

offer many examples of such autonomy and illustrate that such ‘shaping of policies’ takes on diverse forms: some of the actors studied in the book had their own political agenda when acting as lawyer-diplomats, judges or law officers, and their legal work always took place in different social, political and economic contexts.

Beyond illustrating this particular diversity, it is not easy to distil more specific lessons: the contributions to the book, while selective, address interactions between politics and law from very different angles. Furthermore, some chapters span centuries, others focus on prominent episodes and still others on an individual’s lifetime/life work. Readers are left with a rich presentation of case studies, but a relatively diffuse sense of international law’s agency and autonomy. Perhaps even this diffuse feeling reflects the selection of case studies. The ‘legal order’ whose ‘crafting’ is studied in the book is a particular one. Not only does it remain focused on the global North, but it also chooses not to address international law in the context of the violent and authoritarian 20th century. Could the darker roles of law in this century be productively studied from the perspective of law’s autonomy, or would a different theoretical approach be required? It is telling that none of the contributions is devoted to international lawyers working for an authoritarian regime or dictatorship. Soviet or national socialist international lawyers are absent, as are lawyers working for other European and global dictatorships in the 1930s and 1940s and beyond. Some coverage of practitioners from those authoritarian or semi-authoritarian backgrounds would have been helpful to test whether issues and challenges addressed in *Crafting the International Order* are of general relevance, or whether the case studies assembled in the book illustrate ways of ‘Thinking Law, Talking Law, Doing Law’ under privileged circumstances.

Miloš Vec

Chair of European Legal History, University of Vienna, Austria

Email: [milos.vec@univie.ac.at](mailto:milos.vec@univie.ac.at)

<https://doi.org/10.1093/ejil/chad023>

Liv Feijen. ***The Evolution of Humanitarian Protection in European Law and Practice***. Cambridge: Cambridge University Press, 2021. Pp. 227. £85.00. ISBN: 9781108692243.

The notion of ‘the humanitarian’ in international refugee protection is contested in its meaning and its significance. What does ‘humanitarian’ refer to? Is it an inherent characteristic of refugee protection, a desirable quality or a problematic tendency? The book *The Evolution of Humanitarian Protection in European Law and Practice* by Liv Feijen is centred on this notion of ‘the humanitarian’ in international refugee protection. It explores the notion in various contexts and meanings by looking at the legal interpretation and role of humanitarian protection and the concept of humanitarian (as opposed to legal) structures as well as by assessing humanitarian considerations

that underly and influence different parts of international refugee law. Around these considerations, readers will find an interesting compilation of material, including comparative examples from refugee law in some European states and a thorough discussion of the case law of the European Court of Human Rights (ECtHR). The book is structured in five chapters, which stretch from humanitarian ideas that inform refugee protection under international law, via the existing role of ‘the humanitarian’ in law, to a potential broader role of humanitarian protection.

Feijen begins with a ‘Humanitarian Prelude’, which recounts the public reaction to the death of the young refugee boy Alan Kurdi. Kurdi drowned when his family tried to cross by boat from Turkey to Greece. The picture of Alan’s body washed ashore led to a public outcry in September 2015 and, arguably, has impacted the political attitude towards refugee reception in Europe. The incident has been referenced in refugee law scholarship several times.<sup>1</sup> While it is debatable whether this ‘moment ... changed everything’ (at 1), as Feijen suggests, it encapsulates the real influence of collective indignation in view of the avoidable loss of a human life. This is a core assumption that the book builds on and develops: that the law of international protection does not exist in isolation from moral attitudes but is based on, and continues to be influenced by, sentiments of shared humanity.

Thinking about Alan Kurdi’s drowning today, one could equally conclude that little has changed. Civil society movements had advocated for better reception conditions and better rescue at sea before and have continued to do so since. The voices opposing refugee reception predated the incident and did not stop with it. The legal framework that obliges European states remains the same, comprising the 1951 Refugee Convention, European and international human rights treaties, as well as European Union law.<sup>2</sup> That said, the legal framework is open to continuing interpretation, and the effectiveness of the rules is not a given. Even where the legal framework has remained the same, the law applied in practice can evolve. It depends on countless decisions by the administrative authorities of member states, by judges and by parliamentarians, and those decisions are impacted by broader public debates and positions. In this sense, the law of refugee protection is indeed not static but, rather, dynamic. Yet whether this dynamic is a story of an increased humanitarian sense of responsibility is debatable. Developments in Europe over the last eight years point in the opposite direction. Open disregard for legal obligations towards migrants has grown in states like Greece, Croatia, Italy, Hungary and Poland. The reactions by the European Commission to such disregard have been minimal, and judgments from the ECtHR have not had much effect on structural problems such as lacking access to asylum procedures.

Given that the book revolves around the notion of ‘the humanitarian’, a clearer definition of that central concept would have been useful for readers. The introduction remains vague on the concept and does not clearly articulate the central thesis of the book. Feijen suggests that a ‘person on the street’ would disagree with the

<sup>1</sup> For instance, Itamar Mann equally begins with the recounting of the incident and the public reaction to it. I. Mann, *Humanity at Sea* (2016).

<sup>2</sup> Convention Relating to the Status of Refugees 1951, 189 UNTS 150.

international legal answer to who is entitled to international protection and would instead ‘think of the old or sick’ (at 2). This claim is not backed by any reference, nor is the subsequent claim that ‘Western media often show heart-breaking stories of how orphaned children are sent back to post-conflict countries’ (at 2). In a footnote, the book explains its use of ‘humanitarianism’: it relates ‘to the development of a norm of humanitarianism, which serves to justify states’ practice to admit and assist aliens’ (at 3). Later, Feijen provides another definition of humanitarianism as ‘moral obligation of the more fortunate to assist the less fortunate’.<sup>3</sup> But none of this offers much specificity on the central notion of the book.

The first chapter, ‘The Ethical Dimension of Immigration Policies’, explores the humanitarian ideas that underlie international rules of protection. It begins with the recounting of a case: the deportation of a 91-year-old woman was stopped because it would have constituted a violation of Article 3 of the European Convention on Human Rights.<sup>4</sup> It was also accompanied by ‘vehement protest’ against the planned deportation, which leads Feijen to the question of ‘[h]ow and why ... feelings of compassion affect the outcome of an administrative or judicial decision on residence permits’ (at 7). Feijen then introduces central theories on the law of migration, including the basis of a state’s right to control immigration and the conditions under which migrants have a right to enter. With respect to contemporary approaches, Feijen mentions ‘The New Humanitarianism’. She references the work of Didier Fassin who coined the notion of ‘humanitarian government’, which according to Feijen denotes ‘a new way of governing states based on policies of humanitarian moral values or sentiments’ (at 20). This to her offers ‘a convincing foundation as the ethical basis for granting humanitarian protection’ (at 23). However, in Feijen’s enlisting of Fassin, the ambivalence inherent in the term ‘humanitarianism’, which is crucial for Fassin, is lost: the ‘tension between inequality and solidarity, between a relation of domination and a relation of assistance’.<sup>5</sup>

In the further parts of the first chapter, Feijen looks at how certain (European) states have sought to ‘retain the balance between compassion and national interests in immigration matters’ (at 29). Feijen outlines the ‘law and society approach’ in Nordic countries, which she describes as being based on a strong welfare state, restrictive asylum policies and recourse to other protection instruments that come with fewer rights than asylum – for instance, regarding family reunification. In regard to Germany, Feijen highlights the practice of ‘church asylum’ (that is, temporary protection, within religious premises, to avoid a deportation) but notes that it has only been applied in a relatively small number of cases. With respect to the United Kingdom, Feijen observes a trend of ‘legalized humanitarianism’, where humanitarian considerations are invoked to support appeals against refusals of entry or claims to asylum. A subsequent part of the first chapter considers ‘medical humanitarianism’ (at 44) in France,

<sup>3</sup> With reference to D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002), at 57.

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

<sup>5</sup> D. Fassin, *Humanitarian Reason: A Moral History of the Present* (2012), at 3.

where special residence permits have been issued on medical grounds. Overall, the first chapter, like the entire book, offers an analysis of legal instruments of protection and couples this analysis with broader social considerations. This makes for a highly informative read but comes at times at the cost of precision. The relationship between legal concepts, moral perceptions and political developments is not explored systematically. As Feijen writes, '[i]t is ... the premise of this book ... that there is a perceived moral duty to admit, or refrain from expelling, certain categories of persons based on humanitarian values that are deeply entrenched in religious and philosophical traditions, and that this permeates immigration policies in many countries' (at 1). This claim is hardly contested; the crucial question, however, is how the perceived moral duties permeate policies – a question particularly for legal scholars. Any engagement with this crucial question requires thinking about what has shaped international, regional and domestic rules and institutions and who participates in the interpretation and further development.

In the subsequent chapters of her book, Feijen traces the influence of humanitarian ideas on particular aspects of the regime of refugee protection. The second chapter, 'Humanitarian Considerations and the Institution of Asylum', addresses the origins of refugee protection and asks who is covered by such protection. It examines the lines of thought on which the contemporary legal regime is built and the evolution of the concept of 'refugee'. The third chapter, 'Humanitarian Protection or Human Rights Protection', offers insights on what role vulnerability has played in the case law of the ECtHR. It looks at health conditions as reasons prohibiting deportation, at the protection of unaccompanied minors and at the right to family life. The fourth chapter, 'A Solution for Persons with Other Protection Needs', examines rules regarding persons whose claim to international protection is not clear or who have no claim but cannot be returned. This examination includes a part on protection of persons displaced in connection to environmental factors (at 142). A fifth and last chapter, 'From an Act of Charity towards a Legal Obligation', returns to general questions about the nature of humanitarian protection and looks ahead at a potential wider role of humanitarian considerations in law. It argues that humanitarian protection is used with a combination of 'humanitarian and protection considerations' (at 167) and can offer a flexible tool, for instance after persons have been rescued at sea. The chapter further describes cases of regularization based on humanitarian considerations and asks what type of harm prompts international protection obligations (at 186).

Throughout her book, Feijen provides readers with a broad range of material and reflections on questions of humanitarian protection. As is clear from the brief summary so far, the five chapters cover a lot of ground and, read together, offer many illustrations of how humanitarianism influences the existing legal frameworks. A more rigorous framework of analysis might have added to this valuable work of scholarship, allowing for a critical analysis based on the material. There is, for instance, more to explore about the relationship between the humanitarian and the legal form:

while Feijen does not address the matter, her work illustrates the wide range of meanings that the terms can have. 'Humanitarian', for example, can denote considerations that are explicitly non-legal in opposition to 'legal'. Feijen provides an example of this when she mentions 'humanitarianism' as discretionary generosity as opposed to the legal obligations of states (at 3). As is clear from Feijen's analysis, 'humanitarian' considerations can also exist as a term within the law. And it is used as a term referencing states' discretion within an existing legal framework, as in the case of a 'humanitarian visa'. In other instances, 'humanitarian' is used in opposition to 'political': the Statute of the United Nations High Commissioner for Refugees declares that the 'work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social'.<sup>6</sup> The word 'humanitarian' here means an activity that does not side with any party in a conflict. This purportedly non-political nature of refugee protection and the role of humanitarianism have been the object of serious critique.<sup>7</sup> While Feijen makes clear that she is not concerned with extraterritorial activities of states (at 3), those humanitarian activities are not something 'extraterritorial' to Europe: they also concern, for instance, the status of non-governmental organizations assisting refugees in Greek camps. The different dimensions of the concept 'humanitarian' are entangled, and this complexity seems central to the structural challenges in international protection. An engagement with this complexity could have enhanced the value of Feijen's broad-ranging reflections.

At the end of her fifth chapter, Feijen wonders whether grounds for humanitarian protection should be perceived as a 'tertiary protection status' (at 183). While this is formulated as a question several times (at 184, 188), the book's conclusion ends with a short, and surprisingly clear, 'proposition ... that a third generation of rights should be harmonized as a tertiary protection status' (at 191). This 'proposition' is perhaps less in the nature of a conclusion of the book's analysis than an invitation to begin a discussion about what such harmonization could look like. How would this new (tertiary) protection status relate to existing forms of discretionary, humanitarian protection? Feijen's concluding proposition invites further thinking about theoretical questions (as do several other parts of the book): the value and structure of discretionary schemes of protection; the procedures in which such discretion is exercised; and the meaning of 'humanitarian', which is at the same time an element in the existing regime of refugee protection and a normative impulse that goes beyond existing legal obligations. Feijen's book provides a rich basis for engaging in such further thinking.

Dana Schmalz

Max Planck Institute for Comparative Public and International Law,  
Heidelberg, Germany  
Email: [schmalz@mpil.de](mailto:schmalz@mpil.de)

<https://doi.org/10.1093/ejil/chad032>

<sup>6</sup> Statute of the United Nations High Commissioner for Refugees 1950, A/RES/428(V).

<sup>7</sup> G. Verdירה and B. Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (2005); Fassin, *supra* note 5.