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Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity that has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.

Hannah Arendt 1986 [1951]

The dwellers in refugee camps can best be compared to America's African slaves. And as we look on helplessly at the ever-growing numbers of human refuse heaps, we might perhaps listen to the voice of conscience. At the very least we might re-examine anew the claims that are made for and against the call of conscience in the face of group loyalty.

Judith N. Shklar 1993

Over the last twenty years, asylum has become one of the central issues in the politics of liberal democratic states. In 1993 the German Parliament embarked upon the politically onerous task of amending the country's constitution, the Basic Law, in order to slow the arrival of asylum seekers on to state territory. One year later, the Clinton Administration in the US, faced with criticism over its policy of summarily interdicting asylum seekers on boats heading for Florida, launched a military intervention into the island nation of Haiti, largely to restore a regime less likely to produce refugees. In 2001, the Australian government embroiled itself in a heated international controversy by forbidding asylum seekers picked up by a Norwegian freighter, the *Tampa*, to land on its territory; this tough new line virtually guaranteed the government reelection for a second term. And less than two years after the *Tampa* incident, in 2003, the British government announced that annual asylum figures had reached unprecedented levels, even though Prime Minister Tony Blair had, some months earlier, assumed personal control of asylum policy. Liberal democratic states, it would seem, have fallen like dominoes to the so-called problem of asylum. Despite the best efforts of governments, a diverse

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and somewhat unruly collection of foreigners have found themselves at the front of the political stage.

This is a work that aims to subject this central political issue of our time to ethical scrutiny. Asylum brings into relief a conflict between the claims of refugees and those escaping desperate economic situations to a secure place of residence and the claims of citizens to act together to limit access to the territory and resources of their community. It is a conflict on which the governments of the world's richest states have recently expended a great deal of human and financial resources. All Western states have implemented over the last three decades a remarkable array of restrictive measures. Practices to prevent or deter asylum seekers have ranged from external measures such as visa regimes, carrier sanctions and airport liaison officers to internal measures like detention, dispersal regimes and restrictions on access to welfare and housing. Yet, paradoxically, all of these measures have been operated in a context in which states continue publicly to acknowledge legal responsibilities to refugees and others in need of protection (as defined by the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol and a range of other human rights instruments) and trumpet the moral importance of the principle of asylum. A kind of schizophrenia seems to pervade Western responses to asylum seekers and refugees; great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the state where they could receive its protection.

The last two decades may have captured public, media and government attention, but they are not, of course, the first time in living memory that refugees have been a focus of international concern. In 1951 the *émigrée* political philosopher Hannah Arendt described refugees as 'the most symptomatic group in contemporary politics' (Arendt [1951] 1986: 277). For Arendt, the emergence of refugees across Europe since the turn of the century symbolised the triumph of the nation-state. The use of national or ethnic criteria by states to determine who did and did not belong in a particular political community led to groups of people who were not only forced to flee their traditional homeland but simultaneously deprived of any reasonable prospect of attaining a new one (Arendt 1986: 293–4). In spite of the lofty rhetoric of human rights (of rights accruing to human beings as human beings), the implications of a lack of citizenship in a world carved up amongst sovereign nation-states were, as Arendt realised, absolutely devastating. Those who lost the protection of the state were denied not only specific rights but the protection 'of a community willing and able to guarantee any rights whatsoever' (Arendt 1986: 297). In a world where responsibilities and duties were determined

by citizenship, no state accepted responsibility for the refugee. In an international system where sovereign states each claimed the right to fashion their entry and citizenship policies according to their own national or ethnic criteria, refugees were outcasts. They were, in Arendt's words, 'the scum of the earth' (Arendt 1986: 269).

In the years since Arendt wrote, practical concern with the responsibilities of states to refugees has waxed and waned. Between 1950 and 1970 there was reason to feel slightly optimistic about the plight of European refugees. The post-war economic expansion across Western Europe and the growing labour and population requirements of nation-building states such as Australia, Canada, New Zealand and, to some extent, the US eased the dilemma of huge numbers of post-war refugees by creating a range of resettlement opportunities. Moreover, from the late 1940s, the Cold War gave some states added incentive to accept refugees from communist states; as the Western response to refugees from Hungary in 1956 and Czechoslovakia in 1968 showed, liberal democratic states could be highly responsive to the claims of necessitous outsiders when responding to their needs also served to demonstrate the moral bankruptcy of communism. By the end of the 1970s, however, international economic recession and changes in the international economy had severely reduced the demand for external supplies of labour across the West. The restrictive force of this development and changes in the patterns of refugee movement were simply reinforced by the end of the Cold War in 1989, which deprived Western states of an obvious security rationale for resettling refugees. In the face of tough and indiscriminate new entry restrictions coming into force to combat rising numbers of asylum seekers and illicit migrants, the absence of a coherent response to the question, who is responsible for the refugee?, once again became starkly apparent.

Since the early 1980s a sharp rise in asylum claims has occurred across Western countries. Whereas the total number of applications across Western Europe averaged no more than 13,000 annually in the 1970s, the annual totals had grown to 170,000 by 1985, and to 690,000 in 1992. Between 1985 and 1995, more than 5 million claims for asylum were lodged in Western states. By the beginning of 2000 the number of claims had dropped off somewhat to 412,700 for the states of Western Europe, still, however, far in excess of the levels of the 1970s and 1980s, even without accounting for unauthorised entrants.¹ The rising trend in applications has also been evident outside Europe. Out of twenty-one Western countries, only three received fewer asylum applications in the three-year

¹ UNHCR, *State of the World's Refugees 1997–1998* (Oxford: Oxford University Press, 1997), pp. 145–185; UNHCR, *State of the World's Refugees 2000* (Oxford: Oxford University Press, 2000), p. 325.

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period between 1998 and 2000 than they received between 1995 and 1997. In the vast majority of countries the numbers rose dramatically (Gibney and Hansen 2003).

The growth in numbers reflects an expansion in the number of the world's refugees in recent decades, mostly as a result of civil conflicts in the former Yugoslavia, Sri Lanka, Somalia, Central America and the Great Lakes region of Africa. In 1975 there was estimated to be almost 3 million refugees in the world; by 1980 the number had grown to around 9 million, and to 18.3 million by 1992. By the beginning of 2000, the number had dropped off slightly to around 11.7 million (UNHCR 2000: 310). These totals, moreover, exclude another 10 million people either displaced within their own country, or who while not satisfying the UN definition of a refugee are considered to be 'of concern' to the UNHCR (UNHCR 2000: 309). The plight of these last two groups is often as desperate as that of official refugees (Cohen and Deng 1998). But rising numbers of asylum seekers in the West are also related to developments in transportation and communication that have lessened the distance between the world's richest and poorest countries.

In recent years, a kind of globalisation of asylum seeking has occurred whereby many victims of conflict and persecution, as well as individuals in pursuit of better economic opportunities, have been able to move intercontinentally in pursuit of asylum. This has fed fears that growing pressures are merely the thin edge of a wedge of much vaster numbers of people, refugees and non-refugees alike, who would move to the world's richest states if the opportunity presented itself. Certainly, the impact upon the West of this extraordinary movement of people has until now been softened by the actions of the poorest states. While Germany has had to deal with hundreds of thousands of refugees, Pakistan has been home to well over 3 million. Even the desperately impoverished African states of Malawi, Burundi, Congo and Sudan share over a million refugees among them, many more than most liberal democratic states.

The circumstances that confronted Europe with refugees between 1930 and 1950 had their source in what have turned out to be relatively transient forces (war, totalitarian regimes) that emanated from *within* Europe. The current refugee crisis primarily has its driving forces *outside* Europe (though not exclusively, as recent events in the Balkans testify), and is linked to the prevalence of violent civil and international wars and ethnic conflicts, to the increasing involvement of citizens in military conflict, and, most fundamentally of all, to the grave difficulties involved in maintaining durable and humane state structures in conditions of economic underdevelopment and poverty. The present refugee context thus differs significantly from that which moved Arendt to write in the aftermath of World War II. The many refugees currently fleeing civil war, ethnic

conflict and political instability are only the extreme end of a rising number of the world's denizens who respond to the uneven distribution of security and welfare across states by migrating.²

Controversy over asylum in liberal democratic states must therefore be understood as a part of a much broader international problem in which refugees and asylum seekers are merely the vanguard of a world where life chances and economic opportunities are distributed with great inequality. This reality, made daily more obvious by the forces associated with globalisation, throws up a number of tough challenges for asylum policy: for example, in the midst of scarcity of entrance places and different categories of people in need, which claimants for entry deserve priority in immigration admissions? To what extent, if at all, is it legitimate to curtail the rights of asylum seekers and refugees in order to maximise the number of refugees receiving asylum overall? Is it possible to construct generous asylum policies that are not overwhelmed by applicants seeking to migrate for economic reasons? Every Western government is presently engaged, through legislation and public pronouncements, in answering these questions. Their answers are in need of close scrutiny. My aim in this work is to provide some reflections on just what a morally acceptable response to refugees and asylum seekers would look like. I will use the resources of political theory – in combination with the actual experiences of Western states – to construct a critical statement of the responsibilities of states to refugees. But before I commence this task, it is important to consider just who a refugee is and how his/her claim to enter differs from those of other immigrants.

Defining refugees and other claimants for entrance

In recent years, the spectrum of foreign settlers in Western states has been dominated by four major groups of entrants: refugees, asylum seekers, economic migrants and family migrants. I will now take some time to define each of these immigrant groups and examine the nature of their different claims.

Refugees

What is a refugee? The most influential answer to this question is given by the 1951 UN Convention Relating to the Status of Refugees (and extended in the 1967 Protocol), to which all liberal democratic states are signatories. According to this document, refugees are individuals who

² According to the UN Population Division, in 1990 there were some 120 million migrants (individuals who had spent over a year in foreign countries), fewer than 3 per cent of the world's entire population (Martin 2001).

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owing to a 'well founded fear of persecution' for reasons of political opinion, race, religion, nationality or membership in a particular social group are outside their country of nationality and are unable or, as a result of such fear, unwilling to return to it.³ It is evident that this definition, the one used by most of the world's states, emphasises three primary features as central to the attribution of refugee status. First, a refugee is someone who is *outside* his or her country of nationality. In terms of the UN definition, people displaced within their own country are not considered refugees, and thus technically do not fall under the ambit of those requiring protection and assistance. Second, the reason the refugee has fled and cannot return home is because he or she faces the reality or the risk of persecution. Third, the persecution that an individual faces or risks facing is due to reasons of political opinion, race, religion, nationality or membership in a particular social group.

The emphasis on refugees as persecuted people reflects the Convention's origins in the early Cold War period. The Western states responsible for its creation viewed refugees – not least for ideological reasons – as a product of oppressive, totalitarian regimes, like that which existed in Nazi Germany and those forming in the communist states of Eastern and Central Europe, that preyed on certain sections of their citizenry. Refugees were seen thus as a product of a certain kind of political rule in which the normal responsibilities of a state to its citizens were deliberately and directly violated. Even Arendt, prescient as she was about the modern impact of refugees, could be said to have viewed refugees primarily in state-centric terms as individuals for whom the normal bond of trust, loyalty, protection and assistance between a person and his or her government has been broken or does not exist (Shacknove 1985: 275).

In recent times, the adequacy of defining a refugee in terms of these three features has come into question. The term 'refugee' has been extended in common parlance and, more fitfully, in the practices of the UNHCR and liberal democratic states, to include all people forced to flee their homes even if they have not crossed international boundaries. The assistance Western states gave to Kurdish refugees in Iraq in 1991 and the UNHCR's efforts to evacuate people during the war in Bosnia indicate how international assistance is sometimes made available to threatened individuals whilst still in their country of normal residence.⁴ These individuals, refugees within their own country, are commonly referred

³ Goodwin-Gill (1996) offers a superior guide to the Convention's history, as well as international law pertaining to refugees more generally.

⁴ Though UNHCR's involvement with internally displaced persons has been extremely controversial and the subject of criticism. See, for example, Goodwin-Gill (1999) and Barutciski (1998).

to as ‘internally displaced persons’ (see Cohen and Deng 1998). They are a group of growing concern to the international community, not least because their numbers are rising (partly due to restrictive asylum policies) and their vulnerability is often great. Intellectual support for assistance to these men and women has come from Andrew Shacknove, amongst others, who has argued that refugeehood is ‘conceptually . . . unrelated to migration’ (1985: 283). For Shacknove, one does not need to cross international boundaries to be a refugee. Rather, a refugee is simply someone ‘whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible’ (quoted in 1985: 277).

The UN definition has also come under fire because its conception of ‘persecution’ can be used to exclude many people brutally forced out of their country of origin. Under the somewhat dubious interpretation of the Refugee Convention recently used by France and Germany, women who have fled the oppressive strictures of the Taliban, Iraqis displaced by the US and British war to disarm Saddam Hussein, in addition to Zairians escaping the deadly Ebola virus, may not be considered refugees. For these groups are not on the move because they have been *persecuted*, in the sense that their state has deliberately targeted them for ill-treatment. Under the 1951 Refugee Convention, there is no necessary link between refugee status and life-threatening states of affairs, such as situations of generalised violence, like war, or natural disasters or plagues. In Africa, the Organization of African Unity (OAU) has filled this void by offering an alternative to the UN definition. As well as covering those fleeing persecution, the OAU has, since 1968, attributed refugee status to ‘every 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’ (quoted in Shacknove 1985: 275–6).

Throughout this work I will use the term ‘refugee’ (except where explicitly stated otherwise) to denote those people in need of a new state of residence, either temporarily or permanently, because if forced to return home or remain where they are they would – as a result of either the brutality or inadequacy of their state – be persecuted *or* seriously jeopardise their physical security or vital subsistence needs. This definition is broader than the UN’s (and virtually identical to the OAU’s) in that it includes victims of generalised states of violence and events seriously disturbing the public order, such as famine and natural disasters, as well as individual persecution. But it does not take us as far from the current

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practices of most liberal democratic states as might be supposed. Many Western countries use forms of humanitarian status to provide protection to individuals who do not meet the standards of the Refugee Convention but who would risk life or limb by returning home.⁵ At the same time, this definition is narrower than Shacknove's as it does not include everyone who is in a position to receive international assistance whose basic needs are not met. In my account, refugeehood *is*, in one vital respect, conceptually related to migration; what distinguishes the refugee from other foreigners in need is that he or she is in need of the protection afforded by short or long-term asylum (i.e., residence in a new state) because there is no reasonable prospect of that person finding protection any other way. The central claim of the refugee is therefore, 'grant me asylum for, if you do not, I will be persecuted or face life-threatening danger'.

It follows from my definition that whether someone should be considered a refugee or not has as much to do with how they can be protected as the nature of the threat they face. For threatened people already *outside* their country of origin, the question of whether or not they should be considered refugees is for the most part clear cut. The only way of protecting such people in the short term is by granting them asylum where they are or helping them to move on to another safe country; no other form of assistance is likely to be able to be marshalled as quickly or effectively. For individuals still *within* their country of origin, however, the issues are more complex. Often, as in the case of victims of famine or natural disasters, it is easier for outside parties to deal with the threats people face by exporting assistance or protection (food, building supplies, clean water) to people where they are than to arrange access to asylum. Even internally displaced persons, escaping war or hostile state activity, may in many cases best be helped *in situ*, through diplomatic pressure exerted by outside actors or even, subject to considerations of proportionality, military intervention. All this is to say that whether suffering peoples still inside their country of origin can be considered as requiring asylum should be determined by taking into account the options available in each case. We should, however, resist the temptation to define all threatened peoples as 'refugees'. There are other ways of drawing attention to the plight of people in need of protection and assistance than lumping them into a single amorphous category.

⁵ Indeed, some of these protections are a part not simply of national but of international law, for example the *non-refoulement* provisions of the European Convention on Human Rights and the Convention Against Torture. For a fuller discussion of the legal implications of these treaties, see Goodwin-Gill (1996) and Lambert (1999). For a discussion of their broader political implications, see Gibney (2003).

To define refugees is not, of course, to suggest that liberal democratic states have a moral responsibility to assist them. In this work I will furnish some grounds – the principle of responsibility for harm and, in more depth, the humanitarian principle – for determining the responsibilities of states to refugees. But one implication for conceptualising these responsibilities does flow directly from my definition – if states do indeed have a responsibility to meet the needs of these desperate men and women, their primary responsibility must be to ensure that they receive asylum. Asylum is not the only responsibility of states. Liberal democracies may have a key role to play in assisting in refugee repatriation and in addressing the economic, military and political causes of refugee generation. However, what the refugee needs in the first instance *qua* refugee is the security of a new state within which to reside. For that reason I will be concerned in this work primarily with the entrance duties of liberal democratic states.

Asylum seekers

When we ask whether a state – take Britain, for the sake of example – has a responsibility to aid refugees, we could be enquiring about its responsibilities to one of three groups of people: refugees, such as those in Bosnia in the early 1990s, who were in danger within their own country and therefore required assistance in fleeing to a safer country; refugees in temporary border camps, like Kosovar Albanians in Macedonia and Albania in 1999, who were eligible for resettlement; and those foreign individuals at the borders of or within British territory claiming to be refugees, such as the numerous Iraqis who have claimed asylum at Heathrow in recent years. While the first two groups fit neatly under the refugee definition I have just outlined, the last group, commonly referred to as asylum seekers, constitute a second distinct category of entrant to liberal democratic states.

The asylum applicant makes exactly the same moral claim for entrance as the refugee: allow me to enter for if you do not I will be persecuted or placed in life-threatening danger. Despite the similarity of the claim, however, asylum seekers raise a unique set of practical and moral issues. The category of the asylum seeker is in one respect *narrower* than that of the refugee. For any particular state, asylum seekers include only those refugees who actually arrive at its own borders. Indeed, it is the growth in asylum seekers that has, over the last thirty years, made refugees such a burning political issue in Western states. For while these states could once ignore refugees confined far from their borders, within the continental bounds of Africa and Asia, frequent and relatively inexpensive travel and communications have made possible intercontinental transportation

and greatly increased the number of denizens from refugee-producing countries travelling to the West to claim admittance.

The appearance of the asylum seeker at the border immediately raises an important ethical question. Do states have a special responsibility to refugees in their own territory that justifies them giving priority to these men and women over others in danger who are further away? To answer 'yes' appears to commit one to the contentious position that physical proximity should make a difference to a state's moral responsibilities. Yet to answer 'no' seems to commit one to rejecting the one international norm pertaining to refugees that states generally acknowledge: the principle of *non-refoulement*. This norm, enshrined in Article 33 of the Refugee Convention, demands that states not refuse entrance to an asylum seeker if doing so would force that person back to a country where he or she would be likely to be persecuted on one or more of the grounds specified in the UN definition. Recent writers on morality and refugees have been divided on the issue of asylum seekers. Peter Singer and Renata Singer, for instance, have condemned the existence of a special responsibility to asylum seekers based on proximity (1988: 119–20). They argue that need should be the primary determinant of whom a state should admit for entrance. Michael Walzer, on the other hand, argues for a special responsibility to asylum seekers grounded in part in the fact that to turn them away would involve using force against 'helpless and desperate people' (1983: 22–3). The conflict between these perspectives raises important issues and I shall return to them later.

Even if we agree on a moral basis for assisting asylum seekers, immense practical difficulties still face liberal democracies in dealing with their claims. For the category of the asylum seeker is at the same time a more *expansive* one than that of the refugee; unlike refugees in camps and those who gain entry through resettlement programmes (most of whom have received the UN's imprimatur or are obviously escaping life-threatening situations like war), the status of an asylum seeker as an endangered person is typically undetermined. To be an asylum seeker an individual merely has to *claim* to be a refugee. It is perhaps unsurprising, then, that the politics of asylum in Western countries is dominated by concerns that bogus asylum seekers are exploiting the generosity of the host country.⁶ If systems for determining asylum claims might be expected to dampen these controversies, they often fail. The quasi-judicial processes used to evaluate applications tend to be expensive and time-consuming, providing a large and slow-moving target for

⁶ Such concerns about asylum seekers are far from new. Caron (1999) shows that Jewish refugees from Nazi Germany attempting to enter France in the 1930s were commonly viewed as economic migrants.