

Singapore Management University

## Institutional Knowledge at Singapore Management University

---

Research Collection School of Social Sciences

School of Social Sciences

---

1-2016

### Are refugees special?

Chandran KUKATHAS

Singapore Management University, kukathas@smu.edu.sg

Follow this and additional works at: [https://ink.library.smu.edu.sg/soass\\_research](https://ink.library.smu.edu.sg/soass_research)



Part of the [International Relations Commons](#), and the [Political Theory Commons](#)

---

#### Citation

KUKATHAS, Chandran. (2016). Are refugees special?. In *Migration in political theory: The ethics of movement and membership* (pp. 249-268). : Oxford University Press.

Available at: [https://ink.library.smu.edu.sg/soass\\_research/2984](https://ink.library.smu.edu.sg/soass_research/2984)

This Book Chapter is brought to you for free and open access by the School of Social Sciences at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection School of Social Sciences by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email [cherylids@smu.edu.sg](mailto:cherylids@smu.edu.sg).

# 12

## Are Refugees Special?

*Chandran Kukathas*

The stranger has no friend, unless it be a stranger<sup>1</sup>

### 12.1 Prologue: The Morality of Hospitality

His vessel crushed by Poseidon's storm after leaving Kalypso's island, Odysseus finds himself washed up on the shores of Phaiakia and, eventually, the guest of the hospitable King, Alkinoos, to whom he tells the long story of the journey that led him from Troy to Ogygia. After reaching, and quickly leaving, the land of the lotus-eaters, Odysseus relates, he and his crew came to the "country of the lawless outrageous Cyclopes." Of the inhabitants he had this to say:

These people have no institutions, no meetings for counsels;  
rather they make their habitations in caverns hollowed  
among the peaks of the high mountains, and each one is the law  
for his own wives and children, and cares nothing about the others.<sup>2</sup>

Yet when he found himself trapped in the cave of Polyphemus, he had no choice but to address his suspicious host, who demanded to know what these strangers were after, "recklessly roving as pirates do," and wondered if they too proposed to "venture their lives as they wander, bringing evil to alien people?"<sup>3</sup> Odysseus at once tried to reassure the son of Poseidon that he and

<sup>1</sup> Sa'di, *The Gulistan or Flower Garden, of Shaikh Sadī of Shiraz*, translated by James Ross (London: J.M. Richardson, 1823 [1258]), p. 297.

<sup>2</sup> Homer, *The Odyssey of Homer*, translated and with an introduction by Richmond Lattimore (New York: Harper Collins, 1991), Book IX, verses 113–15: p. 140.

<sup>3</sup> Homer, *The Odyssey of Homer*, Book IX, 254–5: pp. 143–4.

his men intended no one any harm, and to remind him that, as strangers, they might well be considered guests:

... but now in turn we come to you and are suppliants  
at your knees, if you might give us a guest present or otherwise  
some gift of grace, for such is the right of strangers. Therefore  
respect the gods, O best of men. We are your suppliants,  
and Zeus the guest god, who stands behind all strangers with honours  
due them, avenges any wrong toward strangers and suppliants.<sup>4</sup>

The Cyclopes, of course, had no intention of showing the wanderers any hospitality, proposing only to eat them.

That Polyphemus should come to the nasty end that he did at the hands of the stranger, “Nobody,” is entirely in keeping with the understanding of civilized life that lies at the core of Homer’s *Odyssey*. A vital part of being civilized is knowing the duties of hospitality—and the duties owed to strangers in particular. The Cyclopes, the Lastrygonians, and Circe, among others, do not understand these duties—and come to grief. The Phaiakians, however, are model hosts, and their land is a civilized place where all is in order.

Indeed, when society is well ordered and in balance, norms of hospitality are also in balance: respected by hosts and not abused by guests. Ithaca, the Kingdom of Odysseus, however, is in a mess, the disorder of the state symbolized by the overrunning of the household by Penelope’s suitors, who abuse the hospitality of their reluctant hostess while demanding a decision which will make one of them king. The task performed by the central figure of Homer’s epic is to keep the household and the kingdom intact, preserving the most important values of civilized life, until Odysseus can return to settle the issue of succession.

The moral world of ancient Greece described in Homer’s poetry is undoubtedly a long way away from our own. Yet there is something important, nonetheless, about the idea that hospitality and the treatment of strangers is fundamental to civilized life, and the key to the possibility of a well-ordered society. It does not seem out of place in Sa’di’s thirteenth century Persia; or, for that matter, in our own time. It seems right to say that we owe a duty of hospitality to strangers, particularly when they come to us in distress: and we owe the most when they can offer us the least. “For I was an hungred, and ye gave me meat: I was thirsty and ye gave me drink: I was a stranger, and ye took me in.”<sup>5</sup>

Intuitively compelling though this might be, however, the skeptical question must be posed: can such a norm serve us in modern society? We live, after all, in a world of many more people and many more strangers. Can a Homeric

<sup>4</sup> Homer, *The Odyssey of Homer*, Book IX, 266–71: p. 144.

<sup>5</sup> *St. Matthew*, Chapter 25 Verse 35.

ethics really serve us when the size of the earth's population, combined with the number of dislocating conflicts and the volume of population displacement, threaten to strain the resources and the tolerance of host peoples? As Rousseau observed, "Wherever strangers are rare, they are welcome. Nothing makes one more hospitable than seldom needing to be. It is the abundance of guests which destroys hospitality. In the time of Homer people hardly traveled, and travelers were well received everywhere."<sup>6</sup>

It must be conceded that the skeptic may have a point: perhaps Homeric ethics cannot be ours. Yet the ethical and political point of Homer's tale ought not to be lost either. The norms of civilized society are importantly bound up with the treatment of strangers. Our conduct before, and treatment of, those we do not immediately count among our own has an important relation to, and bearing upon, the quality of our civilization. And this reflection ought not to be lost sight of when we turn to consider what kind of an ethics we do need to deal with the strangers of the modern world, particularly when they appear before us in large numbers, fleeing persecution or tragedy and seeking refuge in places they hope will prove hospitable. What kind of an ethics do we need to deal with those so displaced—the strangers who come as refugees?

The answer we have settled upon is a political ethics according to which the movement of peoples is a matter for states to manage, with a view to protecting the interests of the state and its members, while granting special dispensation on humanitarian grounds to those whose reasons for moving are deemed special. The question addressed in this chapter is whether or not this political ethics is defensible—whether the idea of a system in which movement is controlled (and more importantly, *restricted*) but exceptions are made is either feasible or morally justifiable. Its main purpose is to cast doubt on this idea by showing that it depends upon distinctions that cannot be sustained and upon the establishment of institutions that cannot do what they proclaim. It does so by focusing on the case of refugees, who are widely regarded by states, political actors generally, immigration advocates, and theorists alike as deserving of special treatment.

## 12.2 Refugees as Exceptions

Modern reflection on the ethics of our relations with strangers begins with the existence of a world of states, and of individuals as members of states (with the notable exception of a small but significant minority who remain stateless). The world today is demarcated by political boundaries and so borders

<sup>6</sup> Jean-Jacques Rousseau, *Emile, or On Education*, Introduction, translation and Notes by Allan Bloom (New York: Basic Books, 1979), ch. V: p. 413.

that are increasingly closely policed. While there is movement across borders all the time, that movement is almost always complicated. To move one has generally to acquire a passport and secure a status, whether as a tourist, or a student, or a worker, or any one of dozens of possible types of person who is eligible to be granted entry into a state. Though some borders are easier to cross than others—or at least, easier for *some* people to cross—the presumption in the modern world is that “thou shall not cross” without proper authorization. Only a few borders come close to being absolutely shut, but none are fully open. The purpose of borders is to keep people out: to deny them membership of the state, or to limit their rights when they do enter, or to bar them from physical entry altogether. The ethical issue at stake is the matter of how closed or open those borders should be: who should be allowed in and who kept out? Whatever the preponderance of opinion among philosophers, the view of the state is generally that people should be kept out unless it is to the advantage (or at least, not to the disadvantage) of the state that they be admitted. No one has a right to be admitted, and the principle of free movement, if it holds at all, applies only within states, and not between states.

Nevertheless, all but the most insistent of defenders of closed borders or restricted immigration make an exception for refugees. However strong they consider the reasons for limiting the numbers, or controlling the types, of immigrants—strangers—entering a country, they concede that refugees are a special case. Michael Walzer, for example, maintains that a people’s right to control membership of the state to which they belong must nonetheless be sensitive to the plight of refugees.<sup>7</sup> David Miller similarly argues, after making the case for immigration limits, that refugees “have a very strong, but not absolute, right to be admitted to a place of safety, a right now widely recognized in both law and political practice.”<sup>8</sup> This is not to say that either of these theorists thinks that the claims of refugees are so great as to trump the interests of states or citizens. In the end, their views are not far from that advanced by Andrew Altman and Christopher Wellman, who argue that while states have a general “samaritan duty” to help people who land on their doorstep seeking asylum, this does not extend so far as to constitute an obligation to grant them admission or membership.<sup>9</sup> Nonetheless, these authors also concede that the duty to “help rescue from peril,” when it can only be discharged by admission to membership of the state, would issue in a duty to admit asylum seekers,

<sup>7</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford: Blackwell, 1983), pp. 43–51.

<sup>8</sup> David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), p. 227. See also David Miller, “Immigration: The Case for Limits” in Andrew I. Cohen and Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005), pp. 193–206 at pp. 202–3.

<sup>9</sup> Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2011), p. 181.

even though they think this duty holds “only if nothing was done to remedy the situation in the home state and no other state was willing to grant permanent residence.”<sup>10</sup>

The thought that lies behind these views is that there is a very strong presumption in favor of a state having the right to, and being justified in, limiting entry into its territory. States may wish to restrict immigration for any of a number of reasons: to protect their citizens from criminals or subversives, to give some of their citizens an advantage in labor-market or business competition—or more generally to ensure it does not share too much of its wealth with outsiders, and to protect its cultural integrity. States are justified in doing so even if the costs to foreigners—would-be immigrants and non-immigrants alike (and indeed citizens who would stand to gain from immigration)—are substantial. (Thus no state thought it was under any obligation to open its borders even a little to the Haitians whose country was devastated by the 2010 earthquake that killed at least 46,000, injured more than 200,000, and left 1.5 million homeless.<sup>11</sup> Many stepped up with generous offers of aid, in cash and in kind, but also strengthened their border surveillance to keep fleeing Haitians out.) Yet, the thought continues, states ought to be more open to some kinds of people: those fleeing persecution, fearing for their lives. Confronted by such cases, the argument goes, states ought to relax the presumption in favor of keeping people out when the benefits of admitting them are outweighed by the costs—or at least engage in some form of recalculation that weighs the interests of the potential immigrants a little more heavily. People seeking asylum are special—not so special, perhaps, as to be regarded simply as ends in themselves, but special enough to be viewed as more substantial concerns in the calculus of value than immigrants of any other stripe. Theorists such as Walzer, Miller, Altman, and Wellman think that exceptions have to be made for special categories (and possibly for special circumstances), but the presumption in favor of states controlling movement remains.

Of course, there are many other things that could be done besides admitting asylum seekers into the state. The samaritan’s duty might embrace any of a variety of possibilities, as Altman and Wellman maintain. The general duty is to rescue people from peril, and this duty can be discharged in any number of ways. It could be discharged by “sending the asylum-seekers to another state that has agreed to let them in; by establishing through military intervention a safe-haven in the asylum-seekers’ home state and returning them there; by

<sup>10</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 181. The buck lingers here.

<sup>11</sup> These are the more conservative figures from the U.S. Agency for International Development, rather than the official numbers published by the Haitian government. According to the Human Development Index, Haiti is the poorest country in the Americas, with an annual per capita income of a little over US\$600 a year.

letting them in and granting them asylum until such time as they can be safely settled in another state or their home state.” Only when all else fails does the duty to admit asylum seekers kick in. But these people are special—for in the case of refugees such a duty can eventually arise in a way that it cannot with respect to other aspiring immigrants.

Yet all this said, there is something troubling about the thought that refugees are special, and that there are certain distinctive features of their situation that impose upon us duties we do not owe others. It is troubling, first, because it suggests that we draw a line distinguishing our obligations in a way that may not make much sense, morally speaking. Second, the institutional implications of this way of approaching the plight of asylum seekers are unfortunate for it proposes that we treat them as supplicants who must prove their worthiness, thereby opening up the way for matters of humanitarian necessity to be transformed into questions of political expediency. More generally, the very idea that duties towards refugees might be special duties owed by the state is troubling because, if we understand the state properly, it is hard to see how refugees will ever be given proper moral consideration. After all, the category of refugee was created by states not so much to enable us to fulfill our duties to the distressed and unfortunate as to make it easier for us to evade them.

If this is true, then those who argue that the existing arrangements under which states are widely seen to be justified in limiting the free movement of people, while having obligations only to make exceptions for special categories of person, should just give up the fiction that the plight of refugees is a serious ethical concern. It would be more accurate and honest to concede that it is simply a matter of indifference, for, ultimately, strangers just don't count—no matter what their predicament.

To see this we should begin by looking more closely at the way the distinction between refugees and other potential migrants is drawn, to try to understand how the case for differential duties might be made—and why it cannot be sustained. We should turn then to consider why institutionalizing this distinction is unlikely to achieve the ethical ends that are supposed to be the point of this development. The historical record provides ample evidence to bear this out. From here we can turn to consider more directly the reasons why making the state the bearer of ethical duties is not likely to serve the interests of the refugees or asylum seekers to any significant degree, and is more likely to harm those interests. Out of this analysis comes just one conclusion that seems plausible: the interests of refugees and asylum seekers can only be served by an opening of state borders. To the extent that this prospect is utopian, so too is the prospect of humane treatment of those almost everyone says is special.<sup>12</sup>

<sup>12</sup> For some reflections on how the attempt to reform the institutions of refugee protection may itself be utopian, see William Maley, “A New Tower of Babel? Reappraising the Architecture of

## 12.3 Refugees versus Immigrants

To see the problem with making a moral distinction between refugees and immigrants, it would be useful to start with the definition of refugee deployed by the 1951 *United Nations Convention Relating to the Status of Refugees*, which came into force in 1954 and now has more than 120 state signatories. The Convention states that a refugee is any person who,

owing to a 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. (Article 1A2)

What is most glaring about this definition is who it excludes: those fleeing their circumstances for reasons other than persecution; those who have fled but not crossed an international boundary; and those whose flight from persecution has taken them across borders but who have been persecuted for reasons other than race, religion, nationality, or social or political membership. Most Cambodians trying to escape from the Khmer Rouge did not count as refugees.

The matter of definition has been a contentious issue from the start and there have been many proposals to revise the Convention's understanding to try to include more people who seem also to be candidates for refugee status: people fleeing war, or famine, or environmental disaster, to name some obvious cases. Thus the Organization of African Unity adopted a very different definition, according to which a refugee was a person who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality" (OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted September 10, 1969 (UNTS no.14691), Article 1(2)).<sup>13</sup> Bosnians fleeing civil war are thus captured by this definition in a way that they are not by the 1951 UN Convention. Yet even this definition has its limitations, since it excludes internally displaced people, and a better account may be the one offered by Matthew Gibney, who suggests that refugees are "those people who require a

Refugee Protection" in Edward Newman and Joanne van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations Press, 2003), pp. 306–29.

<sup>13</sup> See the discussion in Andrew Shacknove, "Who is a Refugee?," *Ethics* 95:2 (1985), 274–84 at pp. 275–6.



new state of residence, either temporarily or permanently, because if forced to return or stay at home they would, as a result of either the inadequacy or brutality of their state, be persecuted or seriously jeopardize their physical security or vital subsistence needs."<sup>14</sup> One particular merit of this definition is that it also includes as refugees those forced to flee in anticipation of rightly foreseeable repression. It also includes refugees *sur place*: persons who were not refugees when they left their countries, but are unable to return home because events in their country since their original temporary departure have left them with a well-founded fear of persecution should they do so.

The problem, however, is not the quality of the definition but the pursuit of the distinction that gives the definition its point. The purpose of distinguishing between refugees and immigrants is to limit and control the movement of people in a world in which free movement is not tolerated. If only some are allowed to move, the question is: who? States allow people to move in and out for a variety of reasons, most of them economic or political. Economic considerations may include the need to meet the domestic demand for labor (both skilled and unskilled), the desire to attract foreign investment capital, and the concern to change the demographic structure of the population. The importance of such economic concerns makes states less likely to welcome the poor, the illiterate, the disabled, the unskilled, the unhealthy, and the elderly.<sup>15</sup> Political considerations lie behind the weight given to different economic concerns. Business interests generally favor more immigration since capital benefits when there is a larger pool of labor; while labor fears that immigrants will either outcompete domestic workers or depress the general level of wages by entering the labor market. Immigration policy will always attempt to placate these two contending economic interests. But other political considerations will also obtrude. Different groups will want preferential treatment for particular classes of migrant: universities will want favorable treatment for students, families with relatives overseas will want to privilege family reunion, ethnic communities will want their own national or cultural groups given special treatment if immigrant places are limited, and lovers will want exceptions made for potential marriage partners. In a world of controlled borders, refugees must either compete with other immigrants for a limited number of places or show that the case for their admission should not be considered as a

<sup>14</sup> Matthew Gibney, "Liberal Democratic States and Responsibilities for Refugees," *American Political Science Review* 93:1 (1999), 169–81 at pp. 170–1. See also Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004).

<sup>15</sup> A quick glance at the "points tests" administered by the Australian and Canadian governments to would-be immigrants makes the nature of the calculus very plain: there are more points to be gained for having greater language proficiency, more years of study, a sum of money to transfer, and a longer life expectancy as a potential future tax-payer. Ill health and any criminal record cancel out the points gained by having some of the other desirable assets.

part of the general case for immigrant admission: that they really are special. But how is this to be done?

It may look as though the best strategy here is simply to insist that the refugee question is a humanitarian issue, and that refugees should not be viewed as economic migrants but people whose human rights have been violated and need to be restored. Thus Yael Tamir suggests that “a clear distinction should be drawn between the rights of refugees and the rights of immigrants. Although certain restrictions on immigrants could be justified, they could never rescind the *absolute* obligation to grant refuge to individuals for as long as their lives are at risk.”<sup>16</sup> This is an argument many refugee advocates have decided to make, in part for fear that if refugees were viewed as migrants they would be easy prey for governments looking to reduce immigration numbers.<sup>17</sup> But this strategy is sustainable only if such a distinction can really be drawn.<sup>18</sup> Unfortunately, this looks very unlikely.

One way of drawing the distinction might be to follow Tamir and say that there is an absolute obligation to grant refuge to individuals whose lives are at risk. Yet there are many difficulties with this approach. To begin with, even if we put to one side the question of whether this, or any other, obligation can be “absolute,” the problem is that human circumstances are never absolute but relative. Lives may be at risk, but all lives are never equally at risk, and the degree of risk that is a cause for alarm is a matter of moral judgment. It may have been riskier to be a Jew in pre-war Berlin than to be a Hazara in Afghanistan today, but it is probably riskier to be a Hazara in Kabul than to be a *Reformasi* activist in Malaysia. The risks borne by those whose lives are at risk also vary, since some face the prospect of being killed, others face possible imprisonment, and some the loss of economic, civil, and political rights. Lives can be at risk in many ways and to varying degrees. It would not be plausible to argue that *any* level of risk triggers a right to be granted refuge; but there is no naturalistic way of determining what level of risk might.

Assuming, however, that the principle of granting refuge to those whose lives are at risk can be given some substantive content, it would have to be shown why this should favor those seeking asylum rather than those moving for reasons other than flight from persecution. Many economic migrants, after all, move because their lives, or the lives of their loved ones, are at risk. Adverse economic conditions, environmental catastrophe, or simply the poverty of their surrounding circumstances may mean that they face destitution unless they move, for their plight cannot be addressed by domestic institutions or

<sup>16</sup> Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993), p. 159.

<sup>17</sup> See the discussion in Liza Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (London: Frank Cass, 2004), pp. 33–4.

<sup>18</sup> Though I don’t want to get carried away here: in politics, truth can all too often be readily overcome by interest or power.

the help of fellow citizens. There are many refugees whose plight is more serious than that of most economic migrants; yet there are also many would-be economic migrants who face greater threats to their well-being than do some refugees. Not all economic migrants are in the same boat; nor are all refugees.

At this point the problem of definition becomes particularly acute. We could try to bolster the claim that the plight of the refugee is more serious than that of the economic migrant by narrowing the definition of refugee—perhaps appealing to a conservative reading of the 1951 Convention so that only those outside their home countries fearing persecution for very particular reasons might qualify. The trouble here is that refugee protection is bought at a high price: excluding, for example, those fleeing war zones or famine or even genocidal violence from being considered refugees. The more narrowly the term is defined the easier it might be to make refugees special, but only because there would be many fewer of them. However, if we consider this unpalatable, and think the definition should be expanded to include a greater number of types of displaced people, the difference between refugees and economic migrants will be even harder to draw.

Any attempt to show empirically that refugees, or displaced people more generally, suffer in ways that economic migrants do not, will founder on the rocks of this particular dilemma. The root of the problem is that the source of injustice, or of human suffering, is not always easy to locate. The aspiration to find the explanation that distinguishes the refugee from the human being who moves merely (*merely!*) to improve his lot is in many cases motivated by a noble concern to address the needs of those who are most vulnerable or suffer most. But, for better or for worse, suffering is dispersed too erratically for our political concepts to handle.

## 12.4 Institutional Solutions

One possible response to this analysis is to say that it will not do to get too caught up in conceptual niceties, for it is well known that in political life philosophical purity is not really attainable. The tragic reality of the plight of refugees, asylum seekers, or displaced people more generally, cannot be denied: the evidence is overwhelming. Even if we cannot quite account for it conceptually, the swarms of people moving in response to the predations of genocidal rulers, or rushing across borders to avoid bombs and marauding armies, supply evidence enough of a distinct phenomenon. What is needed is an institutional response that recognizes that there is a problem that must be addressed.

The institutional response we have made is that embodied in the regime defined by the 1951 Convention. However imperfectly, the argument goes, it

rightly draws the distinction between refugees and immigrants. Our best bet might be simply to try to work within its terms in an effort to secure what we can for the victims of repressive states and war.<sup>19</sup> A regime of human rights that recognizes the rights of refugees might lack the full theoretical justification philosophers seek, but it could just work—by giving refugees the legal and moral resources they need to protect or secure their vital interests.

Unfortunately, this simply won't do. International regimes, to be sure, are political constructions rather than philosophical ones; but this is not to the advantage of the refugee or asylum seeker. On the contrary, what is all too evident is that the purpose of the institutional identification of refugees in international law was never solely to attend to the plight of the distressed and dispossessed but largely to serve the interests of states.

The 1951 UN Convention on Refugees has its origins in the Second World War, which saw hundreds of thousands of people displaced by the conflict, many of them victims and survivors of the Holocaust. Britain became home to many of these people, primarily from Eastern Europe, who were unable to return to their countries of origin. The government labeled them “displaced persons” rather than refugees, since they thought the term refugee might imply that the persons in question would not return to their home countries.<sup>20</sup> In 1947 the International Refugee Organization was formed and its definition of displaced persons as victims of Nazi, fascist, or quisling regimes or “persons who were considered refugees before the outbreak of the Second World War, for reasons of race, religion, nationality or political opinion” later formed the basis of the 1951 Convention understanding of refugees as persons fleeing persecution. But already the British and American governments were hesitant about using the term “refugee” for fear that it might amount to a concession that the persons in question could not return. Many people were thus allowed to stay in Britain, for example, as “European Volunteer Workers,” who were supposedly admitted to help alleviate labor shortages.<sup>21</sup> At the very outset, even with the memory of the Holocaust fresh in the mind, the thoughts of government officials turned to the problem of how to keep people out.

On the whole, the history of the state's treatment of refugees is not an inspiring one. In the years between the wars the nations of Europe were more troubled by the inconvenience of refugee movements and invented new mechanisms to restrict their mobility. The outflow of Jewish refugees from Nazi Germany in the 1930s was met with grim resistance by states that

<sup>19</sup> For further discussion of statelessness and refugees, see the chapters by Joseph Carens and David Owen in this volume.

<sup>20</sup> Tony Kushner and Katharine Knox, *Refugees in an Age of Genocide: Global, Local, and National Perspectives during the Twentieth Century* (London: Frank Cass, 1999), p. 217.

<sup>21</sup> Kushner and Knox, *Refugees in an Age of Genocide*, p. 218.

expressed support for the principle of granting asylum but refused to grant refugees rights to any such thing. Twentieth-century states, it turned out, “were governed by Machiavellian self-interest, and liberalism served only to disguise this brutal reality.”<sup>22</sup>

The workings of the refugee regime since the establishment of the 1951 Convention can scarcely be said to have served the interests of refugees well. Some of this is best explained by the particular interests of states, which have continued to see refugees as a problem whose impact has to be minimized rather than a moral responsibility to be discharged. Thus while the number of conventional instruments devised for the purpose of refugee protection has increased, the commitment of states to that end has, if anything, declined. The upsurge in the numbers of refugees worldwide as a result of the many political conflicts in the postwar era led to states increasingly adopting measures to restrict opportunities to seek asylum. Agnès Hurwitz identifies five kinds of policies used to achieve this end. First, there are measures to restrict access to the territory of the state by imposing fines on companies transporting undocumented aliens, by requiring visas from nationals of refugee producing countries, by posting immigration officers abroad, and by interdicting vessels at sea to prevent them from allowing refugee passengers to make landfall. Second, there are measures to limit access to asylum procedures, for example by imposing strict time limits for the lodging of asylum claims, invoking the concept of “safe country of origin” to require that claims for refugee status be processed elsewhere, and creating international zones in airports. Third, states have adopted a narrower interpretation of Article 1 of the Refugee Convention, and invented weaker forms of protection, such as temporary or subsidiary protection. Fourth, states have tried to create “safe havens” in the regions or countries of the refugee’s origin in order to discourage or prevent attempts to seek asylum. Fifth, states have restricted access to welfare benefits and placed refugees in detention in order to deter arrivals.<sup>23</sup>

In pursuing these strategies states have effectively blurred the distinction between refugees and economic migrants by treating all asylum seekers with suspicion. Even as they have maintained the centrality of the distinction between refugees and migrants to their policies, they have weakened it by treating asylum seekers as undocumented would-be immigrants unless they can show otherwise—while making it ever more difficult for refugee claims to be established. When immigration officers have gone to refugee camps they have often gone with the aim of picking and choosing the most economically

<sup>22</sup> Schuster, *Use and Abuse of Political Asylum*, p. 89.

<sup>23</sup> Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), pp. 18–19.

attractive potential migrants—doctors and engineers rather than women and children traumatized by war or violence.

What has emerged over the years, in what is supposed to be a refugee protection regime, is a security-driven discourse that has led to the adoption of greater and greater measures designed to “contain” the refugee problem by restricting the opportunities of asylum seekers to gain refugee status and, ultimately, admission to the state.

Of the practices used to delay, if not prevent altogether, the possibility of asylum seekers or refugees gaining admission, two are worth dwelling upon a little more carefully. The first is the confining or detaining of asylum seekers waiting to learn if they will be brought to a more permanent place of safety or waiting to learn if their application for refugee status has been successful. The enforcement of immigration controls generally has led to the development of an extensive system of prisons to deal with undocumented workers, visa overstayers, and illegal aliens of all kinds.<sup>24</sup> For many victims of forced displacement, the search for asylum begins in refugee camps where they exist on the edge of the social world in conditions which are often little better than prison. What is too seldom recognized or acknowledged is that refugee camps have become, in effect, one of the four solutions to the refugee problem adopted by the United Nations High Commission for Refugees. The first three, official, solutions are: repatriation, integration in the country of asylum, and resettlement in a third country. In 2007 UNHCR reported that there were some 6.5 million people residing in refugee camps around the world (not including camps of Palestinian refugees, or those for internally displaced people in places like Sudan). Under the refugee regime, vast numbers of people live in makeshift accommodation, often in remote and inhospitable parts of the world, with plastic sheeting for extra coverings, and food that is rationed by agencies which have themselves to go begging to raise the funds to feed people who have fled for their lives. The camps are not a happy advertisement for the success of the institutionalization of refugee protection.

Yet this barely begins to get at the nature of the problem with the institutional response to the plight of the refugee or asylum seeker. Regardless of the conditions in the camps,<sup>25</sup> the people looking for help find themselves not at

<sup>24</sup> For graphic accounts of what this means in practice, see David C. Brotherton and Philip Kretsedemas (eds.), *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today* (New York: Columbia University Press, 2008).

<sup>25</sup> A part of the tragedy of many of the camps is the fact of abuse of the people herded into them for protection by the very people designated as their humanitarian protectors. Discussing the sexual abuses perpetrated in camps in Guinea, Liberia, and Sierra Leone, Michel Agier and Françoise Bouchet-Saulnier observed: “Designed to bring help and protection to people in danger, in some cases humanitarian action has contributed to enclosing people in spaces of exception, spaces of irresponsibility. Far from protecting the international public order, the continued existence of these spaces has reintroduced inhumanity at the heart of all societies.” See their chapter, “Humanitarian Spaces, Spaces of Exception” in Fabrice Weissman (ed.), *In the*

the doorstep of agencies straining to help them but of a vast and impersonal bureaucratic structure that demands that they show—prove—that they have a case. Asylum seekers confront this problem no matter what their circumstances, and regardless of the physical or emotional state they are in. To some extent this is inescapable: bureaucratic procedures, once in place, cannot simply be waived away because some people claim that they are inappropriate or unreasonable or do not apply to them. But the human cost is worth dwelling upon. Consider the case of France, one of the countries most active in the negotiations surrounding the establishment of the 1951 Convention (but also the toughest of the early signatories since it always viewed asylum seekers as potential competitors in the French labor market). When France began to place stronger restrictions on immigration in 1974, its policy on asylum seekers became stricter and stricter as the imperative to stop the flow became increasingly urgent. Over the period of the seventies, eighties, and nineties the percentage of refugee applications granted fell from a peak of 95 percent in 1976 to 28 percent in 1989, until by 2003 only three applicants in twenty were successful.<sup>26</sup> Crucially, however, those who were eventually granted leave to remain in the country as bona fide refugees had first to undergo searching examinations of their histories by border agents who were also under pressure to reduce the credibility of the applicants' testimonies.

Over the years the legal and bureaucratic obstacles to presenting a case for asylum have increased and applicants have been turned into objects of suspicion, dehumanized not only by their subjection to a bewildering array of scrutinizing procedures but by the reduction of their life histories to a series of objective statements on certificates that will be used to determine whether or not the candidate merits selection. The subjective experience of the refugee is played down, discarded, or never inquired into as the emphasis is placed on whether clinical evidence is available to corroborate claims of torture or abuse that led to flight and escape. The following extract from a letter from the file of legal correspondence collated by the nongovernmental organization COMEDE supplies a striking illustration.

Dear Sir,

I write in respect of the Commission of Appeal hearing on [date]. In order for you to obtain refugee status, you *must* send me a medical certificate testifying to the

*Shadow of "Just Wars": Violence, Politics and Humanitarian Action*, quoted in Didier Fassin, "Heart of Humaneness: The Moral Economy of Humanitarian Intervention" in Didier Fassin and Mariella Pandolfi (eds.), *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (New York: Zone Books, 2010), pp. 269–93 at p. 292, n.52.

<sup>26</sup> Didier Fassin and Richard Rechtman, *The Empire of Trauma: An Inquiry into the Condition of Victimhood* (Princeton, NJ: Princeton University Press, 2009), p. 256.

traces left on your body as a result of the torture and abuse inflicted on you, particularly with respect to your eye. Please do not hesitate to contact me if you have any difficulty.

Yours sincerely . . .<sup>27</sup>

The dehumanizing character of the institutional apparatus that has grown up around the world to address the refugee “problem” is further evident in the conditions under which those seeking asylum are detained in those countries that incarcerate applicants until their cases are settled. In Australia the inmates of the detention centers have been driven to suicide, self-mutilation, and even to the extreme of sewing up their lips to express their sense of powerlessness.<sup>28</sup>

Institutionalizing the distinction between immigrant and refugee has been considered by some to be the best, or only, way of promoting the interests of asylum seekers and ensuring that their special claims were appropriately considered. The reality, however, is that the institutional distinction has accomplished no such thing. Governments have consistently seen refugees as competitor economic migrants and have therefore constantly implied that those seeking admission to a country on humanitarian grounds were nothing more than queue-jumpers trying to get around the immigration laws. As time has gone on, the institutional structures they have devised have simply made it more and more difficult for asylum seekers to bring their claims forward, and to gain the protection they seek. Institutionally, refugees have turned out not to be very special at all.

## 12.5 In Search of a Solution

Refugees have been identified as special for a very special reason. Nation-states and their defenders wish to maintain that immigration can rightly be restricted to the extent that the state is an ethical community that requires protection, and freedom of movement threatens to undermine it.<sup>29</sup> Yet the arbitrariness of such an arrangement is difficult to ignore since the opportunities people enjoy to live reasonably prosperous lives in safety differ so dramatically from one part of the world to the next—particularly when some

<sup>27</sup> Quoted in Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (Berkeley: University of California Press, 2011), p. 114.

<sup>28</sup> See Kathy Marks, “Refugee Camp Children Sew Their Lips in Protest,” *The Independent*, January 22, 2002, <<http://www.independent.co.uk/news/world/australasia/refugee-camp-children-sew-their-lips-in-protest-664504.html>>.

<sup>29</sup> For a passionate analysis of the transformative effects of immigration, and its costs and dangers, see Paul Scheffer, *Immigrant Nations*, translated by Liz Waters (Cambridge: Polity Press, 2011). For an even more passionate critique of immigration from an American perspective (albeit by an English immigrant to the United States), see Peter Brimelow, *Alien Nation: Common Sense about America's Immigration Disaster* (New York: Harper, 1996).



people are effectively denied the freedom to improve their conditions by moving to places where they might improve their lot. The birthright lottery might be a fact of life, but it is difficult to justify.<sup>30</sup> For this reason, liberal political theorists in particular have argued for a solution that combines limiting immigration but compensating for the restriction on free movement by greater transfers of wealth to the poor in other nations. There is a “tragic conflict” between the goal of nation-building on the one hand and the liberal commitment to equality on the other. But perhaps the tragedy can be avoided by careful, constructive planning, to transfer wealth from the rich to the poor abroad through appropriately devised global institutions.<sup>31</sup> As Robert Goodin puts it, “if rich countries do not want to let foreigners in, then the very least they must do is send much more money to compensate them for their being kept out.”<sup>32</sup> Theorists such as Will Kymlicka, Thomas Pogge, and Martha Nussbaum, in different ways, advocate a transformation of global institutions, and the development of mechanisms of global redistribution, to combine nation-building with a concern for global equality.<sup>33</sup> The problem with refugees is that transfers of wealth cannot help those whose suffering is rooted in the breakdown of the institutions in their homelands, or the unwillingness of the powers that dominate those institutions to accept them as members of good standing. In such circumstances, it looks like an exception has to be made for this class of people, who can best be helped not by a transfer of funds but by emigration. The answer, it seems, is to allow some people to move more easily as asylum seekers or refugees rather than migrants, and to develop institutions that facilitate this.

As we have seen, however, there are two problems with this solution. First, the distinction between immigrants and asylum seekers or refugees cannot easily be drawn; and second, the history of the development of an institutional framework to deal with the plight of refugees does not suggest that it is even remotely possible to do justice to the people in question. Making

<sup>30</sup> See Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009).

<sup>31</sup> For a discussion of the idea of such a dilemma, see Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), pp. 123–32.

<sup>32</sup> Robert E. Goodin, “If People Were Money . . .” in Brian Barry and Robert Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (University Park, PA: Pennsylvania State University Press, 1992), pp. 6–22 at p. 9. Goodin is, however, an advocate of open borders. See Goodin, “What’s so Special about our Fellow Countrymen?,” *Ethics* 99:4 (1989), 663–86.

<sup>33</sup> See Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001); Thomas Pogge (ed.), *Global Justice* (Oxford: Blackwell, 2004); Thomas Pogge, *World Poverty and Human Rights* (Oxford: Polity, 2002); Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011).

refugees special neither makes sense conceptually, nor looks possible practically on the evidence we have to date.

If this is right, and there is indeed a trade-off between the ideals of nation-building and the humane treatment of the displaced people of the world, then we must either give up some of our concern with nation-building or simply admit that we are prepared to leave a great number of vulnerable people to their fate. If the fate of the wretched of the world is something we cannot ignore, however, then this means, more concretely, that we should open borders to immigrants of all kinds, thus removing the barriers to the free movement of asylum seekers and other kinds of immigrants alike. Trying to make fine-grained judgments about which kinds of distress merit concern is conceptually problematic; and trying to put these distinctions to work institutionally is more or less pointless. At best, this approach serves to do little more than assuage some consciences that something is being done. But it would be more honest simply to plead indifference.

This is not to suggest that we should simply throw our hands up in the air, and wait for the advent of a borderless world to solve the problem. Border controls are a reality, as is the existence of a refugee regime shaped by the 1951 Convention. Undoubtedly some good can be done by revising the Convention, pressing for more generous interpretations of its rules, persuading state authorities to make it easier for asylum seekers to gain the right to work, improving the conditions in detention centers (if authorities are unwilling to close them down altogether). We must, after all, be realistic, as we are repeatedly told we must. Yet we can do all this without buying into the fiction that we can readily draw the distinction between refugees and all other migrants, or that once such a distinction is made we can devise and run institutions that will serve the interests of the desperate and the destitute.

## 12.6 Epilogue: The Morality of Hospitality

Modern democratic societies host many people whose status in society is uncertain, asylum seekers, refugees, and undocumented migrants among them. In her study of the treatment of aliens in the democratic state, Seyla Benhabib observes that such people are effectively treated as criminals by existing polities. "The right to universal hospitality is sacrificed on the altar of state interest."<sup>34</sup> She goes on to suggest that we

<sup>34</sup> Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), p. 177.

... need to decriminalize the worldwide movement of peoples, and treat each person, whatever his or her political citizenship status, in accordance with the dignity of moral personhood. This implies acknowledging that crossing borders and seeking entry into different polities is not a criminal act but an expression of human freedom and the search for human betterment in a world which we have to share with our fellow human beings.<sup>35</sup>

Benhabib develops the argument that leads to this view through an analysis of Kant's understanding of the universal right of hospitality enjoyed by all peoples of the world. For all its humanity, however, Benhabib finds Kant's perspective wanting. While it recognizes an imperfect duty to help and offer shelter to those in danger of life and limb, and is generally sympathetic to the rights of all people to travel and sojourn in different lands, the structure that has emerged that enshrines Kant's thinking to some degree nonetheless views matters from the perspective of the state, rather than of world society. While it may not be possible to have a world of open borders, a case can be made for more porous ones. We can build on Kant's appreciation of the importance of hospitality, but not become trapped by sharp distinctions between citizens and aliens, members and foreigners. The aim should be to develop improved understandings of membership and citizenship which take seriously the need to incorporate those who move into the democratic polity—even if they cannot be granted the full range of citizen rights on first entry.

While I am very sympathetic to Benhabib's stance, and recognize her awareness of the tension between the demands of democratic representation on the one hand and the requirements of open admission on the other, I am not sure that a solution can be found that does not require a serious diminution in the importance of the state, and of membership of states. The problem is that states, while not merely reflections of the relations of power and the strength of particular interests in society, are nonetheless substantially precisely that. To the extent that individuals engage with any society for the first time through a confrontation with the state, they are unlikely to be met with hospitality rather than hostility. The very point of the state is to protect interests; the problem is how to widen its purview so that it serves the interest of all its members rather than the interests of those who can capture it. To turn the state into an institution that takes seriously the interests of those who are not even members might be more difficult still.

If refugees and asylum seekers are to be welcomed into any society, and shown a measure of hospitality, this will not be because the polity is welcoming but because society is so. Hospitality is, as Homer shows us in the *Odyssey*, a human relation rather than an institutional one. To the extent that we try to

<sup>35</sup> Benhabib, *The Rights of Others*, p. 177.

design institutions that perform a function that only people can, it seems unlikely that our efforts will meet with much success.<sup>36</sup>

## References

- Agier, Michel and Françoise Bouchet-Saulnier, "Humanitarian Spaces, Spaces of Exception" in Fabrice Weissman (ed.), *In the Shadow of "Just Wars": Violence, Politics and Humanitarian Action* (London: Hurst, 2004).
- Altman, Andrew and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2011).
- Benhabib, Seyla, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).
- Brimelow, Peter, *Alien Nation: Common Sense about America's Immigration Disaster* (New York: Harper, 1996).
- Brotherton, David C. and Philip Kretsedemas (eds.), *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today* (New York: Columbia University Press, 2008).
- Fassin, Didier, "Heart of Humaneness: The Moral Economy of Humanitarian Intervention" in Didier Fassin and Mariella Pandolfi (eds.), *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (New York: Zone Books, 2010), pp. 269–93.
- Fassin, Didier, *Humanitarian Reason: A Moral History of the Present* (Berkeley, CA: University of California Press, 2011).
- Fassin, Didier and Richard Rechtman, *The Empire of Trauma: An Inquiry into the Condition of Victimhood* (Princeton, NJ: Princeton University Press, 2009).
- Gibney, Matthew, "Liberal Democratic States and Responsibilities for Refugees," *American Political Science Review* 93:1 (1999), 169–81.
- Gibney, Matthew, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004).
- Goodin, Robert E., "What's so Special about our Fellow Countrymen?," *Ethics* 99:4 (1989), 663–86.
- Goodin, Robert E., "If People Were Money . . ." in Brian Barry and Robert E. Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (University Park, PA: Pennsylvania State University Press, 1992), pp. 6–22.
- Homer, *The Odyssey of Homer*, translated and with an introduction by Richmond Lattimore (New York: Harper Collins, 1991).
- Hurwitz, Agnès, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009).
- Kushner, Tony and Katharine Knox, *Refugees in an Age of Genocide: Global, Local, and National Perspectives during the Twentieth Century* (London: Frank Cass, 1999).

<sup>36</sup> I wish to thank Sarah Fine, Lea Ypi, Mollie Gerver, and Liza Schuster for helpful comments on an earlier draft of this chapter.

- Kymlicka, Will, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001).
- Maley, William, "A New Tower of Babel? Reappraising the Architecture of Refugee Protection" in Edward Newman and Joanne van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations Press, 2003).
- Marks, Kathy, "Refugee Camp Children Sew Their Lips in Protest," *The Independent*, January 22, 2002, accessed at <<http://www.independent.co.uk/news/world/australasia/refugee-camp-children-sew-their-lips-in-protest-664504.html>>.
- Miller, David, "Immigration: The Case for Limits" in Andrew I. Cohen and Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005), pp. 193–206.
- Miller, David, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).
- Nussbaum, Martha, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011).
- Pogge, Thomas, *World Poverty and Human Rights* (Oxford: Polity, 2002).
- Pogge, Thomas (ed.), *Global Justice* (Oxford: Blackwell, 2004).
- Rousseau, Jean-Jacques, *Emile, or On Education*, Introduction, translation and Notes by Allan Bloom (New York: Basic Books, 1979).
- Sa'di, *The Gulistan or Flower Garden, of Shaikh Sadī of Shiraz*, translated by James Ross (London: J.M. Richardson, 1823 [1258]).
- Scheffer, Paul, *Immigrant Nations*, translated by Liz Waters (Cambridge: Polity Press, 2011).
- Schuster, Liza, *The Use and Abuse of Political Asylum in Britain and Germany* (London: Frank Cass, 2004).
- Shachar, Ayelet, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009).
- Shacknove, Andrew, "Who is a Refugee?," *Ethics* 95:2 (1985), 274–84.
- Tamir, Yael, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993).
- Tan, Kok-Chor, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004).
- Walzer, Michael, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford: Blackwell, 1983).