

Book Review

Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection

Gregor Noll

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643 pages, including appendices and bibliography

If timeliness were the sole measure of a book's value, then *Negotiating Asylum* should be worth much more than its weight in gold. For not only are the numbers of people who are displaced from their countries of origin alarming, but refugee-receiving states have for a while now displayed an ever-increasing propensity for creativity and doggedness in their single-minded efforts at deflecting and excluding protection seekers from their territories. This much is evident, even from the very title of Noll's extremely important intervention in this hitherto under-studied area. And despite its focus on the states that constitute the European Union (EU), Noll's book should be of interest to scholars, policy makers, and practitioners the world over.

Negotiating Asylum sets off with brief narrations of three historical cases of refugee protection. The first, which concerns the 1933 German laws that began the defining, marginalizing, and eventually excluding and dehumanizing of German Jews, reminds us all of the ways in which the construction of a discrete ethnic or racial group as a social, political, economic, or health "threat" to the mainstream population of a country almost invariably leads to the exclusion and dehumanization of that group. This is an important warning, even in contemporary Canada, where it is becoming somewhat fashionable (again) to justify attempts at disproportionately excluding certain groups of people from Canadian soil on the basis that they constitute "threats" to the "security," health, or some other vital interest of Canadians. It is an argument for the exercise of extreme caution when deploying such justificatory rhetoric.

The second narrative concerns the 1938 Swiss-German agreement controlling the entry of German Jews into

Switzerland just when they had begun to flee the intolerable conditions to which they were then being subjected by the Nazis. This account also reminds us of the ways in which too many richly endowed states too often stand aside and do nothing, or very little, to protect protection seekers who are fleeing the most intolerable conditions imaginable. It also highlights the tragic paradox that, more often than not, it is precisely at the moment that a sharp rise occurs in the protection needs of persons from a particular country (the moment of greatest need) that potential countries of refuge impose border controls, visa requirements, carrier sanctions, and all kinds of pre-entry and post-entry demands and conditions, all designed to stem the numbers of those arriving at the edges of their territories in order to seek protection. And this is so, despite international agreements that impose obligations on such states to protect a class of such persons in need of asylum. As Noll argues, the imposition of such pre-entry and post-entry conditions amount to devices aimed at preventing protection seekers from being in a position to file protection claims in the relevant country, and may in fact violate the international legal obligations of such states.

The third narrative concerns Sweden's imposition of visa requirements on citizens of Bosnia-Herzegovina in 1993, shortly after granting permanent residence to a large group of Bosnian protection seekers. The latter act led the rest of Europe to similarly impose restrictions on the entry of Bosnian citizens. This difficult situation was exacerbated by Croatia's decision a year earlier to close its borders to Bosnian refugees, despite the fact that it was the main refugee-receiving country in that conflict region. The lessons to be gleaned from this narrative are

similar to those already articulated when describing the second narrative.

The book also discusses more normative and interpretive deflection and exclusion devices that have been widely deployed by EU states. For one, it calls attention to the inimical uses they make of the “safe third country” concept. States understand (or interpret) this concept to require that if the protection seeker could have sought protection in a “safe” third country through which she passed, her claim shall be rejected, and she shall be returned to that third country. Under the scheme on which this concept is based, such a protection seeker’s fate is determined by the nature of her travel route and other allocative factors (stated in the Dublin Convention), thus denying her the right to choose the country in which to lodge her application for protection. Part of the genius of this book is the convincing ways in which it debunks the “efficiency”-based logic that underlies this regime of deflection and shows how its implementation leads too often not just to results that are manifestly absurd, but as well to the possible endangerment of protection seekers. Noll’s point is appreciated even better when one considers that in Europe, as in much of the rest of the world, the success or failure of one’s application for protection depends all too often on the luck of the draw—on the identity of the country in which the application is processed and how that country chooses to interpret the requirements of international law in that regard. That is why there is such a wide variation among EU states in the acceptance rates for protection seekers who are fleeing precisely the same situations or conditions. Just as interesting is the fact that none of the inter-European agreements on the regulation of migration seem to have much to say about the harmonization of the substantive normative regime that guides decisions on immigration control in individual countries.

Similarly, Noll also maps and critiques the ways in which too many of those protection seekers that have been lucky to penetrate the fortress of deflection devices mounted by states, and who have lodged protection claims in an EU state, are denied access to full-fledged administrative or judicial procedures for the determination of their claim. Here the most popular devices deployed by EU states are the concepts of “safe country of origin” and “manifestly unfounded claim.” Like the other deflection devices, these ones are also partly aimed at keeping down the length of time devoted to the determination of protection claims and to ensuring that the costs associated

with those processes are also reduced. While these objectives are, of course, understandable in the abstract, as Noll has ably demonstrated, such efficiency “gains” are almost always obtained at the cost of deflecting far too many protection seekers. Viewed in this light, such measures are, in general, unsupportable.

Another important contribution that the book makes to the literature in this area is its detailed and thought-provoking consideration of the inequities of the current burden-sharing arrangements, one that the UNHCR has long pointed out, and one to which a number of scholars such as James Hathaway and Alex Neve have already devoted some attention. Noll highlights the need for a more equitable burden-sharing arrangement among states by pointing out the fact that Iran, for instance, bears the grossly disproportionate burden of sheltering over 2 million refugees, while Germany (which is by far richer) shelters just over 1 million refugees. We might even add that a much poorer state like Tanzania shelters an even greater number of refugees. By pointing out and seeking ways to ameliorate these gross inequities, Noll delivers a sharp, if unintended, rebuke to many in Canada (one of the world’s richest countries) who seem to believe that each new refugee who appears at the Canadian border is one too many.

As admirable as Noll’s substantive work in this book is, his scholarly approach to the material is also commendable. It is quite evident to the reader that Noll has strived to be fair and balanced in his presentation. He describes and critiques the protection mechanisms that states have adopted, as well as the devices that states deploy to ensure the deflection of protection seekers from their territories, from the perspective of the state as well as from the perspective of the protection seeker. He has tried very hard to present an objective analysis of the opposing views, with the goal of finding a workable middle course that might meet the practical difficulties faced when protection is unavailable to those who need it most. For this reason, and many more, his work is likely to be a useful resource to *all* of those interested in this area.

However, despite its obvious and considerable strength as a piece of scholarly writing, the book may be seen as deficient in one or two respects. At the outset, Noll declares that the book is “a work on law, using the language of law.” This statement is understandable, of course. But in toeing too faithfully a “legal” line, Noll’s work leaves the reader with the impression (intended or otherwise) that it is easy in this area to neatly separate legal analysis

from other related forms of analysis, especially those common in the other social sciences. While we believe that this impression is somewhat misleading, ours is not merely a methodological quibble. We are convinced that this mindset might have been responsible for the fact that Noll did not grapple as much as he should have with the non-legal factors, structures, and stories that undergird and shape the turn within EU states to what he aptly terms “a common market of deflection.” That these stories, structures, and factors have a high level of explanatory power, even within a “legal” piece of writing, is almost palpable. For instance, if Noll’s ambition is to inspire in some way a transformation in this regime of deflection, it becomes relevant whether or not *legal* regimes of deflection largely owe their creation to the fears associated with the effects of non-legal factors such as economic depression, or are chiefly a matter of racial or cultural xenophobia, or of both. If any one of these permutations is correct, then it may not be as fruitful as we think to invest *all* of our scarce time in critiquing the nature of the legal regime of deflection. For, in this case, the nature of the legal texts that create a regime of deflection do not matter as much as the willingness of the administrative tribunals or policy implementers to adopt the most restrictive of the several possible interpretations of the legal text. And this willingness, and often zeal, to read the text in the most restrictive way possible, or to read it as authorizing a device of deflection when it could be read otherwise, is hardly ever rooted in the nature of the text itself but in social attitudes and pressures, and in the particular state’s self-understanding (as constructed in public discourse). This is not to suggest that “legal” analysis is not possible, but to argue that, in this case at least, legal analysis would have benefited tremendously from a less marginalized consideration of the social, economic, and cultural determinants of interpretive, policy, and adjudicative behaviour.

Also largely missing in Noll’s work is a paradox that might help us understand not just refugee law discourse, but also international law and international human rights discourses. This paradox relates to the inconsistent understandings of sovereignty among EU states. It is interesting to note that from Noll’s account, the area of refugee law (and migration law) is perhaps the one where European states still hold doggedly to the sovereignties! Despite their adoption of several regional international instruments in this area, it is quite clear to the reader that most of the devices that European states use to deflect potential protection seekers from their territories are

firmly grounded in the self-image of these states as Westphalian sovereigns. This is so, despite their insistence in other international forums that the affirmation of sovereignty so notable among Third World states is now an unqualified anachronism. The question then is, Why do EU states still hold on so tightly to their own sovereign rights to exclude (mostly Third World) protection seekers? This is also another example of how a more socio-legal analysis might be important to a project like Noll’s, because a possible explanation for this paradox is that EU states, just like other states, will deploy their self-images as sovereign states when these states perceive that social, economic, and political factors so necessitate. Here again, if the sovereignty of EU states is an obstacle of sorts to the effective protection of protection seekers, it is because such extra-legal factors have shaped a mindset that makes the deployment of sovereignty a necessity.

Again, despite these inadequacies, the book remains an excellent piece of scholarly writing, one that makes an original and timely contribution to the relevant literature. We suspect that most scholars and activists will surely find much to concur with, and little to dissent from, in this meticulously written and extremely well thought-out volume. While we cannot say the same with as much confidence for many policy implementers in EU states and beyond, some of them will be impressed by Noll’s thoroughness and balanced presentation. It is a book that is not meant only to inform and educate, but also to provoke and challenge. It can also be seen as a form of encouragement to those working in the field of refugee protection to continue with their relentless struggles for a more humane protection regime. For although there is a great deal of knowledge of the notorious tendency common among many EU states towards “deflection” of protection seekers, not only does this book exhaustively substantiate that critique, it also proposes concrete and practical means of influencing urgent reforms, no matter how seemingly far-fetched and difficult. We highly recommend it to all those who are interested in the subject of asylum and migration law.

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