How Should We Think About the Ethics of International Migration?

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INTRODUCTION

Every discussion of public policy takes place against a background of explicit and/or implicit presuppositions about ethical principles and their implications for acceptable policy choices. One presupposition that underlies almost every discussion of migration is that states are morally entitled to exercise considerable discretionary control over which non-citizens it will admit. I call this the conventional view. Because this view is so widely held, it is useful to begin the discussion of international migration within the constraints that it imposes.

In that context, two key questions that arise for rich democratic states in Europe and North America are these: what sorts of obligations do democratic states have to admit refugees and how should democratic states respond to irregular migration. All democratic states recognize that our obligations to refugees set some limits to the discretionary control over immigration to which states are normally entitled under the conventional view. The challenge for this topic is to spell out the extent of our obligations and to specify the limits they impose on our discretionary control over who gets in. Under the conventional view, states are morally entitled to try to prevent irregular migration by people who are not refugees, but they may still be morally constrained in how they prevent irregular migration and in how they treat irregular migrants who manage to get in despite the controls in place. The challenge for this topic is to spell out those moral constraints. These questions about refugees and irregular migrants are interrelated because many of the measures designed to reduce irregular migration also prevent refugees from arriving and many of those who wind up in an irregular status arrived as refugee claimants but had their claims denied.

I will argue that:

(1) rich democratic states have an obligation to resettle many more refugees from among those living in long-term refugee situations elsewhere in the world;

(2) rich democratic states should not seek to prevent the arrival of refugees;
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(3) measures to deter non-refugee irregular migration must be consistent with a commitment to the preservation of human life as the most fundamental priority;

(4) long settled irregular migrants should be granted legal status even if they do not qualify as refugees and should enjoy a range of legal rights prior to regularization.

Although most of my discussion will take place within the constraints of the conventional view, it is important, especially in an academic context, not to neglect questions about deeply entrenched injustices, merely because they may be beyond the reach of currently feasible policy alternatives. If we ignore such questions, we implicitly legitimate the status quo, and whatever injustices it contains. We should not do that inadvertently. So, in the last section, I will raise the question of whether the conventional view that states are morally entitled to exercise discretionary control over immigration is really defensible. I will argue that it is not.

RESETTLEMENT OF REFUGEES

Everyone recognizes that refugees pose a challenge to the international state system. Suppose that you think that most human beings are better off under an international order in which the world is divided into distinct, sovereign states, and in which each state has primary responsibility only for its own citizens (or, perhaps, for all those living within its borders together with some responsibilities for citizens living abroad). Even if the general claim about the benefits of the international state system are correct, it is clear that this arrangement is not working well for people who have to flee their home states because their basic human rights are threatened there. It doesn’t follow that we have to abolish the international state system altogether but it does mean that the system as a whole has a responsibility to assist such people and to ensure that they can find a place to live where their basic human rights will not be threatened.

There is an analogy here which can be helpful. You might think (as I do) that most children are better off if raised within families. I leave open here the complications raised by different sorts of family structures and arrangements. In most cases, any sort of family is better than none. But not always. Some children are severely abused by their families. And in those cases it is important to remove the children from their original family, and, if the situation giving rise to the abuse cannot be fixed, to find another family to take care of the children.

Even if the international state system is good for most of those who live under it, it is clearly not good for refugees. They are the moral equivalent of abused children who suffer from being in their original family. But here is the big difference between the two cases. When it comes to abused children, we know who has responsibility for protecting the children, removing them from their family and fixing the situation or finding them a new home: the state in which the children live. There is no comparable overarching agent with both the responsibility for protecting refugees and the effective capacity to do so. There is the UNHCR, of course. It has responsibility for protecting refugees. But its effective capacity is highly limited. It depends, for the most part, on
What would be fair?

The problem is this. Most states are very reluctant to take in refugees. They are inclined to do so only when the only alternative to admitting refugees is to use force overtly to make the refugees stay in their home states. That means that most people who manage to get out of their home states wind up in a neighbouring state. (It is important to recognize that there are many people who might reasonably be considered refugees but who have not managed to get out. There are over 30 million forced migrants who are “internally displaced.” In effect, they are refugees who are still within their home state.) The fact that refugees usually wind up in a neighbouring state might be OK if the situations giving rise to their flight were likely to be resolved quickly so that they could go back home in a few months, but many of the crises are not like that. The people who have fled remain refugees for many years, living either in camps with limited life chances or on the margins of the society they have entered without any secure legal position or social and economic opportunities. That is not fair either to the refugees or to the states that have admitted them. And these long-term refugees represent a significant portion of the refugee population. For example a few years ago when there were only(!) ten million refugees under UNHCR’s protection, over half of them had been in that situation for over five years. That year only about one hundred thousand refugees were resettled.

What would be fair? Once it becomes clear that the refugees are not going to be able to return home in the foreseeable future, they should be given the opportunity to make a new home somewhere else. But where? There is no principled reason why neighbouring states should normally be expected to bear the responsibility of permanently resettling refugees. The right thing would be to establish some general principles for allocating resettlement responsibilities among the world’s non-refugee producing states. These principles should take into account both the interests of the refugees themselves and the capacities of the states to integrate the refugees. I won’t try to specify these principles further here, but I will say this much. I think that any plausible version of such principles would require all of the rich democratic states of Europe and North America (with the possible exception of Sweden) to admit many more refugees for resettlement than they currently accept.

That’s what makes this solution so difficult. The rich states are saying in effect, “It is not our fault that all these people are refugees. We didn’t make them refugees, so why should we be responsible for resettling them?” Now it is sometimes (often?) the case that this claim to have played no causal role in the creation of refugee flows is not true. But let’s take the harder case and assume that it is true. Even so, most of the time, it is also true that the neighbouring state to which they have fled did nothing to cause the refugee flow either. It is in the nature of this problem that the burden of caring for refugees will often fall necessarily upon states that did not cause the problem. As David Miller has argued elsewhere, the fact that a state has not caused a particular problem does not mean that it is not responsible for providing a solution to the problem.

There is a familiar collective action problem here. Every state has an incentive to hope that other states will act and will bear the costs of resettling refugees. The result is that almost no state except a neighboring
one does much, and even the neighbouring states often limit the ability of refugees to create a new social life for themselves. Sometimes this sort of collective action problem can be overcome when most states see that they have important interests at stake that they won’t be able to advance if they do not coordinate and commit themselves to some sort of binding collective solution. It is difficult, however, to show what interest most states have in resettling refugees. Moreover, and relatedly, taking in refugees is usually politically unpopular, even when there is no reasonable doubt that the people are in fact refugees and in need of a new home. So, while it is reasonably clear in broad outline what is morally required with respect to refugee resettlement, there is little likelihood that most states will take in their “fair share” (however that is measured) or work towards a collective commitment to address this problem. I am sorry to be pessimistic.

**ASYLUM CLAIMANTS**

Besides resettlement, the other route by which refugees gain admittance to rich democratic states in Europe (and elsewhere) is by arriving on the territory or a state and asking for asylum under the Geneva Convention which requires states not to return people who have asked for asylum to any situation in which they would face a basic threat to their human rights. In fact many more people succeed in getting into Europe by this means than through resettlement. The rich democratic states try to prevent people from using this asylum system by imposing visa requirements and carrier sanctions that prevent people who might claim to be refugees from gaining access to their territories. Some still manage to arrive, however. A few hundred thousand a year. But that is a small proportion of the total refugee population, which is now around 17 million. And many of those who seek asylum are found not to qualify under the rules of the Geneva Convention, although a significant number of these cannot be sent back because the state recognizes that they would be in danger if they were sent back even though they do not technically qualify for asylum. Moreover, recognition rates vary so widely among European states even for people coming from the same country and similar circumstances that it is hard to believe that the determination processes really are successfully separating those with valid claims from those without such claims.

One crucial component of the asylum system under the Geneva Convention is that it places the responsibility for determining whether someone is a refugee and for not returning anyone to a state where her basic human rights will be in danger on the state where the person first arrives and can safely file a claim. There is a powerful rationale for this non-refoulement rule in the principle of state sovereignty itself. Every state is responsible for what goes on within its own borders. So, once someone has arrived within our borders, we have a specific responsibility for her fate that is different from the general responsibility that states have to protect human rights everywhere in the world. It does not follow, however, that it is fair to let the responsibility of admitting refugees on a long-term basis depend so heavily upon the accidents of geography. This is the complaint of the European states like Italy, Greece and Malta that are the closest ones in Europe to refugee-producing regions, and it is a reasonable complaint with respect to the other EU states.
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The main point I want to make in this section, however, is that it is morally wrong to create a system to protect refugees and then to prevent refugees from gaining access to that system, as all rich democratic states (including Italy, Greece and Malta) routinely do. That point seems so obvious that it is embarrassing to mention it, but we have become so accustomed to the techniques of exclusion, that it is important to remind ourselves why they are problematic. The usual justification for the techniques is to insist that they are not designed to exclude real refugees but only economic migrants posing as refugees. But the techniques are indiscriminate. If it were really the case that states only wanted to exclude economic migrants and not refugees, they would at least supplement the techniques of exclusion with greatly increased resettlement programs and with opportunities for refugees to claim and receive asylum while still in their home countries. Even then, we would not be justified in preventing people from being able to file a refugee claim.

PROTECTING HUMAN LIFE AS A PRIORITY

Why is the title of this conference “The Lampedusa Dilemma”? Presumably because this phrase is intended to evoke the tension between the humanitarian responsibilities of European states and their interests in limiting the inflow of uninvited immigrants. Even if we accept the conventional view, as I am doing here, it does not follow that states may use whatever methods they want to exclude those seeking to enter without the state’s permission. First, there is no way to know in advance whether or not those seeking entry would qualify as refugees under the Geneva Convention in a fair determination process. Many of those who died in the Lampedusa tragedy had plausible claims for asylum. At a minimum, the fact that people are willing to engage in such risky and desperate attempts to get to Europe is, by itself, an indicator of how bad things are for them in the places they have left. Second, it is important for democratic states to respect the basic human rights even of people who do not qualify as refugees and who are seeking to enter without authorization.

In the wake of Lampedusa, there were increased efforts to provide search and rescue assistance to people in the waters between Europe and North Africa, efforts that have recently been reduced. Some critics objected that making the crossing less risky would only encourage more people to make the attempt, perhaps endangering more lives in the end. But this sort of calculation is one calculation too many. Every basic human right can be reinterpreted as an incentive for someone to act in ways that the state would like to prevent. But the whole point of identifying certain moral claims as basic human rights is to preclude this sort of assessment. The right to life is the most basic human right, the one that is a prerequisite for all the others. That is why a commitment to protect human life must constrain whatever measures are used to prevent unwanted immigration. More specifically, rescuing people at sea is a fundamental humanitarian responsibility. Even under the conventional view, we are obliged to find other ways to discourage unauthorized migration than deliberately exposing irregular migrants to risks of death that we could prevent. And recall again, there is no justification for discouraging refugees from seeking asylum and no way to know in advance which ones of those crossing might qualify.
Every state has a moral responsibility to protect the basic human rights of everyone within its jurisdiction. This includes temporary visitors and it even includes people who have settled without authorization. In a modern democratic state, there are no outlaws in the classical sense of that term.

I turn lastly to the treatment of migrants who have entered without permission or overstayed a visa and who make no claim to be refugees or whose claim to be refugees has been (reasonably) denied. I will call these people irregular migrants. I make two claims about them. First, they are morally entitled to many legal rights. Second, over time they become members of society and become morally entitled to have their status regularized. In both cases, the fact that they have settled without permission does not prevent them from having these moral entitlements.

What legal rights should irregular migrants possess? Well, first, they should have whatever legal rights are necessary to protect their basic human rights. Every state has a moral responsibility to protect the basic human rights of everyone within its jurisdiction. This includes temporary visitors and it even includes people who have settled without authorization. In a modern democratic state, there are no outlaws in the classical sense of that term, i.e., people entirely outside the law’s protection. The fact that someone has settled without authorization does not mean that she can be robbed or killed with impunity. The problem, however, is that irregular migrants are afraid to come into contact with any state authorities lest they be turned over to immigration officials and deported. So, often they have only a nominal legal entitlement to the protection of their basic human rights. In practice, they are without protection. There is a solution to this, however. It is to build a firewall between those who are responsible for protecting basic human rights and those who are responsible for enforcing immigration laws. The former should be prohibited from communicating any information about irregular migrants to the latter. That is the only course to pursue if we are really serious about protecting basic human rights. There is also a case for granting irregular migrants other legal rights, especially rights to education and to workplace protections, and for protecting those rights with a firewall as well, but the argument is more complicated and I don’t have the space to develop it here.

Why should irregular migrants be granted legal status after the passage of enough time? Because they become members of society, and the ways in which they are connected to others in the society become more important morally while the ways in which their entry or settlement contravened the rules becomes less important. Consider the similarities between today’s irregular migrants and yesterday’s guestworkers. Many European states admitted “guestworkers” after World War II on the explicit understanding that these workers would eventually go home. Some did, of course, but many guestworkers sank roots in the societies where they were working. They brought in their families, sent their children to school and so on. In the end, the European states came to see that they could not justifiably enforce the original contract and make the guestworkers go home, even in cases where they were no longer really needed as workers. They had become members of society and they had to be recognized as such. It’s a little different with irregular migrants, of course, because the guestworkers had permission to come and work and the irregular migrants usually don’t, but the crucial factor that is the same: time reduces the moral importance of the original circumstances under which the migrants arrived.
We often recognize the moral significance of the passage of time in other areas as well. For example, many legal regimes have rules of prescription that allow property rights to evolve over time on the basis of actual use. And many legal regimes have statutes of limitation, so that one cannot be prosecuted for a crime after a certain amount of time has passed. This only applies to lesser crimes, of course, not to things like murder, but violations of immigration laws are clearly in the category of minor offenses and often are not even criminal offenses at all.

How much time must pass before irregular migrants acquire a right to stay? That is not a question that can be settled philosophically. It requires drawing a line which will inevitably appear arbitrary in the distinctions it makes between those very close to the line but on different sides of it. Still, that is simply the nature of such line-drawing and the law. Think of the recent EU requirement that immigrants who are legally present on a temporary basis for five years should be granted permanent residence status. That rule reflects the same moral impulse that I am drawing attention to here regarding the moral significance of the passage of time. But there is no deep reason why it should be five years rather than, say, four or six. On the other hand it is plausible to say that one would be too short and ten too long, given the ways in which human lives normally go. Something similar could be applied to the issue of regularization.

CHALLENGING THE CONVENTIONAL VIEW

I conclude with a few critical comments on the conventional view about the state’s right to exercise discretionary control over immigration, an argument (like all of the others in this presentation) that I have developed more fully in my recent book.

We all know that feudalism was wrong. It divided people into two groups, the nobility and the peasantry, purely on the basis of birth. Relatively few people were nobles and they had many more rights and much better material conditions than the peasants who were the vast majority of the population. And it was very difficult, almost impossible, for peasants to become nobles, no matter how talented or hard-working they were. No one defends feudalism today. We can all see that this was an unjust way of organizing society. But in fact the modern world, taken as a whole, is a lot like feudalism. Being born into a rich state in Europe or North America is a lot like being born into the nobility under feudalism. It greatly enhances one’s life chances (even if many of us belong to the lesser nobility). Being born into a poor state in the global South is like being born into the peasantry in the Middle Ages. It greatly limits one’s life chances (even if there are a few rich peasants). This way of organizing the world is not natural, any more than feudalism was. It is a social order constructed by human beings, and it is unfair to most of those who live under it. One of the most important things that make it possible to keep this unjust set of arrangements in place is the fact that states control entry. We don't let people move freely from poor states to rich ones, and we could not keep things the way they are if we did. Restrictions on mobility were one of the keys to the feudalism, too, by the way.
I'm not saying that the best way to fix this problem is simply to open borders and have everyone move from the global South to the global North. It would be much better, in my view, to reduce the vast inequalities between states. Then fewer people would be driven to move. We see that within Europe today where there are open borders within the EU, and people are free to move but most do not, even though there are still significant economic differences between states. That is what a just world would look like. The differences between states would be much smaller and people would be free to move.

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