of persons coerced to flight by the failure of states to meet even their most essential duties of protection. This collision of interests seems destined to result in the reconsideration of the mechanisms of protection, and may require the equation of refugee status with something less than even the current limited notion of asylum if the needs of a more broadly defined class of involuntary migrants are to be met. Because refugee law is, after all, the creation of largely self-interested nation states, it may ultimately prove impossible to define access to asylum more generously than as we know it today.

¹ Statement of Mr. Rees of the International Council of Voluntary Agencies, U.N. Doc. A/CONF.2/SR.19, at 4, November 26, 1951.