

Introduction

In December 1994, Angela's 13-year-old daughter was killed by a gang member in the Tivoli Gardens area of West Kingston, Jamaica, where Angela lived. She reported the killing to the police and gave them the name of the gang member who had pulled the trigger. Three weeks later, her 21-year-old son was also shot and killed after he publicly vowed that his sister's killer would go to prison. The same week, gang members threatened Angela as well, accusing her of informing to the police. In search of safety, Angela moved to other parts of the island in 1996 and 1997, but in each place, she was subjected to sexual abuse by men who threatened to expose her identity. During that time, her brother was shot by the same gang, as was her boyfriend's eldest daughter. Finally, in 1998, she fled to the United Kingdom and claimed asylum.¹

Alain Baptiste, a Haitian, noticed in 2003 that he had begun to lose weight and that he generally felt unwell. Concerned, he went to the doctor and tested positive for HIV.² Despondent, Alain decided he could not remain in Haiti. He feared that he would be ostracized once others found out about his HIV-positive status – which they surely would, given his deteriorating health. He was also likely to lose his job. Even more importantly, he would have no access to adequate medical care. In short, staying in Haiti would be tantamount to a death sentence. He left for the United States and sought asylum there.

Rodi Alvarado Peña's husband, Francisco Osorio, began to threaten and assault her soon after they were married in Guatemala. Once, when her period was fifteen days late, he broke her jaw. When he misplaced something, he would grab her head and strike furniture with it. As the marriage progressed, his violence became more frequent and increasingly severe. When Rodi complained that he was hurting her, he would reply, "You're my woman, you do what I say." On several occasions she fled to her relatives, but Osorio found her and dragged her home, beating her until she was unconscious. Rodi called the police for help on a number of occasions: three times her husband ignored police summons and no further

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action was taken; twice the police ignored her calls. Osorio had served in the military, and he told Rodi that calling the police was therefore useless. Once she appeared before a judge who said that he would not intervene in a domestic affair. Ultimately, Rodi left for the United States to seek asylum. Her sister subsequently told her that Osorio had left word that he would “hunt her down and kill her if she [came] back to Guatemala.”³

Should Angela, Alain, and Rodi be permitted to remain in their countries of refuge? The ordinary avenues of immigration are closed to them: they have neither relatives there nor employable skills. They hope to be granted asylum, an exception to the usual restrictions on immigration. Each year in Western Europe, North America, and Australia, over 500,000 people apply for asylum – many (though not all) with stories as deserving of sympathy as those of Angela, Alain, and Rodi. Sadly, stories of human tragedy are seemingly infinite in their variety. What criteria should determine whether these asylum seekers receive a reprieve from deportation?

Some would respond to this question by challenging its premise: states should open their borders to all who seek to enter. Immigration restrictions, the argument goes, are the modern-day equivalent of feudalism, dividing the world into haves and have-nots based upon the utterly arbitrary fact of where one happens to be born. Justice requires that one’s life chances should not be dependent on such arbitrary facts, and so the freedom to move across borders should be regarded as a basic right.⁴ As a matter of theory, much can be said for this position. As a practical matter, it is a political non-starter. Immigration quotas might be increased, but they will not be abandoned altogether; and, for the foreseeable future, ordinary immigration is likely to remain available only to those who have something to offer: job skills; resources to invest; a family connection to citizens or permanent legal residents; or (in some places) a shared ethnicity.

Others might respond by challenging the premise from the opposite direction: why should states *ever* offer a reprieve from immigration controls when closed borders advance the national interest? Our obligation to help others, the argument goes, is limited to those who are already members of our society. It stems from a shared national identity, or alternatively, from a tacit social contract among compatriots.⁵ While we may allow outsiders to become members of our society when it serves our collective interest to do so, why should we ever be obligated to admit them?

One answer to this challenge appeals to what is known as the duty of “mutual aid”: when a person urgently needs one’s assistance to

avoid serious harm, and one can provide that assistance at minimal cost or risk to oneself, one has a moral duty to do so.⁶ For example, if a person were to pass a child drowning in a shallow pond, he would have a moral duty to assist, even if he might get his pants dirty in the process. The danger faced by the child is extreme and urgent, and the cost and risk of assistance negligible. This duty follows from our recognition of others' humanity: other people deserve our moral concern because of their capacity for suffering in the way that we suffer. Refugees, like children drowning in shallow ponds, urgently need assistance, and states can provide refuge at very low cost – at least when the number seeking refuge is small. Opinions can differ about when that threshold is passed – are 10,000 refugees too many to absorb easily? Perhaps 50,000 or 500,000? – but that is a question of implementation, not of principle.*

Further, as a practical matter, asylum is deeply rooted in the traditions and political narratives of Western states. Arguments persist about whether it should be broader or narrower in scope, but few campaign for its elimination altogether. Indeed, it is striking that over the past fifteen years – a period in which states have adopted a variety of measures designed to make it more difficult to file an asylum claim – no state has moved to abandon asylum altogether, or even to narrow substantially the substantive grounds for eligibility.

So the question remains: who should be eligible for asylum? Who should benefit from this loophole in otherwise restrictive immigration

* When a state is directly responsible for making a foreigner's homeland uninhabitable, it may have more demanding obligations toward those foreigners. In such a case, restorative justice demands that the state rectify conditions of insecurity that it has directly caused. The paradigmatic historical example is the American acceptance of tens of thousands of Vietnamese refugees in the late 1970s. See Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), p. 49. A similar obligation arguably exists today for the resettlement by the United States of some of those displaced by the Iraqi war – especially for those whose lives are endangered because of the help they provided to the coalition forces. Some may be tempted to argue further that states are responsible for refugee flows, and are thereby specially obligated to refugees, merely because they offered diplomatic or political support to a persecutory regime or imposed destabilizing structural adjustment programs on developing economies through the IMF or World Bank. That, however, stretches the concept of special obligation, created by direct responsibility, too far.

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policies? The traditional answer holds that asylum is meant to protect those who have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.” This standard – which I call “the persecution requirement” – reflects the definition of “refugee” in the 1951 UN Convention Relating to the Status of Refugees and the corresponding 1967 Protocol, and it is found in the laws of virtually every Western state.⁷ Jews in Nazi Germany and dissidents in the Soviet Union are the classic examples of persecuted people, targeted by the state for harm on account of an immutable characteristic or political beliefs.

The persecution requirement seemed natural in a Cold War world in which those who sought refuge in the West typically fled from strong, oppressive states. Today, many of those who seek asylum – such as Angela and Rodi – flee violence committed by groups as varied as guerrilla armies, death squads, criminal gangs, family members, and clans, as well as government security forces. Many are not themselves targets, but rather are simply victims – people caught in the cross-fire of anarchic violence. Others flee grinding poverty, famine, natural disaster, or – like Alain – seek access to life-saving medical treatment. These realities have put pressure on the traditional focus of asylum. Limiting asylum to persecuted people may seem too narrow: those fleeing from the violence that accompanies state breakdown and civil war, or from famine or extreme poverty, need protection from harm just as much as do persecuted people.

Accordingly, asylum is now discussed by academics, refugee advocates, and increasingly by courts, in *humanitarian* terms: as a kind of escape valve to otherwise restrictive immigration policies, intended to provide protection for foreigners who face serious threats of any kind to their security. A humanitarian theory of asylum suggests that eligibility ought to be widened beyond the persecuted. Scholars Aristide Zolberg, Astri Suhrke, and Sergio Aguayo suggest that “[a]n optimal policy would start from the explicit premise of moral equivalence” among targets of persecution and other victims of violence:

Whether the individuals are activists or passive bystanders simply caught in [a] conflict is immaterial from the point of view of their immediate security. Their need clearly could be the same regardless of the cause ... It follows that in a ... normative sense, the three types of refugees are equally deserving. The activist, the target, and the victim have an equally valid claim to protection from the international community.⁸

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From a humanitarian perspective, a foreigner's *need for protection* – regardless of whether that need results from persecution, civil war, famine, extreme poverty, or some other cause – grounds a claim for asylum.⁹ The more serious and urgent is the need for protection, the stronger is that claim.

This humanitarian view of asylum's purpose enjoys widespread support among scholars and refugee advocates.¹⁰ It is not hard to see why: urgency of need for protection provides a morally appealing yardstick for the strength of one's asylum claim because it adopts the victim's viewpoint. Drawing a distinction between various causes of insecurity – for example, persecution on the one hand, and civil war on the other – intuitively seems morally dubious. Why should our duty to assist people depend on the *reason* they are in distress? Isn't it the *fact* of distress that should matter? It is certainly what matters to victims: it makes no difference to people dodging bullets whether or not they are the intended target.

The humanitarian view is increasingly reflected in international law and practice. At the regional level, as early as 1969, the Organization of African Unity extended its definition of the "refugee" to cover not only persecuted people, but also those forced to flee abroad "owing to external aggression, occupation, foreign domination or events seriously disturbing public order."¹¹ In 1984, Latin American states issued the non-binding Cartagena Declaration on Refugees which "enlarg[ed] the concept of a refugee" to include those who flee due to "generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed the public order."¹²

The United Nations High Commissioner on Refugees (UNHCR) has followed suit. In 1994, it noted that individuals' "need for international protection" – a category broader than "fear of persecution," since a need for protection can arise due to many causes other than persecution – "most clearly distinguishes refugees from other aliens."¹³ More recently, the UNHCR has explicitly endorsed the protection of "human security" as its guiding principle, suggesting that aid should be directed not only at those who flee their countries because of persecution, but also at those whose basic security and subsistence needs are unmet.¹⁴ As one observer has noted, this position marks an important shift for the UNHCR: "It is no longer the quality of 'refugee,' however defined, that entitles one to protection. It is the need for protection that entitles one to treatment as a refugee"¹⁵ – that is, to eligibility for asylum.

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While the persecution requirement remains on the law books in virtually every Western state, over the last fifteen years courts in Australia, Canada, Britain, New Zealand, the United States, and elsewhere have broadened their interpretation of “persecution” in order to make asylum available to many groups traditionally excluded, including battered women and people fleeing ethnic conflicts.¹⁶ Commonwealth courts in particular have linked refugee law to human rights law, interpreting “persecution” as “the sustained or systemic violation of human rights demonstrative of a failure of state protection.”¹⁷ This approach, much celebrated by refugee advocates, has significantly broadened eligibility for asylum to include claimants who have been victimized by private parties (as opposed to government agents).

Moreover, the United Kingdom and Canada have effectively amended the persecution requirement by granting the same legal status to certain non-persecuted refugees as they do to those who are persecuted. In the UK, “humanitarian protection” is available under the rubric of asylum to those who face a “real risk” of torture, inhuman or degrading punishment, the death penalty, unlawful killing, or a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”¹⁸ In Canada, asylum is available not only to persecuted people, but also to those who face a substantial risk of torture or an individualized risk to their lives against which the state is unable or unwilling to provide protection, unless caused by the inability of that state to provide adequate medical care.¹⁹

The end of the Cold War has affected public thinking about asylum in another respect as well. During the Cold War, asylum was viewed in *political* terms: intertwined with foreign policy, asylum was a vehicle for expressing Western political values. Asylum seekers were seen as “ballots for freedom,”²⁰ symbols of liberal democracy’s ideological superiority over Communism. By labeling those who fled the Eastern Bloc as “persecuted” – a word that reflects a value judgment – the West expressed its condemnation of Communist regimes. One unfortunate consequence of investing asylum with an ideological valence was that states were often unwilling to shelter refugees who fled from friendly authoritarian regimes (for example, those who fled from El Salvador to the United States during the 1980s).

In a post-Cold War world, one less defined by grand ideological struggle, a political conception of asylum – according to which asylum

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expresses political values and communicates condemnation of persecuting regimes – is in disfavor. The same impulse driving humanitarianism also suggests that asylum should be politically neutral. What matters from the humanitarian point of view is whether asylum seekers need protection. From that perspective, identifying and calling to task the party responsible for an asylum seeker's insecurity is not only beside the point, but can interfere with the purpose of asylum to protect. This position was reflected as early as 1967 in the UN General Assembly Resolution on Territorial Asylum: "The grant of asylum by a State is a peaceful and humanitarian act and ... as such, it cannot be regarded as unfriendly by any state."²¹ Similar sentiments have been repeated in other international conventions,²² and have been widely endorsed in the academic literature.²³ From a humanitarian standpoint, asylum has a "palliative" purpose.²⁴

In sum, the last fifteen years have seen a marked shift away from what I call a "political" conception of asylum, one focused on helping persecuted people, expressive of value judgments about the conduct of persecuting states, and connected to a broader political program to reform those states. There has been instead a move toward a politically neutral "humanitarian" view, focused on helping people exposed to harm regardless whether that harm stems from persecution or some other cause.

The last fifteen years have also been a period of crisis for asylum policy. The number of asylum applications in industrialized countries has soared from only 13,000 per year in the 1970s to about 200,000 in 1985, reaching a peak in 1992 at over 857,000 due to an influx of refugees from the former Yugoslavia, largely to Germany (which received 438,191 asylum seekers that year). After dipping slightly in the mid-1990s, the number of applications climbed again, from about 375,000 in 1997 to over 625,000 in 2002 (see Figure I.1, below).²⁵

The surge in asylum seekers was followed by an intensifying public backlash. Asylum seekers were decried as "economic migrants" in search of jobs who used asylum to circumvent otherwise restrictive immigration controls, and as "bogus" applicants who were drawn to the West by the promise of welfare benefits. Many also saw asylum seekers as a cultural threat whose presence in large numbers could undermine the liberal and secular values of their host countries.

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Critics pointed not only to the historically unprecedented levels of new asylum applicants, but also to states' utter ineffectiveness at removing hundreds of thousands of asylum seekers whose claims had been rejected.

Suspicion of asylum seekers has been exacerbated by fears of terrorism. Such concerns were present even before September 11, 2001. Following the 1993 World Trade Center bombing, carried out in part by Ramzi Yousef, who had entered the US as an asylum seeker, the US Congress enacted legislation substantially curtailing asylum seekers' procedural rights.²⁶ After 9/11, the disclosures that one of the hijackers had gained residence in Germany by filing for asylum and that Ahmed Ressam, who plotted to blow up Los Angeles International Airport, had gained entry to Canada as an asylum seeker, reinforced fears that al-Qaeda operatives could use the asylum system to evade immigration controls.²⁷ Moreover, law enforcement authorities have expressed concern that transnational human smuggling and trafficking gangs, which themselves may have ties to terrorists, receive significant income from smuggling asylum seekers across borders.²⁸

In response to public hostility toward asylum seekers, states have adopted a broad array of measures to reduce the number of applicants. These include barriers to entry that prevent asylum seekers from arriving in the first place, such as visa requirements and the interception of asylum seekers on the high seas; onerous procedural requirements, such as filing deadlines, that make it more difficult for an asylum claim to be heard on its merits; reductions in the public benefits available to asylum seekers while their applications are pending; detention of asylum seekers pending determination of their status, often in facilities housing criminals; and expedited proceedings, with minimal judicial review, designed to remove failed asylum seekers quickly. These policies are blunt instruments, largely failing to distinguish between those who seek asylum in bad faith and those who are genuinely eligible. Efforts to crack down on asylum seekers led to a sharp reduction in applications filed in industrialized countries between 2003 and 2006, from 625,000 in 2002 to barely 300,000 in 2006 (see Figure I.1, below). The number of applications filed in 2006 in Germany was the lowest since 1983; in Australia, the lowest since at least 1989; in Belgium, the lowest since 1995.²⁹

In the past fifteen years, states have also begun offering less to those applicants who actually receive asylum. While traditionally recipients of asylum have received permanent residence and citizenship in the state

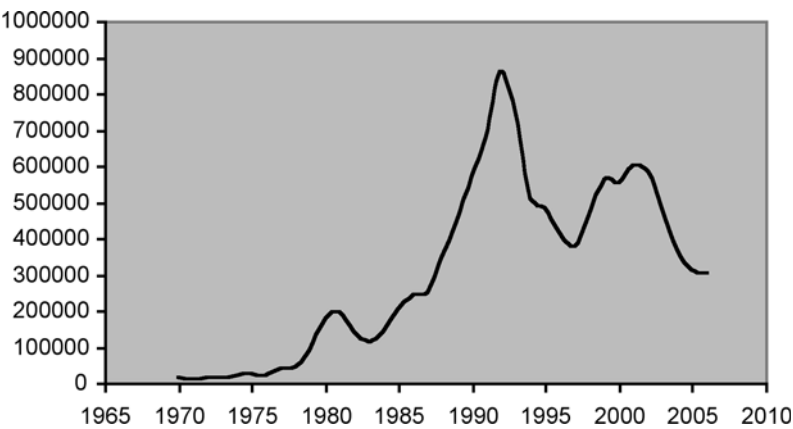


Figure I.1. New asylum applications filed in industrialized countries³⁰

of refuge fairly quickly after being granted asylum, increasingly states have given asylum recipients only “temporary protection.” After a predetermined period of time, usually somewhere between one and five years, recipients are required to re-prove their need for continuing protection or face deportation.³¹ Temporary protection is attractive to states for several reasons. First, it “prevent[s] the permanent integration of foreigners” and, therefore, advances states’ “objective to control migration.”³² Second, temporary protection can be used by states to justify cutting back the rights and benefits they offer to recipients of asylum: when shelter is presumed to be temporary, states have less reason to invest in refugees’ integration. Indeed, temporary protection reflects a trend toward giving refugees the bare minimum consistent with states’ international law obligation of non-refoulement – that is, the duty not to expel or return refugees to territories where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.³³

In the last seven years, asylum has grabbed the headlines more in Britain than anywhere else, where the number of new applicants surged from about 32,000 in 1996 to over 103,000 in 2002. After the introduction of stern measures designed to deter such applications, the number of new applicants in Britain was down sharply in 2003 and continued to fall through 2006, to 27,850 – the lowest number of applications in that country since 1989.³⁴ Nonetheless, public opinion remains hostile to asylum seekers. In a 2004 poll, 82 percent of Britons

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thought that the government could “do more” to “to ensure Britain is not seen as a soft touch for bogus asylum seekers.” In 2003, 67 percent thought a “small minority” – less than a quarter – of asylum seekers were “genuinely fleeing persecution.”³⁵ And in a 2002 poll, 43 percent of Britons thought that asylum seekers sought refuge in Britain for economic reasons or to look for work, up from 11 percent in 1997.³⁶ Asylum seekers are regularly attacked in the tabloids as leeches on Britain’s welfare state, and the government is assailed for having lost control of its borders.

Public support for restrictive measures may be connected in three ways with the shift from a political to a humanitarian view of asylum. First, the humanitarian view decouples asylum from foreign policy and thereby diminishes its ideological significance. When asylum is no longer seen as intertwined with foreign policy, the public may be less supportive of it. Along these lines, refugee scholar Andrew Shacknove has written:

During the Cold War the refugee regime, reconstituted under the aegis of the United Nations, served the new ideological purposes of the [Western] States ... Many policy innovations in the affluent States reflect a basic doubt about whether asylum any longer serves their interests ... In a period when communism has ceased to be a serious ideological force and asylum States are experiencing low economic growth and heightened demand for entry, concern with domestic tranquility exceeds any possible ideological benefit derived from granting asylum.³⁷

One should not be surprised at Western states’ waning enthusiasm for asylum when the only motivation for granting it is humanitarian compassion.

Second, the humanitarian view pushes toward expanding eligibility for asylum beyond the persecuted. But, as immigration expert David Martin has argued, political realities make asylum a “scarce resource.” Western publics support asylum as a way to help people who truly need assistance, but only if they feel assured that their obligations are limited and that border controls are being maintained. If the public perceives that the asylum system is being used as a loophole by “ordinary” immigrants, and that “resettlement rights are not being reserved only for those who show the kind of special threat that clearly justifies an exception from the usual rigours of the immigration law,”³⁸ resistance toward asylum will increase. When courts widen eligibility for asylum – by treating more