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Michelle Foster. *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation.* Cambridge: Cambridge University Press, 2007. xlvii + 387 pp. $118.00 (cloth), ISBN 978-0-521-87017-7.

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Connecting the Conventions: Refugees, Economic, Social and Cultural Rights and Due Diligence

There are different causes for global migration, but probably the two greatest are flight from conflict zones as refugees, and movement from country to country searching for better economic opportunities. In most cases in the last twenty years, determining refugee status has been fairly easy. The individuals concerned have crossed a border as a group and have been placed in a camp under the authority of the UN High Commissioner for Refugees, as mandated by the United Nations 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. UNHCR makes the determination of status, sometimes on a collective basis. For other persons who cross borders and claim refugee status, determining whether the person is a bona fide refugee or an economic migrant has become increasingly difficult, particularly when the person has left the proximity of the country of origin and has reached a country that grants asylum on the basis of the Refugee Convention. Michelle Foster's thorough study of the issue examines the legal aspects of determining refugee status for individuals who have already reached a developed country. Her focus is on the use of economic, social, and cultural rights to determine status rather than the civil and political rights that are usually used.

Foster begins her analysis, which is thoroughly footnoted to case law, with an exploration of why a human rights framework should be used to interpret the refugee convention. That human rights are relevant is set out in the first paragraph of the preamble to the Refugee Convention. But which rights apply, or how, is not established in the Convention. She discusses the arguments made for and against using human rights protection as a ground for granting refugee status, and concludes that it is incontrovertible. She then examines whether socio-economic claims can provide grounds for status. Here the grounds become somewhat more murky, but she argues that although some consider economic, social, and cultural rights less than civil and political rights, there is a clear integration of all of the rights and no realistic hierarchy of importance among them. She does note that some states, including particularly the United States, consider economic and social rights aspirations rather than rights in the same sense as civil and political rights (and for this reason have only ratified the International Covenant on Civil and Political Rights).

She then examines the meaning of "persecution" as defined in the Refugee Convention. Here the application of economic and social rights again is less clear, since often violation of rights is because of neglect rather than a formal act, and it is sometimes difficult to separate the situation of the individual from the general conditions in his or her country of origin. She notes a number of cases where there is an intersection between group membership and access to education or to health. These are linked, in part, to her discussion of what constitutes a social group for the purposes of the Refugee Convention. Here there is a body of case law that links situations of individuals to human rights conventions that define groups, like the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on Migrant Workers and their Families, and the new Convention on the Rights of Persons with Disabilities. She notes that there are other groups, defined by common features that lead to discrimination, like persons suffering with HIV/AIDS. She analyzes the existing cases and concludes that there is an increasing, but by no means constant, body of law that has found depri-

vation of economic and social rights, including especially the right to work, to education, and to health, to be a ground for conceding refugee status.

I read Foster's analysis not from the perspective of an international lawyer, but as someone who was involved in different ways with several of the key conventions that she cites. While the International Covenant on Economic, Social, and Cultural Rights (ICESCR) is the direct translation of the Universal Declaration on Human Rights, much of the case law cited refers to the group specific conventions. I worked with the CEDAW Convention when I was Deputy Director of the UN Division for the Advancement of Women, as well as when the UN Declaration on the Elimination of Violence against Women was negotiated. I also had an input at an early stage of the negotiations of the Disability Rights Convention. The ICESCR sets out the rights and some obligations of states to protect them, but the other conventions were negotiated because governments and civil society believed that while states accepted the rights (even as aspirations), the issue for the groups was whether the rights could be enjoyed. The group-specific conventions contain a standard set of policies that states should adopt in order to guarantee enjoyment. The focus was on whether the states actually established policies as part of their compliance with the obligations and how effectively they implemented them.

The dilemma with economic, social, and cultural rights is that, if a state fails to provide for them for the whole population through policies and programs, it is difficult to make a case for individuals on the basis that the rights are not enjoyed. As Foster points out, the strongest case individuals can make is that, because of their political views, or their ethnic or other group affiliation, states act to deprive them of work, or education, or health services as a matter of policy. The key here is that the states act against the individual and that this constitutes persecution. Less clear is when there is no act, but rather neglect. States can argue that resources are not sufficient to enable the state to protect certain rights, as some have done regarding persons with HIV/AIDS.

This argument came up in the context of negotiating the UN Declaration on the Elimination of Violence against Women (VAW). The Declaration itself was one response to the fact that the CEDAW convention was completely silent on the violence, because the convention had been negotiated before the violence issue had come to the fore. The definition of violence against women in the Declaration is, in fact, a tautology ("violence against women 'means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life,"' United Nations Declaration on the Elimination of Violence Against Women, Article 1 [General Assembly resolution 48/104 of 20 December 1993]). It specifies a range of acts that constitute this type of violence. Because much of this occurs in non-public space, the issue of using a well-founded fear of violence as a woman's basis of a claim for refugee status has to do with the role of the state. Here the negotiators of the Declaration agreed that state responsibility was not merely to avoid committing violence itself, but rather to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons" (United Nations Declaration on the Elimination of Violence against Women). Under this understanding, if a state failed to exercise due diligence to protect a group–in this case women–it could be said to permit persecution. When the VAW was being negotiated I remember some of the participants noting that the addition of due diligence was a breakthrough in defining state obligations for acts that did not occur in public space. It is interesting that due diligence is not something highlighted in the analysis. In some respects, this is an instance of the emerging international notion of responsibility to protect, one of the innovations of Kofi Annan's tenure as UN Secretary-General and one now being promoted by his successor Ban Ki-Moon.

Foster bases most of her analysis on judicial decisions in common law countries. This makes sense since judicial reasoning in the United States, the United Kingdom, Canada, Australia and New Zealand (as well as some countries in the Commonwealth like South Africa) is how international law develops. While her arguments are cogent, I did note that in some places she noted that the application of economic and social rights was accepted by courts because the discrimination was directed toward groups, like the Roma, who could be shown (because of the Nazi concentration camps) to have been historically targeted. The same case often cannot be made for persons who are not part of those groups.

The real issue is whether, if violation of economic and social rights becomes a major basis for granting refugee status, this will open the floodgates to interstate movements. One could envisage, for example, persons from the United States fleeing to Canada and claiming refugee status because the U.S. government has not been able to provide them with affordable health insurance. More apt is the current move of persons to leave their own countries in search of a better life, but where, depending on how economic and cultural rights are interpreted, they could claim that economic opportunities were not provided in their home countries. Applying the due diligence test might be one way of dealing with this. If the state of origin has tried to improve the economic and social lot of its population without discrimination, there would be no grounds for claims of persecution. However, if it failed to exercise due diligence for a part of its population, based on discrimination against a coherent group, a claim might be made.

Foster notes that there is an evolution of practice, and that she has not addressed the issue of whether the Refugee Convention needs to be revisited in the light of a broader human rights approach. Such a re-examination would be a positive development, as would a further exploration of due diligence as a criterion. In the meantime, this book should be of considerable use to everyone dealing with the complexities of refugee law or the practical evolution of economic, social, and cultural rights.

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