Reconfiguring the Concept of Asylum

Workshop on Forced Migration Studies, Kolkata, India, 16-21 March 2015

Simon Behrman, University of East Anglia, UK

There is much careless talk in forced migration studies and elsewhere about a 'right of asylum'. Usually this is framed in terms of its supposed grounding in international refugee law. As a result it is commonly assumed that this legal regime, underpinned by the 1951 Refugee Convention, and supplemented by the quasi-customary principle of *non-refoulement* and various human rights treaties, represents the *sine qua non* of protection for forced migrants today. But as just a few commentators have noted from time to time, insofar as a right of asylum exists it is a right of the State to grant asylum, not the individual to receive it. This is evidenced by the complete absence of any mention of such a right in the 1951 Convention along with other regional legal instruments, and by the insistence by states that the original draft of the Universal Declaration on Human Rights which talked of a right to be 'granted' asylum be changed to the mere right to 'seek and enjoy' it. Indeed, I would argue, how could it be otherwise in a system of international law underpinned by the fundamental principle of state sovereignty?

This paper addresses this issue in two ways. First, by uncovering the origins of international refugee law squarely within the desire of states to manage and control the movements of forced migrants, rather than 'humanitarian' concern for them. Second, by discussing the concept of asylum as it has been understood and practiced from antiquity up until the modern age, which was grounded within it etymological root as 'freedom from seizure' by sovereign power and the law. This tradition is a rich one, which has drawn variously on theological, spiritual and political notions of justice and contestability. It is a tradition that, in contrast to law, directs itself to the protective principle.

Refugee Law as an Apparatus of Control

From the earliest days of international law, there has been a concern to delineate the refugee subject through exclusions and restrictions. The founding theorists of international law laid out certain key principles in relation to asylum, which have

remained at the heart of refugee law today. Hugo Grotius sought asylum in France and was one of the first modern jurists to call for a right of asylum to be recognised in international law.[1] Yet he qualified this by denying such a right to the undeserving, namely those guilty of having done something 'injurious to human society or to other men'.[2] Christian Wolff set out a natural law by which 'in primitive society any man is allowed to dwell anywhere in the world', whilst on the other hand considering the right of the sovereign to decide 'whether or not he desires to receive an outsider into his state'. On balance, the right of the state in civilised society must be preferred: 'if admittance is refused, that must be endured'.[3] Samuel von Pufendorf believed that it was a matter exclusively for the state to decide whether or not it was in its own interests to allow entry for the refugee in question.[4] And Emmerich de Vattel perhaps expressed the problem from the viewpoint of states most clearly when he wrote:

> 'if in the abstract this right [of asylum] is a necessary and perfect one…it is only an imperfect one relative to each individual country; for…every Nation has the right to refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it serious trouble…By reason of its natural liberty it is for each Nation to decide whether it is or is not in apposition to receive an alien. Hence an exile has no absolute right to choose a country at will and settle himself there as he pleases'[5]

If the individual right of asylum is imperfect, then the classic authors on international law are much clearer in asserting a far more 'perfect' and secure right of asylum when understood as that which belongs to the state. Again, Vattel writes: a state is 'free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation'.[6] Writing in the 1960s, Léopold Bolesta-Koziebrodzki has pointed out that the right of

---

1 Hugo Grotius, *The Law of War and Peace* (Francis W. Kelsey [trans], Bobbs-Merrill 1962) ii.2.XVI.

2 ibid ii.21.V.

3 Christian Wolff, *Jus Gentium Methodo Scientifica Petractatum: Volume Two* (Joseph Horace Drake [trans], Clarendon Press 1934) s.147, 148.

4 Quoted in Einarsen (n 6) 42.

5 Quoted in Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume Two* (A.W. Sijthoff 1972) 14.

6 ibid.

asylum is founded upon the inherent right of the state to territorial integrity and the right to admit into its domain whomever it so wishes.[7] Whereas the contemporary scholar of French immigration policy, Gérard Noiriel identifies the modern principle of state sovereignty as the link between the destruction of the ancient sanctuaries and the modern law of asylum:

> 'From the beginning of the 16th Century, the right of asylum became the prerogative of royal power. It presupposed the sovereignty of the refugee's state of origin (the principle of territorial plenitude excluding the possibility of the domestic spaces which had constituted the religious refuges of earlier centuries) and the sovereignty of the state of reception (which alone decided whether or not to receive the exile). The right of asylum was therefore a *consequence and not a limitation of the principle of sovereignty*.'[8] (emphasis added)

Henri Coursier describes very well the transformation following the French Revolution:

> 'With the new regime, the right of asylum ceases to be a right which the person can claim, relying on the principles of humanity as being above the law of the State, to become instead a right which, while it operates in the interests of the individual on the basis of humanitarian norms, is one that the state asserts for itself'.[9]

What Coursier identifies is that while humanitarianism *might* be a function of modern refugee law, it is at bottom based on the rights of states not of the refugee. Put another way, Richard J. Fruchterman has written that the birth of the modern age brought with it 'a shift away from the idea that the individual had a right to territorial asylum and

---

7 Léopold Bolesta-Koziebrodzki, *Le Droit d'asile*, (A.W. Sythoff 1962) 79.

8 Gérard Noiriel, *Réfugiés et sans-papiers: La République face au droit d'asile XIXe -XXe siècles* (Hachette 1998) 20, footnote 1.

9 Henri Coursier, 'Restauration du droit d'asile' (1950) 32 *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge* 909, 911

toward the concept that it was solely the right of the State to grant or deny territorial asylum'.[10]

The repeated insistence over the centuries by jurists and commentators on international law that the right of asylum is one that belongs to the state not the refugee is reflected in the formation of the current regime of international refugee law. In the original draft of the 1951 Convention, what is now paragraph four of the Preamble referred to the 'right of asylum' and the consequent burden it placed on states of refuge. During the *travaux préparatoires* concern was expressed by a number of delegates at this wording. But the President of the conference reassured them that the right being described was that of the state to grant asylum, not of the individual who benefits from it.[11]

It is therefore unsurprising that contemporary refugee law, instead of being the institutional expression of humanitarian concern for the refugee has revealed itself to be 'a basis for rationalizing the decisions of states to refuse protection'.[12] In answer to those who would maintain that international law represents some kind of higher authority descending from the heavens to mitigate the power of the nation-state, James Hathaway puts his finger on the critical point when he writes that international law 'must be agreed to by, rather than imposed upon, states'.[13] More specifically, Fruchterman is correct to point out that:

> 'The… [1951] Convention is not in derogation of the State-supremacy doctrine, but is rather a voluntary undertaking by the signatories to provide assistance to refugees. The States still retain full authority to grant or deny

10 Richard L. Fruchterman, 'Asylum : Theory and Practice' (1972) 26 *Judge Advocate General Journal* 169, 171.

11 Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With A Commentary by Dr Paul Weiss* (Cambridge University 1995) 30. The final draft, to clarify the point, refers to the 'grant of asylum'.

12 James C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129, 130

13 ibid 134.

asylum to persons who do not qualify as refugees as that word is used in the Convention.'[14]

The current system of international refugee law as one whose origins are rooted in the perceived need to 'govern disruptions of regulated international migration in accordance with the interests of states' is a prime example of this truism.[15] Moreover, the point about determining asylum on the basis of who is or is not deemed to be a refugee 'as that word is used in the Convention' has been crucial to the ability of states to police the reception of forced migrants.

The Birth and Development of International Refugee Law

International refugee law has its origins in the chaotic conditions following the First World War. In particular the huge numbers of people forced to flee as a result of the Russian Revolution and the breakup of the Ottoman Empire demanded some kind of response. In 1926 the number of refugees in Europe was estimated to be around 9.5 million.[16] The first initiative was the creation by the League of Nations of the office of High Commissioner for Refugees, with the Norwegian Fridtjof Nansen appointed to the role. He in turn created the Nansen Passport system, based on a temporary document issued to refugees in order to allow them at least some limited travel in exile. However, one had either to be Armenian or Russian to qualify as a recipient of this document. For the Armenians, and other minorities of the former Ottoman Empire, they had possessed citizenship of a state that no longer existed. In the case of the White Russians, they had been stripped of their Russian nationality by the Bolshevik government in 1921. The Russian refugees had an ambiguous legal status for a few years as most other states did not recognise the Soviet government. But by the end of the 1920s this was no longer the case. In contrast to the Russians the Italian government of Mussolini decided against revoking the nationality of the large number of its political exiles, partly, at least, because the renewal of passports to the exiles helped facilitate continued surveillance over their movements.[17] Because these Italian

14 Fruchterman (n 19) 177.

15 Hathaway (n 21) 133.

16 Marrus (n 4) 51.

17 Simpson (n 3) 56.

refugees therefore did not formerly fall outside of a state/individual relationship, they were not covered under the Nansen system.

Hathaway describes this period as one in which 'refugees were defined in largely *juridical* terms', so as to remedy the fact that a mass of stateless persons in Europe was creating 'a malfunction in the international legal system'.[18] While Claudena Skran suggests that, as well as assisting some refugees to travel, the Nansen Passport 'would help governments to count and monitor their refugee populations'.[19] Noiriel argues that the relative ease with which the Nansen Passport was instituted in the years after the First World War was possible only because European states believed that it would facilitate the mass repatriation of refugees caused by the war and the revolutionary upheavals in Russia.[20] In short the Nansen Passport system, often claimed to be a prime example of humanitarian assistance, was primarily about stabilising, monitoring and controlling the movement of forced migrants in Europe. Insofar as it had a humanitarian effect in facilitating greater ease of movement to refugees who would otherwise have been without travel documents, this was a secondary aim. Moreover, it must be stressed that such a scheme was only necessary because of the plethora of border controls that had become the norm across Europe over the preceding decades. In essence, states having artificially created the problem now found that they had to provide some kind of a solution to those who fell between the cracks of the nation-state paradigm.

First attempts at establishing a system of international refugee law

The *ad hoc* and 'rudimentary'[21] arrangements of the 1920s were followed by more formal and far-reaching attempts to create a system of international refugee law with

---

18 James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33 *International and Comparative Law Quarterly* 348, 349, 358.

19 Claudena Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 7.

20 Noiriel *Réfugiés et sans-papiers* (n 1) 106.

21 Paul Weis, 'The International Protection of Refugees' (1954) 48 *The American Journal of International Law* 193, 194.

the 1933 Convention, and a further international agreement at Evian in 1938.[22] The 1933 Convention was the first legally binding international treaty on asylum, and would form the basis for the 1951 Convention.[23] A major impetus for the creation of the 1933 Convention was to put in place a framework of international law that could deal with refugees beyond the anticipated lifetime of the Nansen Office.[24] Only Russians, Armenians and a few other small groups such as Christian minorities from the former Ottoman Empire were included. The plight of those forced to flee the new Nazi government in Germany was completely ignored, in spite of some 50,000 refugees fleeing the country in the early part of that year.[25] The 1933 Convention also allowed signatories to derogate from all aspects except for one: Chapter XI, General Provisions.[26] By the outbreak of the Second World War, however, only eight countries had formally adopted the Convention, and many of them had derogated from some of the most important provisions such as Article 3 on *non-refoulement*.[27] This was the first enunciation of this principle, which has since become a critical aspect of international refugee law. However, states could still expel refugees for 'reasons of national security or public order'.[28] The U.K. made a reservation to Article 3 stating that 'public order' could include criminal or 'moral' issues.[29] Similar exclusion clauses were later included in Article 5 of the 1938 Evian Convention.[30]

By 1938 it was clear that there needed to be a more significant response to the exodus of Jews fleeing Nazi Germany. The matter became even more urgent

---

22 League of Nations, *Convention Relating to the International Status of Refugees,* 28 October 1933, League of Nations Treaty Series, Vol. CLIX No. 3663; League of Nations, *Convention Concerning the Status of Refugees Coming From Germany,* 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461.

23 Skran (n 14) 14.

24 Simpson (n 4) 86. In 1931 The League of Nations had stipulated 31 December 1938 as the date by which the Nansen Office's work would cease.

25 Simpson (n 4) 59; Skran (n 14) 18.

26 Skran (n 4) 24.

27 ibid 24-25.

28 1933 Convention (n 20) Article 3.

29 R. Yewdall Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 *British Year Book of International Law* 98, 105, footnote 3.

30 Simpson (n 4) 106.

following the annexation of Austria in March of that year. So, at the instigation of the U.S. government, a meeting was convened at Evian in July. Although the Evian conference has gone down in history as one of the more shameful episodes in the closing of doors by Western countries to the Jewish refugees, it did result in a new convention specifically to deal with assisting them.[31] Article 1 defined 'refugees coming from Germany' as:

> 'a) Persons possessing or having possessed German nationality and not possessing any other nationality who are *proved* not to enjoy, in law or in fact, the protection of the German Government;
>
> b) Stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are *proved* not to enjoy, in law or in fact, the protection of the German Government.
>
> 2. Persons who leave Germany *for reasons of purely personal convenience* are not included in this definition.'[32] (emphasis added)

Two things are most striking about this definition. First, it is the first time that an international agreement insists on proof that the person being helped is a refugee as so defined. We have here the inauguration of a key aspect of contemporary refugee law, namely that assistance is conditional upon the offering of proof by the refugee that they fit the juridical definition of a refugee. In addition, the second clause, excluding those who have left Germany 'for reasons of purely personal convenience' is also the first time in international law that a group are specifically excluded from protection. Skran writes: 'This clause makes a distinction inherent in refugee law as a whole – that refugees were a separate, special, and deserving category of international law.'[33] I would add to that, that it also assumes such a distinction is clear and can be expressed in law without in fact denying protection to all those who need it. One can easily imagine Germans, Jewish or otherwise, who having felt harassed or oppressed living under the Nazi regime, had chosen for reasons of 'personal convenience' to move

---

31 The extent of the shabby attitude of state delegations' towards refugees and indeed the whole purported task of the conference is well described in Marrus (n 4) 171.

32 1938 Convention (n 20) Article 1.

33 Skran (n 14) 31.

elsewhere. The concept of 'personal convenience' is certainly not an objective one. But what such a clause does is not simply to make a distinction between two objectively pre-determined groups, it also necessarily involves a level of suspicion or scepticism about all claims for protection, for it becomes necessary to judge all as to whether or not they are 'genuine' refugees or merely migrants for personal convenience. It is therefore easy to accept Gil Loescher's claim that 'the term *economic refugees* was first used to describe Jews leaving Germany in the 1930s; they were referred to as the *Wirtschaftsemigranten*'.[34]

In sum it can be said that 'the interwar years…helped to establish refugees as a special category of migrant'.[35] For most commentators at the time and since this was a sign of progress as it appeared to create special privileges for refugees in the context of closing borders and more stringent measures on entry. Certainly in the context of the specific needs of the refugees fleeing Nazi Germany, and with hindsight refracted back through the Holocaust, such a view is understandable. However, in the light of over 60 years' experience of solid legal regimes at both international and domestic level that specifically categorise the refugee as distinct from other types of migrant, such a positive spin on these interwar developments are at least questionable. Moreover, much of the detail of the legal provisions discussed so far suggests a far greater concern even at the time with control of the refugee rather than assistance or protection.

Writing in 1938, Louise W. Holborn, later to be the official historian of UNHCR, accurately identified the key problem from the point of view of nation-states:

> 'Disorganized groups of refugees are more difficult…to deal with than are organized groups, even if the latter are larger in number. A clearly defined status for refugees would aid efforts to make refugee status transitory in character and would facilitate settlement. If coupled with adequate technical organization, refugees would be under more direct control than at present, and

---

34 Gill Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993) 17.

35 Skran (n 14) 36.

> the possibility of subversive political activity against governments responsible for their exile would be greatly lessened. The political complications often connected with aiding refugees would be practically eliminated also, particularly if the local offices concerned with refugees were qualified to decide which people fell within the accepted definition of "refugee"'.[36]

Here, in essence, is revealed the cynical approach that was evidently current in the pre-war period: the focus of refugee law was to be on managing refugees, rather than assisting them. At around the same time another commentator, R. Yewdall Jennings made a similar point, that for there to be an effective legal system governing refugees the 'first step' would have to be 'a definition of the term "refugee"'. The definition he offers is one who has lost the protection of their state, and for whom therefore, 'the link between him and international law' has broken down.[37] Also writing in 1938, although from perhaps a less cynical perspective, Simpson, as part of his survey into the refugee crisis in Europe, argued that refugee assistance had been hobbled by political partisanship.[38] Specifically, he criticises as 'political sectionalism' attempts made by refugees themselves to add to the refugee program of the League an anti-fascist aim in order to address the root cause of refugee problems. Instead, Simpson proposes that refugee assistance be made, as far as possible, a technical procedure. Repeatedly then, the concerns expressed by leading commentators on the refugee question, ones moreover who tended to be sympathetic to the plight of the refugees, at the close of this first period of the development of international refugee law, are all to do with controlling, managing and depoliticising asylum; their solution being to make it more a juridical and administrative affair.

Post-1945

During the Second World War the first step towards the creation of a global refugee relief organisation was created and voluntarily placed itself, curiously enough, under the direct control of the military Supreme Commander of Allied Forces.[39] And they

---

36 Louise W. Holborn, 'The Legal Status of Political Refugees 1920-1938' (1938) 32 *American Journal of International Law* 680, 703.

37 Jennings (n 27) 99.

38 Simpson (n 3) 97.

39 Noiriel, *Réfugiés et sans-papiers* (n 1) 120; Marrus (n 4) 319.

appeared most concerned not for the welfare of the refugees, but rather for the disruption that might be caused by 'uncontrolled self-repatriation of displaced persons who might form themselves into roving bands of vengeful pillaging looters on trek to their homes'.[40] Following the end of the war, many former Nazi concentration camps were turned into 'Assembly Centres' for refugees. Liisa H. Malkki argues that it was in these centres that the bureaucratic monitoring and documenting of refugees was first initiated, out of which the 'postwar figure of the modern refugee largely took shape'.[41]

A result of this system of refugee law that has developed since 1945 has been the 'leaching-out' of the politics that lays behind refugee movements; this depoliticisation has in turn become pervasive amongst the various humanitarian and policy organisations concerned with refugees today.[42] In addition, the initial placing of the military in control suggested that with an emerging Cold War, European security and reconstruction became the prime motivation behind the development of refugee policy. Therefore, 'addressing the refugee crisis became a geopolitical imperative', whereas in the specific U.S. context, 'foreign policy interests dictated that the United States take some responsibility for resettling war refugees.'[43] Although, as Mae M. Ngai notes, no consideration was given to the many Asian refugees created as a result of the war in the Pacific. At this time, of course, this region was not yet considered to be a significant arena of conflict between the emerging superpowers.

In the initial post-Second World War period the distinction between refugees and what were known as 'surplus workers' was unclear, with many of the former being lumped in with the latter. Reiko Karatani argues that the emerging refugee

---

40 Supreme Headquarters Allied Expeditionary Force (SHAEF) Plan, quoted in Liisa H. Malkki, 'Refugees and Exile: From "Refugee Studies" to the Natural Order of Things' (1995) 24 *Annual Review of Anthropology* 495, 499. Similar sentiments were expressed by General Patton in language that was only slightly more offensive, describing DPs as 'locusts' who needed to be kept behind barbed wire. Marrus (n 4) 322.

41 Malkki (n 48) 500.

42 ibid 505.

43 Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University 2004) 235-6.

regime essentially reflected the concerns of states that this 'surplus population' not endanger post-war political stability and economic recovery.[44] Thus much of the discussions on the various instruments of international law, culminating in the 1951 Convention were dominated by state representatives emphasising defence of national interests and the need for a strict codification in law of the category of refugee, so as to enable a filtering process for the 'surplus population'.[45] In June 1946, for example, the French delegate to the UN remarked that the question of the refugee definition was far from being a merely academic one. A broad definition, he argued, such as the one proposed initially by the U.K., would lead to a potential difference in the number of refugees entitled to protection ranging from 200,000 to 1 million.[46] In the following month the United Nations Relief and Rehabilitation Administration (UNRRA), which had been set up in 1943 to manage aid and resettlement for refugees, compelled those seeking refugee status to provide 'concrete evidence' of persecution in order to receive assistance and protection.[47] Thus states and international bodies were quickly fastening on to the notion that a formal legal definition of the refugee would assist in controlling population movements.

The International Refugee Organisation, successor to UNRRA, also introduced or reinforced prior concepts that would become key elements of the definition of the refugee in the post-war period. The Preamble of the IRO's Constitution makes repeated reference to '*genuine* refugees and displaced persons'.[48] Annex 1 then lists those worthy or not of being refugees, creating categories of those considered to be 'unworthy of international protection and assistance'.[49] In the main this referred to former Nazis or their collaborators.[50] But also specifically excluded

---

44 Reiko Karatani, 'How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins' (2005) 17 *International Journal of Refugee Law* 517, 519.

45 Noiriel, *Réfugiés et sans-papiers* (n 1) 121.

46 ibid 123.

47 Hathaway (n 13) 373.

48 United Nations, *Constitution of the International Refugee Organisation* (IRO) A/RES/62 (1), 15 December 1946, Preamble (emphasis added).

49 Hathaway (n 13) 376.

50 IRO (n 58) Annex 1, Art. 1(c).

were economic migrants.[51] The IRO Constitution further excluded from the remit of protection those who:

> ‘(a) have participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization;
>
> (b) have become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin’.[52]

At a time when national liberation movements were reaching a critical moment of intensity in India, Algeria, Indochina and elsewhere, this must be understood as a means to shore up the integrity of the imperial states of Europe. Thus refugee policy not just of the U.S., but of the UN became even more a tool reinforcing the sovereign rights of states and for mediating the geo-political rivalries between them, rather than a humanitarian goal of protection.

---

51 ibid Art. 1(e).

52 ibid Sec.D, II (6).

The 1951 Convention

Frank Krenz, a former member of the Legal Division of the UNHCR offers us a heroic description of the post-war evolution of refugee law:

> 'From [the end of the Second World War] onward the concept of "Freedom of Movement" gained impetus, and rebellion took place against the supremacy of State sovereignty in matters relating to the release of subjects or the admission of aliens.'[53]

Sadly this rather overblown description does not fit the reality of what happened then. The state-centred concept of asylum that arose in the 17th century remained. A leading textbook on international law, in an edition published in 1948 stated:

> 'the so-called right of asylum is certainly not a right possessed by the alien to demand that the State into whose territory he has entered with the intention of escaping persecution in some other State should grant these things'.[54]

In more positive terms the prevailing view at the time on the law of asylum is best summed up in the description offered by the Institute of International Law in 1950: 'Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.'[55] The Institute further declared that the state has the right to expel the asylee, that such an expulsion might be impossible if other states refused to accept them, and that in situations involving mass refugee flows, it was up to states to best manage these on the basis of 'the most equitable way of sharing between their respective territories'.[56] Nowhere does this declaration on international law, by one of the leading authorities in the field, refer to the rights of the refugee. In other words, in the year before the adoption of the 1951 Convention, a leading body of international jurists identified the right of asylum as fundamentally vested in the putative host state not the refugee herself. In discussing the same description given by the Institute of International Law,

---

53 ibid 90.

54 *Oppenheim's International Law* (7th ed.), cited in Vaughan Bevan, *The Development of British Immigration Law* (Croom Helm 1986) 214.

55 Institut De Droit International, *L'asile en droit international public*, (Bath 1950) Article 1.

56 Institut De Droit International, *L'asile en droit international public*, (Bath 1950) Article 2.

Grahl-Madsen makes the point that asylum can be understood within the framework of the 'territorial supremacy and integrity of States…in the sense that [the refugee] is no longer subject to (lawful) seizure by the authorities of the country from which he has fled',[57] i.e. the territorial integrity of the country of asylum must be respected vis-à-vis the state seeking custody of the asylee. Felice Morgenstern writing on the eve of the 1951 Convention, concurs:

> 'There is an undisputed rule of international law to the effect that every state has exclusive control over the individuals on its territory…A competence to grant asylum thus derives directly from the territorial sovereignty of states.'[58]

Further, Noiriel argues that the 1951 Convention was only acceded to by so many states, and has therefore succeeded over the past 60 years in becoming an established part of international law, precisely because it preserves the prerogatives of the nation-state to be the final arbiter of who can or cannot enter its territory.[59] Indeed, the mechanism of individualisation and control, the techniques involved in determining eligibility, that is the veracity of the claim for asylum, are the foundation without which a law of asylum could not exist within the context of a world hegemonised by the nation-state.[60]

The Drafting of the 1951 Convention

Drafting of the 1951 Convention began in early 1946. Loescher argues that for Western governments the negotiations were mainly about 'limiting their legal obligations to refugees'.[61] Discussions on the refugee definition were perhaps the most extensive of the entire process with over 500 pages of official documents

---

57 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume Two* (A.W. Sijthoff 1972) 4.

58 Felice Morgenstern, 'The Right of Asylum' (1949) 26 *British Yearbook of International Law* 327, 327.

59 Gérard Noiriel, *Réfugiés et sans-papiers: La République face au droit d'asile XIXe -XXe siècles* (Hachette 1998) 151.

60 ibid 152.

61 Gill Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993) 57.

devoted to it alone.[62] There were many drafts of the refugee definition and arguments over the exact wording lasted right up until the end of the drafting process five years later. The definition eventually agreed entailed 'substantial limitations' on who would be included, leaving out internally displaced persons, economic refugees, people made stateless for reasons not related to persecution, those fleeing general situations of violence or war, and those fleeing natural or ecological disasters.[63] An innovation of the 1951 Convention definition was the insistence on 'persecution' as cause of the refugee's flight, although the term had been 'in the air', having previously been used by both UNRRA and the Allied military in reference to the refugees at the end of the war.[64] The term is also present in Article 14 of the UN Declaration on Human Rights. It has sometimes been suggested that 'persecution' was also intended to be directed specifically towards people fleeing communist states, and thus was adopted for opportunist reasons at the height of the Cold War, rather than a perception that victims of persecution were particularly deserving of protection.[65]

Stephanie Schmahl, citing the French and Italian delegates to the Conference of Plenipotentiaries that drafted the 1951 Convention, describes the concern of European states as being to create a legal regime 'primarily designed to create secure conditions such as would facilitate the sharing of the refugee burden.'[66] There appears to have been a trade-off in the negotiations over Article 1, the 'key' to the system of rights for refugees under international law'.[67] In return for a settled universal definition of a refugee, the temporal and geographical limitations (relating to events in

---

62 Terge Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 49.

63 ibid 52.

64 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume One* (A.W. Sijthoff 1966) 189.

65 Loescher (n 17) 57.

66 Stephanie Schmahl, 'Article 1B 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 469.

67 Einarsen (n 18) 40.

Europe prior to 1951) had to be put in place.[68] The French delegation, following concerns expressed within the French government that they would have to receive too many refugees, successfully insisted on these restrictions being included in the final draft.[69] The U.S. delegation, among others, objected to a universal definition as it would force states to sign a 'blank check'. The U.S. delegate, Henkin pointed to the numbers of Palestinian refugees and of those who had fled as a result of Indian Partition as examples of why a more specific definition was necessary. The Italian delegate, Del Drago, expressed horror at the idea that European nations would have to accept refugees as a result of national movements in the East.[70] It was left to the Pakistani delegate, Brohi to express his government's opposition to a refugee convention that excluded all non-Europeans, such as the millions who suffered as a result of Partition.[71] It is therefore clear that the Convention refugee has its origins not in concern for refugees *per se*, but rather as part of a compromise intended to assuage the concerns of states, particularly those in Europe, that they would be inundated with masses of unwanted asylum-seekers. The Western bias of the Convention is obvious in statements such as the following made in 1966 by UNHCR:

> 'The limitation did not give rise to any particular problem when the 1951 Convention was first adopted, since at that time the 1951 Convention extended in practice to all known groups of refugees.'[72]

This claim is highly disingenuous as it ignores at least three other major refugee crises of the time: the largest forced migration in world history involving some 14.5 million people who crossed the borders following the partition of India and Pakistan in 1947, the 800,000 Palestinians forced from their homes by the Zionists in the following year, and the refugees created by the outbreak of war on the Korean peninsula in 1950. For geopolitical reasons to do with the Cold War, the UN, at the behest of Western States, was prepared to set up specific agencies to assist the Palestinians and

---

68 ibid 55.

69 Noiriel (n 15) 144.

70 Einarsen (n 18) 60.

71 ibid 57.

72 UNHCR, UN Doc. A/AC.96/346 (1966), para.2.

Koreans, but those in the Indian sub-continent were denied aid, in spite of repeated requests from both India and Pakistan.[73]

Writing in 1954, Paul Weis observed that both the discussions that led to the setting up of the IRO and then later the UNHCR demonstrated a 'keenness' amongst states to delimit the scope of people who would be assisted and given asylum.[74] In addition to the exclusive nature of the definition, the 1951 Convention ended up with a cessation clause – Article 1C – a novelty in international refugee law. Further, during the negotiations states insisted on retaining the right to exclude refugees on the basis of national security and public safety, whom they considered 'unworthy or undesirable',[75] something which found expression in Article 1F and Article 33(2). In discussions on Article 31 of the Convention, which ostensibly grants some leniency to refugees who illegally enter the putative host state, the Secretariat in proposing the draft begin their commentary by stating categorically: 'The sovereign right of a State to remove or keep from its territory foreigners regarded as undesirable cannot be challenged.' Further, the Secretariat raised the issue of the refugee 'caught between two sovereign orders', but in the context not of the suffering of the refugee, but rather that they might end up leading 'the life of an outlaw and may in the end become a public danger'.[76] The negotiations that led to the 1951 Convention are probably best summed up by an NGO observer of them. He ironically noted that the discussions:

> 'had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee. The draft Convention had at times been in danger of appearing to the refugee like a menu at an expensive restaurant, with every course crossed out except, perhaps, the soup,

---

73 Loescher (n 17) 62.

74 Paul Weis, 'The International Protection of Refugees' (1954) 48 *The American Journal of International Law* 193, 208.

75 James C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129, 172.

76 Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With A Commentary by Dr Paul Weiss* (Cambridge University 1995) 202.

and a footnote to the effect that even the soup might not be served in certain circumstances.'[77]

Defining and Controlling the Refugee Subject

Unlike many other signatories of the 1951 Convention, France moved swiftly to implement it into domestic law. Within months the law of 27 July 1952 incorporated into the domestic legal regime the definition of a refugee contained in Article 1A of the 1951 Convention.[78] This law also created the *Office Français de Protection des Réfugiés et Apatrides* (OFPRA) in order to manage the implementation of refugee admissions and to ascertain refugee status on the terms of the Convention. This legislation therefore led to the principle of the right of asylum in France being definitively 'subordinated to establishing proof of persecution'.[79] The emphasis on establishing proof of identity led quickly to OFPRA relying heavily on the police and police methods. For example, the authorities began to screen Spaniards arriving over the Pyrenees, distinguishing between Convention refugees and economic migrants, and issuing 'eligibility certificates' to those deemed to be genuine refugees according to the definition in Article 1A.[80] In its account of its own history, OFPRA states that the focus on judging the eligibility of the applicant is crucial, for 'the credibility of the narrative, its coherence and its accuracy, comes down to the question of proof'.[81] In addition the semi-autonomous refugee groups to aid Armenians, Russians and Spaniards, which had hitherto played the leading role in settling refugees, were effectively subsumed into this new administrative apparatus.[82] Similar practices resulted from the introduction of the 1951 Convention elsewhere. Almost immediately after the Convention came into force states began to use it as a means to

---

77 Quoted in Hathaway (n 32) 145.

78 Article 2, Loi n° 52-893 du 25 juillet 1952 relative au droit d'asile.

79 Noiriel (n 15) 200.

80 Weis, 'International Protection' (n 31) 196.

81 OFPRA, *De la Grande guerre aux guerres sans nom : une histoire de l'OFPRA* (OFPRA no date) 17.

82 In 1945 an office, similar to those that had been set up in the 1920s to aid Armenian and Russian refugees, had been created for the Spanish exiles. ibid 9.

restrict the entry of those seeking asylum. West Germany, for example, set up a 'recognition procedure' based in Nuremburg, which assessed the 'refugee quality' of applicants against the definition in Article 1A. In Italy those entering the country illegally were held in 'collecting centres' where they would be assessed as to 'refugee quality' before being released.[83] The logic of control that guided the process leading up to the 1951 Convention led to the creation in a number of countries, including France, Germany and Italy, of 'eligibility certificates' for refugees, without which they could not get work, or access other forms of material assistance. The eligibility in question again related to the Convention definition. The burdensome apparatus of screening procedures, surveillance and detention that is so ubiquitous today is therefore not a betrayal of the spirit of the 1951 Convention, but rather are expressions of it.

Although the 1967 Protocol removed the temporal and geographic limitations of the 1951 Convention, the restrictive definition of a refugee as one fleeing their home state for reasons of persecution on grounds of the denial of social or political rights remained. Indeed it was strengthened due to the fact that this definition now assumed a global and indefinite character; that is, it completed the gesture towards universality. As a result, the overwhelming majority of contemporary forced migrants from the Global South, fleeing conditions of civil war, natural disasters and economic hardship, are placed outside this 'universal' refugee construct.[84] The process used for getting the 1967 Protocol through the UN was designed precisely to prevent any wider political discussion on the question of the scope of protection and the question of the refugee definition; it is why the Protocol was drafted in a plain technical way, and why it makes no explicit reference to the 1951 Convention.[85] As Hathaway writes:

> 'The refugee definition established by the Protocol has enabled authorities in developed states to avoid the provision of adequate protection to Third World

83 Weis, 'International Protection' (n 31) 216.

84 Hathaway (n 32) 162.

85 ibid 163-164.

asylum claimants while escaping the political embarrassment entailed by use of an overtly Eurocentric refugee policy.'[86]

Frédéric Tiberghien points out that the very fact of creating a definition of a refugee in law in turn creates the distinction between 'true' and 'false' refugees. The refugee determination procedure, ostensibly necessary to police this distinction can also end up as a mechanism for making subjective judgements on whether or not the refugee is worthy of being granted asylum.[87] B.S. Chimni critiques the 1951 Convention when he writes that its 'objectivism tends…to substitute the subjective perceptions of the State authorities for the experiences of the refugee'.[88] In sum, all those aspects of international refugee law, as expressed primarily by the 1951 Convention, that are claimed to be positives– objectivism, universality, and most of all, legality – turn out on closer inspection to be key ingredients in the diminution of the refugee subject, and the placing of her under even greater control and management by states and the international legal order. We are a long way indeed from asylum as a space in which the refugee can enjoy freedom from seizure.

The Tradition of Asylum

There is ample evidence for the existence of exiles and sanctuaries dating to very early in recorded history. From extradition treaties agreed between the ancient Hittites and Egyptians more than twelve centuries before Jesus Christ,[89] Biblical sanctuary cities along the Jordan river, the Greek *asylia*, Romulus' fabled sanctuary on the Palatine, the early Church, and medieval sanctuaries, there is a more or less unbroken tradition of safe spaces for those fleeing persecution of one sort or another. At the close of the 15th century, in a court case concerned with a violation of sanctuary, the right of asylum was pleaded for as one which reached back to the Old Testament and Romulus.[90] There is evidence that sanctuary cities described in the Book of Numbers

86 ibid 164.

87 Frédéric Tiberghien, *La protection des réfugiés en France* (2nd Ed, Économica 1988) 57.

88 B.S. Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23 *Refugee Survey Quarterly* 55, 62.

89 W. Gunther Plaut, *Asylum: A Moral Dilemma* (Praeger 1995) 36.

90 J.H. Baker, 'The English Law of Sanctuary' (1990) 2 *Ecclesiastical Law Journal* 8, 10.

influenced the creation of sanctuaries set up in various English towns in the 1540s.[91] While my research currently focuses on what might termed the Western tradition of asylum, there is certainly evidence of it as an ancient practice throughout the world. There is some evidence, vague it must be said, of asylum in India and China before the Christian era.[92] An Arab tradition of asylum can also be traced to pre-Islamic times.[93] Following his conquest of Mecca, the Prophet Muhammad declared two sites as sanctuaries for those who had opposed him.[94] In short, the practice of asylum is ancient and widespread.

The dominant ideology of modernity, of autonomous and equal subjects before the law is often invoked to denounce sanctuary as a relic of a 'barbaric' past, ill-suited to our 'civilised' societies today.[95] This is perhaps best summed up in the declaration of the French revolutionary Convention declaring: 'The right of asylum is being abolished in France, for it's now the law being the asylum of all people.'[96] Yet the treatment of petty criminals, traitors, subversives and other 'undesirables' was frequently more humane and more contested than is the case with today's asylum-seekers. Moreover, it is precisely the loss of spaces within the polis yet without the

---

91 Teresa Field, 'Biblical Influences on the Medieval and Early Modern English Law of Sanctuary' (1991) 2 *Ecclesiastical Law Journal* 222.

92 M. Cherif Bassiouni, *International Extradition and World Public Order,* (A.W. Sijthoff 1974) 88.

93 Ghassan Maârouf Arnaout, *Asylum in the Arab-Islamic Tradition*, (UNHCR 1987)

94 Bassiouni (n 5) 87.

95 E.g. Arthur Stanley, *Historical Memorials of Westminster Abbey* (John Murray 1886) 414; Thomas John de' Mazzinghi, *Sanctuaries* (Halden & Son 1887) 101; Norman Trenholme, 'The Right of Sanctuary in England: A Study in Institutional History' (1903) 1 *University of Missouri Studies* 1, 96; Isobel D. Thornley, 'The Destruction of Sanctuary' in R.W. Seton-Watson [ed], *Tudor Studies* (Longmans 1924) 185; Elizabeth Howard West, 'The Right of Asylum in New Mexico in the Seventeenth and Eighteenth Centuries' (1928) 8 *The Hispanic American Historical Review* 357, 359; Pierre Timbal Duclaux de Martin, *Le Droit d'Asile* (Librarie du Recueil Sirey 1939) 453; Jorge L. Carro, 'Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?' (1986) 54 *University of Cincinnati Law Review* 747, 767.

96 Quoted in Herman Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Indiana University 1994) 144.

grasp of the sovereign power that has led us to the complete hegemony of the law. It would not be true to say that asylum has mainly, or indeed ever, been a place without sovereign authority. The priesthood, whether pagan or monotheistic, or the local lord, have always asserted sovereign power of the space either on their own terms or on the basis of dogma, but rarely have they asserted such power over the asylees themselves. For sure there were rules about use of the space of asylum and conduct within it. But this tended to be guided either by respect for the sacred space, i.e. not impinging upon the altar; or for practical reasons i.e. not carrying weapons. A test for admission was either perfunctory or non-existent. In this sense, asylum remained for most of the period under discussion as a place free from seizure by the legal paradigm, one founded upon a rigid delineation and judgement of the subject.

Instead asylum has been largely grounded throughout its history within ethical, political and theological notions of justice. The starting point in most accounts of asylum is Ancient Greece. The word itself comes from Ancient Greek: 'asylum' is derived from *asulon*, meaning 'without right of seizure'.[97] The Greek *asylia* were typically associated with shrines to the various gods, of which Delphi was the most famous and venerated. But they were also defined as spaces that were 'sacred and inviable', and thus were off limits to kings, armies and sovereign orders that rose and fell throughout the internecine wars of the period.

The political and spiritual elements of asylum are particularly evident with the rise of the Christian Church and the terminal crisis of the Roman Empire that took hold in the 4th Century A.D. These two phenomena are closely linked. Examples of refusal to pay taxes, assassinations of local officials of the Empire and other forms of sabotage proliferated. And increasingly the perpetrators of these acts then sought refuge and protection in churches. The establishment of church asylum, an institution that would last for over a millennium, was a product of struggle by a significant proportion of the population, led by Church fathers such as St. Augustine, St. Ambrose and St. John Chrysostom, who called upon Christians to defend their churches as sanctuaries from those, including the Roman authorities, who attempted to remove suppliants. At the

97 Kirby, Larry Joseph, 'Sanctuary: The Right of Asylum in the Corpus Iuris Canonici' (Masters Thesis, Catholic University of America 1986) 1.

same time, for the Church, the right of asylum already existed as something granted by God, irrespective of the domain of temporal law. The principle of asylum in the Christian Church was founded upon the idea that the refugee could pay penitence in the house of God, and where His mercy trumped the strictures of the law.[98]

The Struggle Between Christian Mercy and Law

A Roman law of 398 closed off asylum to Jews who had opportunistically converted to Christianity so as to take advantage of asylum in churches. One of the effects of this law was that it 'transformed bishops into inquisitors', by putting the onus on them to enquire of all who sought sanctuary if they were 'genuine' Christians, or if they were 'illegal' refugees.[99] At the same time, the law now placed a burden upon the suppliant to prove that they were genuine converts. The resonance for our own time with its discourses of 'illegal', 'genuine' or 'bogus' refugees is inescapable. Moreover, it turned the custodians of the asylum, the clerics, into its gatekeepers. This was resisted by some of the leading bishops of the time, notably Augustine of Hippo.

Ducloux describes St. Augustine as the 'theoretician' of asylum in the early Church.[100] In one of his sermons he declares that the church is a 'common refuge', open to all to seek sanctuary. He speaks of three kinds of refugees: 'the unjust who flee the just, or the just who flee the unjust, or the unjust fleeing the unjust.' He goes on to argue that it is not for the Church to distinguish which is which. If 'we had wanted that the guilty could be removed from [the church], then it would not be a place to which the innocent would flee…Thus, it is better that the guilty should have shelter in the church than the innocent should be snatched from it.'[101] As Ducloux argues, Augustine was appealing to his flock that at any time one of them might require asylum. If they were to demand judgement on those who sought sanctuary today, what would happen when they would be judged by others as worthy or not of being granted asylum?[102] Augustine's declaration that asylum was open to all was a rejection of the laws of the

98 ibid 59.

99 Ducloux (n 2) 63.

100 ibid 170.

101 Quoted in ibid 172-173.

102 ibid 181.

last decade of the 4th Century, which sought to distinguish between deserving and undeserving fugitives.[103] It was also, in my opinion, a rejection of law itself as a method of regulating the asylum. Instead of laws demarcating the deserving from the underserving refugee, it appears that Augustine was in favour of the church as the City of God, to be open to all, an approach much more in tune with hospitality than law.[104] Augustine's view was that no matter how heinous the crime committed, or how far from the church's teachings the fugitive was, Christians must always love the sinner, and recognise their duty to help them avoid eternal damnation in the hereafter.[105] In this, he was following the words of St. Paul. In an extraordinary passage in his first letter to the Corinthians, Paul condemns those Christians who would seek justice through the law.[106] They should, he insists, leave it to God to pass judgment on a person's character. In everyday matters of conflict he advises seeking an honest broker from within the community 'who will be able to decide between his brethren'.[107]

These principles underpinned by an ethics of openness and hospitality, and a political will to remain outside the realm of the state and its law, guided the practice of asylum for much of the next thousand years throughout Europe and elsewhere. Asylums, or sanctuaries as they were more frequently known, were spaces marked off from the sovereign sphere, where kings and emperors along with their agents were forbidden to enter. Sanctuaries were mainly in churches. However, in many places the space of sanctuary extended far beyond the walls of the church, to encompass whole towns. Medieval London was effectively 'a patchwork quilt of legal jurisdictions' divided between the king's realm and the precincts within fugitives could seek protection and immunity from the secular law.[108]

While the integrity of asylum has never been absolute, the question of political, religious or social solidarity with its ideals have been indispensable to its functioning, much more so than law. Sanctuary in England was more or less abolished in 1623. Yet

---

103 ibid 182.

104 Augustine, *The City of God*, (Henry Bettenson [trans], Penguin 1984) Book 1.

105 Timbal (n 19) 47.

106 I Corinthians 6

107 I Corinthians 6:5

108 McSheffrey (n 20) 484.

just 60 years later, one of the largest ever movements of refugees into England took place with the arrival of the Huguenots. In relation to the current population of the U.K., the equivalent proportion of refugee arrivals today would number over 1.5 million people. Yet the absence of law was no barrier to asylum.

In more recent times, grassroots movements such as the Sanctuary Movement for Central Americans in the USA during the 1980s, and the *sans-papiers* in France since the mid-1990s, have sought to reclaim spaces, including churches, trade union offices, university campuses, private homes etc. where forced migrants can receive care and assistance outside of the oppressive force of legal status determination procedures. These movements reassert asylum, not in terms of objective standards, of universal principles, but instead as a form of contestation with the sovereign order.

Conclusion

Philip Marfleet reflects on the transformation from the ancient practice of sanctuary, abolished by James I in 1623, and its resurrection in a new guise some 60 years later:

> 'The idea of protection remained but the practice of providing security had changed profoundly. The territory of the national state now defined the boundaries of refuge: the state itself had in effect been sacralised and provided space within which fugitives might find protection. They must be aliens, however: subjects of another state authority and ready to submit themselves to English Law'.[109]

The space of asylum in this modern conception was not outside sovereign control. Indeed, it was only at the invitation of the Crown, no doubt encouraged by popular feeling, that the Huguenots were admitted. However, this right of the state remained discretionary and thus open to political influence and pressure. Again, throughout most of the 19th Century, Britain had no laws restricting entry to the country, and in fact became known as a haven for refugees. Indeed, one attempt by Lord Palmerston's

---

109 Philip Marfleet, 'Understanding "Sanctuary": Faith and Traditions of Asylum' (2011) 24 *Journal of Refugee Studies* 440, 448.

administration in 1858 to enact a very minor restriction on refugees led to mass popular resistance and the fall of the government.[110] And yet today, in spite of the panoply of international and domestic laws supposedly guaranteeing the right of asylum, lack of sympathy or support has rendered it increasingly meaningless. In other words, the more law has come to concern itself with asylum, the less space there has been for the political element.

There have been many alterations and variations of asylum in the course of the last few thousand years. But a common thread throughout has been fidelity to a greater or lesser extent to the etymology of 'asylum' – freedom from seizure. Milligan makes the point that the history of legal sanctions in respect of sanctuary in the pre-modern world is overwhelmingly in respect of violations of sanctuary.[111] By contrast, today the reverse is true: the force of law is directed against those who would either seek or offer sanctuary outside of the sovereign order.

The refugee today has been reduced in political, legal and everyday discourses to what Guy Goodwin-Gill has referred to as a 'unit of displacement', as someone who is categorised, controlled and warehoused; this process is, I argue, facilitated by law, not in spite of it. Thus the legal regime of refugee law has not created spaces of protection, but has instead extended ever further the grasp of the State over the refugee. In a world in which security paradigms such as the 'war on terror', the Pacific Solution and Fortress Europe, along with an archipelago of detention centres and camps largely determine the experience of the forced migrant, it has become an urgent necessity for academics, practitioners, activists, and not least forced migrants themselves, to recover and reassert the tradition of asylum as freedom from sovereign power not subjection to it. Thus we need to reject the legal categorisation of refugees, asylum-seekers, economic migrants etc. Further, we must reconfigure asylum not primarily as a legal right vested either in the state or on an individual basis, but instead as the reclaiming of spaces in which forced migrants can seek protection and care free from seizure by states of reception as much as states of origin.

---

110 Bernard Porter, *The Refugee Question in Mid-Victorian Politics* (Cambridge University 1979) 196-199.

111 Charles S. Milligan, 'Ethical Aspects of Refugee Issues and U.S. Policy' in Ved P. Nanda [ed], *Refugee Law and Policy: International and U.S. Responses* (Greenwood Press 1989) 175.