

The End of Asylum

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Abstract

The dramatic political, social, and technological changes since World War II have made the asylum regime established by the 1951 Refugee Convention unsustainable. Because asylum is seen as a “right”, it has become a challenge – arguably an existential challenge – to the sovereignty of developed nations. The measures proposed or taken so far have failed to address the fundamental contradiction between international asylum rules and modern conditions. The beginning of a solution, then, must be to withdraw from multilateral treaties that relate to asylum and for each nation to develop its own asylum policies based on its own interests.

Keywords: Asylum, refugees, borders, illegal immigration, United Nations

Introduction: asylum and sovereignty

While a handful of countries signed a refugee convention in 1933,¹ the current refugee (and asylum) regime was established in the 1951 Convention Relating to the Status of Refugees.² It applied only to persons in Europe and only retrospectively, i.e., to those displaced by World War II and the subsequent Red Army subjugation of Eastern Europe. This framework was universalized in 1967 through the Protocol Relating to the Status of Refugees, which applied the Convention’s terms to the whole world and made them prospective – i.e., for all future claimants for refugee status.

There are two aspects of the refugee issue, differentiated by geography.³ The first category are refugees from abroad who are brought to a country by that country’s government for resettlement. This does not represent a challenge to national control

¹ LEAGUE OF NATIONS 1933.

² UNHCR 1951.

³ The terminology may vary slightly depending among countries; these are the labels in U.S. law, but the framework is similar everywhere.

over immigration since the selection and resettlement of refugees are affirmative decisions of the receiving state – sovereign acts. This may be deemed a good or bad policy, it may be executed well or badly, but it is up to the receiving state whether and how it will happen.

The other aspect is asylum, which is when an alien is already in the receiving country (usually illegally, but occasionally in some kind of temporary status), and then seeks refugee status as a means of avoiding deportation. This is the core border-control challenge, arguably an existential challenge, for the developed nations of the world.

Asylum represents a surrender of sovereignty, a pledge to permit foreigners to decide who will live in a country, as opposed to the citizens of that country. It reframes immigration as a *right*, rather than a *privilege* – a claim that an unauthorized foreigner has on the state he illegally broke into, which the ostensibly self-governing people of that nation are required to honor, regardless of any numerical limits in the nation's immigration law.

The framers of the 1951 Refugee Convention appreciated this concern over sovereignty and sought to reassure potential signatories that “refugee” would be narrowly defined.

According to the Convention (and the Protocol), to be considered a refugee, one has to be out of one's country of nationality and have been persecuted or have a well-founded fear of persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”.⁴

What is more, for purposes of asylum – i.e., for illegal aliens claiming refugee status – the convention has further strictures. Article 31, entitled “Refugees unlawfully in the country of refuge”, reads, in part:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The important caveats here are the requirement that illegal aliens claiming refugee status come “directly from a territory where their life or freedom was threatened” and that such illegal aliens “present themselves without delay to the authorities”.

⁴ UNHCR 1951, 3.

Asylum in recent history

In the first four decades of the post-WWII refugee regime, asylum's potential threat to national sovereignty and national security were seldom considered because asylum was a minor issue. After the initial large-scale movements of people in the immediate wake of the Soviet takeover of much of Central and Eastern Europe, only the flight of some 200,000 Hungarians after the 1956 uprising would fall under the category of asylum in Europe – a large movement of people, not authorized by receiving governments. Most other population movements in Europe were either organized labor migration or the arrival of co-ethnics, such as Greeks expelled in the wake of the 1955 pogroms in Constantinople or Pieds-Noirs fleeing Algeria for metropolitan France.

And in the United States asylum was even less of an issue. President Truman did not sign the 1951 Convention, due to concerns over its limitation on sovereignty, and the U.S. definition of a refugee was shaped largely by Cold War concerns. The Displaced Persons Act of 1948⁵ was mainly concerned with resettlement of people from Europe, but included a provision defining a “Displaced Person residing in the United States” as someone fearing persecution “on account of race, religion or political opinions”. But, crucially, it was limited to aliens lawfully in the country in some kind of non-immigrant (i.e. temporary) status, such as students. In current U.S. law, this is considered an “affirmative” asylum claim, as opposed to the much more common, and more problematic, “defensive” claim, which is offered by an illegal alien as a defense against deportation.

The 1965 Immigration and Nationality Act⁶ further altered the definition of a refugee somewhat, but still with limited relevance to asylum. A refugee was again someone fleeing “on account of race, religion, or political opinion, from either a communist country or from “any country in the general area of the Middle East”. But this still applied almost entirely to people seeking to come here legally under this status.

The only real asylum crisis faced by the United States in this period was the large-scale illegal arrival of Cubans after the communist takeover of the island. Tens of thousands arrived illegally by boat, many of whom were placed in deportation proceedings, until 1962, when the government, for anti-communist reasons, simply paroled in Cuban illegal aliens rather than referring them to deportation

⁵ U.S. CONGRESS 1948.

⁶ U.S. CONGRESS 1965.

hearings. But these and subsequent actions were specific to Cuba due to its status as an outpost of the Soviet Empire, and did not inform broader immigration policies.

The United States signed on to the international refugee system when it signed the 1967 Protocol, which was ratified by the Senate in 1968. But the Protocol is not self-executing and so it was not until the passage of the Refugee Act of 1980 that the Convention refugee provisions were included in U.S. law.

To give a sense of how small an issue asylum was before the passage of the 1980 law, in 1979 the total number of asylum claims filed with the Immigration and Naturalization Service was fewer than 6,000.

Last year it was close to half a million.

A New World

In recent decades four developments have combined to fundamentally change the migration environment – hugely increasing the saliency of asylum policy and rendering the Convention’s and Protocol’s caveats and limits regarding asylum meaningless in practice.

First, the Cold War has ended. The cruelty and unworkability of communism meant millions wanted to move to the West, but it also meant that communist regimes made escape difficult. With few people able to escape, it was easy for the West to accept the handful who succeeded, confident in the knowledge that their open posture would yield diplomatic points but not result in any large number of arrivals.

Second, global population has grown significantly, with most of that growth coming in developing countries, where poverty, disorder, and misrule create powerful incentives to leave. In 1951, when the Refugee Convention was signed, there were about 2.5 billion people in the world, about 29 percent of them in Europe and North America.⁷ In 1980, when the United States accepted the international refugee regime, there were 4.4 billion people, about 22 percent of them in the West. In 2024, there are about 8.1 billion people, only 14 percent in the West.

So, since the current refugee and asylum rules were formulated, the globe’s population has more than tripled, while the share of that population in the

⁷ UN 2022.

primary destination countries for migrants has fallen by half. That math alone makes asylum a threat to the nations that prospective migrants seek to move to.

But the population math is not alone. The past 75 years have also seen amazing declines in the cost and ease of transportation and communications, making it dramatically easier to travel the world, allowing migrants to engage in “forum-shopping”, traveling long distances to claim asylum in prosperous countries rather than seeking safety in their own regions.

In 1950, a three-minute telephone call from Boston to London (requiring the assistance of an operator, and using a device plugged into the wall) cost about \$50 a minute in current dollars.⁸ The price now of calling on a mobile phone can be measured in pennies and is arguably free, depending on one’s plan or if one uses an application like WhatsApp or Viber.

Moving from one place to another is also much less expensive. In 1955, TWA offered a one-way flight from New York to Paris at an inflation-adjusted price of more than \$3,600.⁹ Today you can make the same trip on a bargain carrier for little more than \$200, and even airlines more comparable to the old TWA charge less than \$800 – a reduction of more than 75 percent.

So there are far more people with the desire and ability to get to the West and use asylum as a gambit for entry. But there is yet one more change in circumstances that makes asylum very different from the past. That is the post-1960s loss of cultural self-confidence among the elites of the developed world.

The leadership classes in Europe and North America have simply lost the will – even the inclination – to defend their nations’ sovereignty. That means “no” seldom means “no”, and most of those who manage to penetrate the borders of Western nations and make an asylum claim, no matter how preposterous, are permitted to stay. As the president of Finland said last year, “Deportation of migrants who do not meet the criteria for asylum has become impossible, so entering the border means you stay in that country if you want to”.¹⁰ Of course, it is not literally impossible, it is just that the leadership strata of receiving societies – not just governments but also business, academia, media, NGOs, etc. – choose not to do what is necessary.

⁸ CHADDOCK 1997.

⁹ STRUTNER 2014.

¹⁰ LEHTO 2023.

“No Upper Limit”

These changed conditions have turned asylum-seeking into a vehicle of mass illegal immigration, and have made it extremely difficult for developed nations to control who enters their countries.

The consequences of this are well-known; the 2015-16 migration crisis in Europe is perhaps most notorious. In September 2015 German Chancellor Angela Merkel allowed illegal aliens to come to Germany and claim asylum instead of making the asylum claim in the first EU country the aliens entered, as required by the Dublin Regulation – countries less desirable for illegal migrants, such as Greece or Italy. The result was the arrival of well over 1 million illegal entrants, ostensibly fleeing the Syrian civil war but in fact from all over the Middle East, North Africa, and South Asia.

A comment Merkel made at the time in a media interview distilled the asylum problem faced by the developed world. When asked how many refugees Germany could tolerate, she said, “The basic right to asylum for politically persecuted persons has no upper limit. This also applies to the refugees who come to us from the hell of a civil war”.¹¹

This is the logical end-point of the 1951 refugee/asylum regime, and why it can no longer be sustained in today’s changed circumstances.

But the 2015-16 crisis in Europe pales beside the ongoing crisis at the U.S.-Mexico border. Previous U.S. administrations had struggled with the use of asylum as a means of illegal immigration, but administrative reforms¹² and legislative restrictions¹³ put in place in the mid-1990s helped rein in asylum abuse for a while.

A key part of the legislative changes was something called “expedited removal”¹⁴ for illegal aliens, which, as the name suggests, was intended to speed up deportation by permitting agents to order removal without sending the case to an immigration judge for a hearing. But an illegal alien could avoid this expeditious process if he expressed a credible fear of being returned, meaning he would be permitted

¹¹ BRÖCKER – QUADBECK 2015.

¹² MARTIN 2000.

¹³ KRİKORIAN 2007.

¹⁴ CADMAN 2019.

to apply for asylum. In any event, however, the law required detention until the alien's case was resolved one way or the other.

But then in 2009 the new Obama administration issued the “Morton Directive”,¹⁵ under which illegal aliens receiving positive “credible fear” determinations would be released into the country. That effectively reversed the gains made by the mid-1990s reforms, and kicked off the growth in asylum claims that was only briefly interrupted by President Trump's implementation of the Migrant Protection Protocols (often known as Remain in Mexico, about which more below).

Under the Biden administration, the asylum crisis has ballooned beyond anything previously imagined. Jeh Johnson, who had been Secretary of Homeland Security under President Obama, said in 2019 that more than 1,000 apprehensions of illegal border-crossers in a day “overwhelms the system”.¹⁶ When he said that, the daily number was around 4,000, and his response was “I cannot begin to imagine what 4,000 a day looks like, so we are truly in a crisis.”

During Fiscal Year 2021, the average daily number of illegal border-crossers was more than 5,000; it grew to an average of more than 7,500 a day in FY 2022, more than 8,700 a day in FY 2023, and more than 9,500 a day in the first half of FY 2024 (October 1, 2023 through March 31, 2024).

The Biden administration has taken into custody and then released some 3.5 million illegal border-crossers since January of 2021, on the assumption that they would apply for asylum. Many never even expressed a fear of return, but such a fear has simply been imputed to them as a matter of policy. And many do apply; the number of “defensive” asylum claims (those made by illegal aliens in removal proceedings) tripled over four years to more than 465,000 in 2023, and the backlog of pending cases grew to more than 780,000 (see Figure 1 and Table 1 below).

In a very real sense, the goal of illegal immigrants is not so much to *receive* asylum, though that would be fine, but rather merely to *apply* for asylum, and then go about your new life secure in the knowledge your case may not be heard for years, and even if you are rejected, you are unlikely to be removed.

¹⁵ ARTHUR 2021.

¹⁶ ERNST 2019.

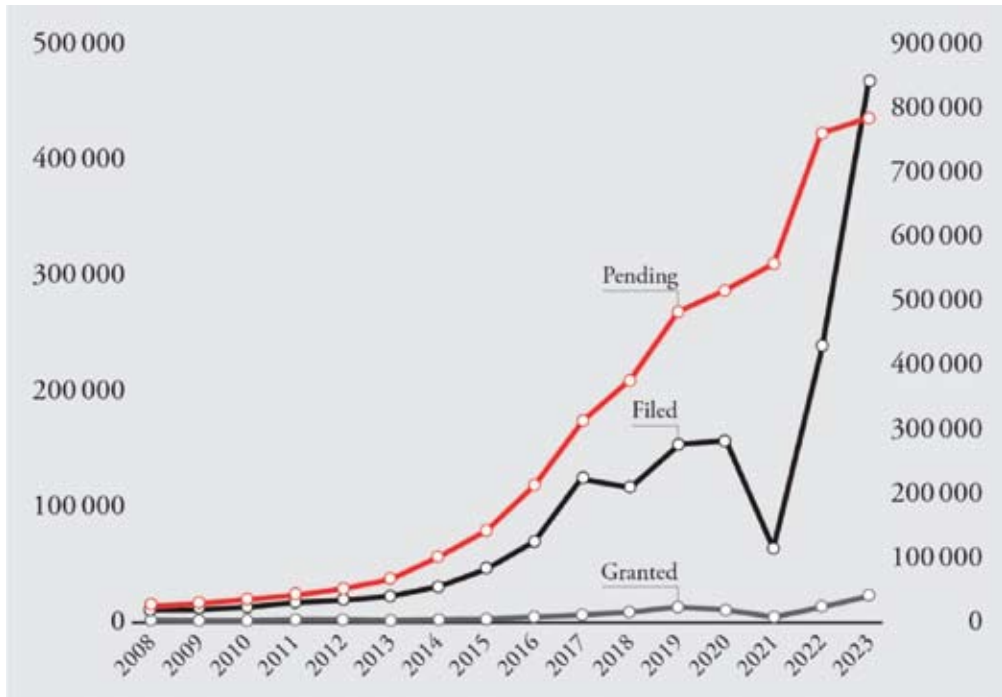


Figure 1. Defensive asylum applications. Source: Executive Office for Immigration Review 2023.

Fiscal year	Filed	Granted	Pending	Defensive Receipts: Defensive Grants Ratio
2008	13,171	2,674	26,403	4.93:1
2009	12,183	2,193	29,899	5.56:1
2010	12,758	2,091	35,497	6.10:1
2011	18,019	2,676	42,992	6.73:1
2012	19,997	2,737	52,148	7.31:1
2013	23,651	2,526	67,409	9.36:1
2014	31,560	2,680	103,134	11.78:1
2015	46,839	3,304	143,646	14.18:1
2016	70,554	4,803	213,798	14.69:1
2017	124,138	6,922	313,628	17.93:1
2018	117,276	9,056	376,627	12.95:1
2019	154,934	13,458	481,224	11.51:1
2020	158,208	10,866	515,830	14.56:1
2021	65,935	5,195	557,185	12.69:1
2022	236,547	15,295	758,639	15.47:1
2023	465,874	23,402	782,067	19.91:1

Table 1. Defensive asylum applications. Source: Executive Office for Immigration Review 2023.

Curbing asylum

There have been many efforts in developed countries to limit the use of asylum as a tool of illegal immigration. The Trump administration, for instance, instituted the Migrant Protection Protocols (Remain in Mexico) in early 2019, which required illegal border-crossers applying for asylum to be sent back across the border to await their hearings, thus eliminating the ability to use an asylum claim as a stratagem to obtain release into the U.S.

This yielded immediate results, tamping down the 2018 surge in illegal crossings that followed the end of the zero-tolerance policy (and the attendant family separations) at the border. But it remains, in the words of former U.S. Ambassador to Mexico Christopher Landau, a “second-best approach”, because “it seems odd for people to cross third countries where they do not have those imminent threats of danger and then apply for asylum in their preferred country.”¹⁷

In addition, the Trump administration reached “safe third country” pacts (formally known as Asylum Cooperative Agreements) with Guatemala, Honduras, and El Salvador. Those agreements would have required foreigners (of any nationality) who passed through one of those countries on their way to infiltrate the U.S.-Mexico border to be sent back to apply there.

Similar efforts to limit asylum within the existing 1951 framework have been made by other developed countries. Israel, for instance, reached agreements with Rwanda and Uganda to send illegal-alien asylum-seekers there to apply for asylum. From 2013 to 2019 Israel sent some 4,000 Eritrean and Sudanese illegal aliens.¹⁸

Israel’s program was voluntary, but Britain and Denmark reached similar agreements with Rwanda that envisioned mandatory removal to Rwanda. Denmark has paused its plan, but the UK version, after being tied up in litigation, was approved by Parliament in April 2024, and may begin soon.¹⁹

Italy also has reached an agreement that might be called “Remain in Albania”, wherein illegal aliens rescued at sea by Italian authorities would be sent to Italian-funded centers in Albania for asylum processing.

All these efforts were inspired by Australia’s “Pacific Solution”, which started in 2001. There were several iterations, but the point was that illegal aliens arriving

¹⁷ LANDAU – MARSAL – PÉNZVÁLTÓ – KRIKORIAN 2023.

¹⁸ WALSH 2022.

¹⁹ REUTERS 2024.

by sea would not be allowed to set foot in Australia, but rather would be sent to Australian detention facilities on the island nations of Papua New Guinea and Nauru (from which they could relocate to Cambodia²⁰, though few did).

But the shortcomings of trying to limit the harmful effects of asylum while still operating within the 1951 refugee regime are apparent from all these examples.

In the United States, the Biden administration suspended Remain in Mexico and canceled the safe-third-country agreements almost immediately upon taking office in 2021. Israel's supreme court suspended the Rwanda program in 2019.

Britain's agreement with Rwanda, despite its approval by Parliament, is sure to be challenged in court once it gets underway, with anti-borders groups claiming that it violates the UK's commitments under the Refugee Convention (as well as under the European Convention on Human Rights).

Administrative measures to limit the use of asylum for illegal immigration are always susceptible to change by subsequent administrations, and by courts. What are needed are legislative changes that will not be subject to judicial interference based on international agreements. In other words, the entire treaty structure of post-World War II asylum law needs to be dismantled.

This must start by withdrawal from the Refugee Convention and Protocol, but also from the Convention Against Torture, and the International Covenant on Civil and Political Rights – all of which prevent democratically elected governments of destination countries of illegal immigration from controlling their borders, but do nothing to change the behavior of non-Western countries.

Specifically, the *non-refoulement* requirements of such treaties are weapons wielded by trans-national NGOs and supra-national institutions against the sovereignty of Western nations. This does not mean that developed nations will start sending people to their deaths, but rather that *non-refoulement* is a determination to be made by national governments based on their own interests and their own citizens' moral and political calculations, not an objective obligation enforced in court by anti-sovereignty activists.

These broad international agreements bring to mind the Kellogg-Briand Pact of 1928, which claimed to “outlaw” war. During the debate in the U.S. Senate over its ratification in 1929, Sen. James Reed of Missouri derided the agreement as “throwing a kiss to Europe”, but added: “if we are going to throw a kiss, let us understand that it does not carry with it any obligation of matrimony.”²¹

²⁰ GLEESON 2016.

²¹ CONGRESSIONAL RECORD 1929.

Unfortunately, the international “kisses” that relate to asylum do, in fact, claim to carry with them obligations, but in practice those obligations are one-sided. Does anyone think Yemen, for example, or Belarus feel any obligation to honor the provisions of the Refugee Convention? Are Pakistan or Cuba sued by domestic NGOs to comply with Convention Against Torture? Is the conduct of Azerbaijan or Equatorial Guinea changed in any way by the fact that they ratified the International Covenant on Civil and Political Rights?

Obviously not. The only nations whose sovereignty is limited by such agreements are democratic nations least likely to abuse asylum-seekers in the first place. Only once a nation has withdrawn from these agreements will it be able to reclaim sovereign control over its borders.

Only once that is done will destination countries be free to prohibit, by law, any asylum claim from an illegal alien.

The way forward

The challenge will be greater in Europe, due to the European Convention on Human Rights, though UK Prime Minister Sunak has threatened to withdraw from the ECHR if it is used to block the Rwanda deportation plan. Likewise, barring constitutional reforms, Israel’s Supreme Court is able to overturn any law it disapproves of, whether or not it is undergirded by treaty commitments.

But that change is key – illegal entrants must, by law, be prohibited from making an asylum claim. Asylum as a right must be abolished.

In one important way, this simplifies the challenge faced by receiving states, but also presents a challenge. The simplification comes from ending the judicialization of immigration policy. In the words of David Martin, a professor of law at the University of Virginia, “Asylum decisions may require the most difficult adjudication known to administrative law, owing both to the high stakes involved and the unique elusiveness of the facts.”²²

This leads to ever-greater procedural protections and due-process rights, endless layers of appeal, and growing cries for taxpayer-funded legal representation for illegal aliens. Control over a nation’s borders takes second place to “due process” rights of illegal aliens, as judges and lawyers argue endlessly about how many

²² MARTIN 2000.

particular social groups dance on the head of a pin. Categorically eliminating asylum for illegal entrants – including the excision of the 1951 definition of a refugee from domestic statutes – simply wipes away this entire body of law.

The challenge will be what to do with those illegal aliens who come anyway. Abolishing defensive asylum for illegal aliens will have no practical effect if there is nowhere to remove illegal aliens to. In most cases, of course, they would simply be deported to their home countries, but there will always be some from places which do not accept the return their own citizens (known in the U.S. context as “recalcitrant countries”²³) and others who come from places where the receiving nation, for its own reasons, decides against *refoulement*. The danger would be that, rather than granting the formal status of asylum, the receiving government might simply confer some other, lesser status that still permits the foreigner to stay – which was, after all, his goal all along.

To avoid this, an abolition of the current asylum framework would need to be accompanied by precisely the kind of efforts by the UK and others described above to offshore asylum processing. But rather than send illegal aliens to Mexico or Albania to pursue their U.S. or EU asylum claims, or judge which countries to send illegal entrants to based on the robustness of their own asylum systems, nations would decide on their own where to send illegals, based on the political preferences of their own citizens rather than reference to outside standards. There would be no reason, for instance, to ensure that recipient countries were signatories to the Refugee Convention, as the UK has in its assessment of what countries other than Rwanda it might deport illegal-alien asylum-seekers to.²⁴

Conclusions

Today’s asylum regime is a relic from an earlier age. Given the effectively unlimited number of people who have the means to use an asylum claim as a stratagem to move to a richer country, the 1951 refugee framework and everything flowing from it needs to be scrapped.

The only way to win is not to play the game. Asylum must no longer be available to anyone who crosses a developed nation’s border illegally.

²³ CADMAN 2019.

²⁴ DATHAN 2024.

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