What’s in a Label?

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One of the most striking features of the international refugee regime as it has evolved over the last quarter century is the proliferation of labels. Rather than simply assessing the circumstances of applicants against the Convention refugee definition, the governments of most developed states have instead invented a seemingly endless list of alternative statuses – “B” status, humanitarian admission, temporary protected status, special leave to remain, Duldung, and the like. Persons assigned one of these labels have generally been protected against refoulement in line with Article 33 of the Refugee Convention. But in a variety of other ways, they have not been treated as refugees.

They have, in particular, faced limits on freedom of movement, the ability to earn a livelihood, and access to education and general social support systems. Most critically, there has been a near-universal association of alternative status with non-permanent presence. While refugees are by and large granted “asylum” – understood to entail an enduring right to remain in, or to be enfranchised by, the host country – the beneficiaries of alternative forms of protection have usually been admitted instead to what is commonly called “temporary” protection. That is, they are not granted an indefinite right to remain, but are instead allowed to stay in the host state for the duration of the risk in their country of origin.

In pursuing this dual track approach, developed states have laboured under two fundamental misunderstandings.

First, the approach is apparently driven in large part by a belief that recognition of Convention refugee status is a legal fetter on the right of governments to bring protection to an end when and if circumstances in the

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the University of Potsdam. Hemme Battjes of Vrije Universiteit Amsterdam kindly provided assistance in updating the analysis to take account of developments up to January 2003. Most of the positions taken here will be developed in detail in The Rights of Refugees Under International Law (Cambridge University Press, forthcoming 2004).
country of origin allow. As a matter of international law, this is not so. A link between refugee status and “asylum” was rejected both in the drafting of the Refugee Convention and at the 1977 Territorial Asylum Conference. Moreover, the cessation clauses in Art. 1(C)(5–6) of the Convention make it absolutely clear that refugee status entails simply a duty to protect so long as a well-founded fear of being persecuted persists – ironically one of the key goals pursued by establishment of the alternative labels. Granted, the dissociation of refugee status and asylum would be contested at the level of politics and domestic law in some states. But the crucial point is that, as a matter of international law, there was and is no impediment to seeing refugee status as requiring only protection for the duration of risk. Refugee status is not a legal constraint on the right of states to define their own immigration policies.

Second and conversely, there is no legal magic in the various alternative protection labels assigned by states. Because the recognition of refugee status is simply a declaratory, not a constitutive act, a person is a refugee with entitlement to Convention rights as soon as he or she in fact meets the refugee definition. The decision of a reception state to label a refugee as something else is, as matter of international law, quite irrelevant. If the individual is in fact a refugee as defined by the Convention, even if not yet recognized as such, he or she must be treated with respect for the system of incremental entitlement established by the Refugee Convention. A government may not rely on its decision to delay or avoid verification of refugee status in order to circumvent respect for rights which are, as a matter of international law, its duty to uphold.

This does not mean that every right set out in Arts. 2–34 of the Convention must be immediately granted to any person who claims to be a refugee. To the contrary, the Convention strikes a neat balance between the needs of refugees and the legitimate concerns of state parties. While all refugees under a state

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3 See text infra at note 34.

4 I explain the nature of this rights regime, including what I refer to as its incremental “attachment system”, in “The International Refugee Rights Regime”, (2000), 8(2) *Collected Courses of the Academy of European Law*, pp. 91–139 (“Refugee Rights Regime”).