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Labour, Law and Forced Migration

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Labour, Law and Forced Migration

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&
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2015

Content

- | | |
|--|----|
| 1. The 'Migration State' & Labour Migrants in Central Asia | 1 |
| 2. Reconfiguring the Concept of Asylum | 14 |

The 'Migration State'¹ and Labour Migrants in Central Asia

Anita Sengupta *

Shukhrat Berdyev's story (in *Diary of a Gastarbeiter*²) is a familiar one of a middle aged Uzbek school teacher who in the post-Soviet era is faced with the prospect of traveling to Moscow to work as a loader at the Tyoply Stan market.³ His experiences in the market as a loader, which include his reception and help from fellow country-men in the market, his existence on the edge of legality and the nightly encounters with the police are in sharp contrast to his first trip to Moscow in the summer of the Olympic Games when as a student but also a Soviet citizen he had enjoyed the city in all its glory. The Central Asian *gastarbeiter* experience follows a familiar trajectory. A stint in Moscow, followed by experiences in the Russian countryside as a labourer (in Shukhrat's case as a carpenter) intercepted with news about violence and the looming presence of the Russian mafia boss. It is a story of repeated return, practically every year, if not to Moscow then to some other location (in Shukhrat's case Siberia) despite the dangers of aggression and fraud in a system that offers no legal protection. But it is also a story full of unexpected developments as Shukhrat, like many others, enters into 'civil marriage' with a local woman with the knowledge and support of his Uzbek wife Gulsara. There is always the lurking threat of being replaced with local unskilled labour despite the conviction that Russians would not be interested in the menial labour contributed by the Uzbeks and the Tajiks. Shukhrat's diary is also incomplete indicating at one level his continuing visits to Russia and on the other the ongoing global movement of illegal labour as an enduring reality.

Shukhrat's story has several layers. It reflects on an economy where seasonal work as *gastarbeiter* becomes a necessity to support families and particularly families with growing children, the social acceptance of this necessity and its consequences as also helplessness in the face of hostility and the lurking fear of becoming a victim of that hostility. But it is also a story that clearly indicates the existence of well-established informal institutions of support and therefore the fact that Shukhrat's *gastarbeiter* experience is neither isolated nor recent. The necessity of this labour is recognized at the local level, and as Shukhrat moves away from Moscow the lack of dignity that he endured there is significantly reduced. However, there is also a complete lack of legal recognition of this numerically significant migrant group, bringing into focus the eternal dilemma of both sending and receiving countries about this transnational movement.

Unlike the systems that are in place for the movement of capital (the IMF) or goods (WTO) a complex network of intergovernmental organizations focus on transnational movements of people. There is little coherence among them except in cases of refugee movements particularly from conflict prone regions. By definition the movements of people involve at least two states, and in many cases three or more as labour migrants transit through third countries to reach their destination. But as

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long as states retain exclusive authority to decide on who enters and who leaves, the free movement of people for efficient resource allocation of benefit to all will remain restricted. The reason is not that the free movement of people, like the free movement of capital and goods would not result in more efficient use of resources, but because disregard of national boundaries would mean the end of the sovereign state. As Myron Weiner argues, even the most ardent neoclassical economists recognize that with respect to movement of people there remain other considerations than the efficient use of resources. In the absence of state control over immigration, titular communities would lose control over central cultural symbols of national life and political control over the state.⁴ Concern for maintaining particular national identities, widely shared values and control over political institutions therefore preclude a policy of open entry. Countries do however offer open entry policy to those with whom their populations share close ethnic affinity, those with whom they have ethnic ties, or in cases where there is a sense of obligation or guilt. However, even here, as among the Central Asian states where there is free entry for limited periods, work permits are generally not provided.

However, the global integration of markets for goods, services and capital entails higher levels of international migration. Therefore, James Hollifield argues that if states want to promote freer trade and investment, they must be willing to manage higher levels of migration.⁵ In a globalized era, international security and stability are dependent on the capacity of states to manage migration. Many states are willing to sponsor high end migration because the numbers are manageable and there is likely to be less political resistance to the importation of highly skilled individuals. However, mass migration of unskilled and less educated workers is likely to meet with greater resistance, even in sectors like construction and health care where there is high demand for unskilled labour. The tendency for governments is to bring in just enough temporary workers to fill in the gaps in the labour market but with strict contracts between the foreign workers and the employers that limits the length of stay. In reality this creates the possibility of illegal immigration.

In the former Soviet space, Russia and Kazakhstan are the principal receiver states while labour migration in significant numbers takes place from Uzbekistan, Kyrgyzstan and Tajikistan.⁶ Although emigration does not serve long term 'objective' interest of senders, it does provide a short term safety valve. More importantly for the sender state it provides substantial income in the form of remittances and other transfers. According to Barbara Schmitter Heisler, to take optimal advantage of emigration, the interest of the sending country is best served by promoting "temporary but long term" migration.⁷ Given that a country decides to export labour as a partial solution to economic problems, it benefits only if emigrants remain abroad for an extended period without settling permanently. In case of permanent settlement abroad the sending country loses on the investment made on human capital and also possible augmentation of skills acquired abroad. Short term emigration only postpones the problems that gave rise to it in the first place. Early return aggravates conditions of unemployment and underemployment as returning migrants may not find commensurate work. The interest of both sending and receiver countries is served by temporary labour migration, though receivers prefer flexible short term migration (which entails no social responsibilities) and senders prefer long term absences without permanent settlement, which ensures a flow of remittance. Neither takes note of the interest of the migrating labour.

Moreover, stagnation of economic growth rates due to declining oil prices and sanctions and fear of economic and political disruptions has meant that receivers in the post-Soviet space are now readjusting and redefining their migration policies. Russia remains the principal receiver state here and the scale of recent transformation has made migration an issue of considerable political commentary.⁸ In the run-up to his Presidential election in 2012 Putin entered the debate on Russian

migration policy with a long essay on the ‘national question’ in *Nezavisimaya Gazeta* reserving particular criticism for the landlords of rubber stamp apartments who register migrant workers illegally in their homes. In June 2012, Putin signed into force a concept paper on Russia’s migration policy to 2025, which lamented the declining Russian language and professional skills of migrant workers from other post-Soviet states. The new law requires certain categories of migrant workers to be tested on their knowledge of Russian language, history and legislation. On the other hand, in the sending countries of Central Asia policy makers tend to be preoccupied with migration’s macro dimensions: how many people are on the move? How much money is being sent back? Should remittances be seen as a source of development or threat to the local economy?

Stagnating economies leading to the devaluation of the ruble has also meant that migrants are now sending back much less money than before as the ruble to dollar rates has suffered nearly 50%.⁹ This together with the introduction of the new rules of obtaining work permits means that immigrants from Central Asia are leaving Russia in large numbers.¹⁰ In fact most familiar immigrant stories are of return as even those who had migrated in the mid 2000’s are now attempting to look for alternatives in their native state. While reports indicate that up to 70% of the migrants are on the move, the Russian reaction is that this is a temporary phenomenon as the labour market in the native states, whether it is Uzbekistan, Tajikistan or Kyrgyzstan do not have the capacity to absorb this labour.¹¹ It is being argued that many migrants go back home for the New Year and come spring the movement would be reversed. While returning to the native state may not be an option, there is apprehension that that migrant movement from Russia may head for the states like Syria and Iraq to join the jihad movement led by the ISIS which is reported to pay large sums of money.¹² Many young Central Asians migrants, faced with humiliating social conditions turn to Islam as a means to surpass ethnic boundaries and claim honour and respect from Russians. Islam becomes an important means of organizing life, as well as securing hygiene and moral behaviour. Mosques are increasingly used and understood as central places for social, educational and political activities. After the prayers, groups form around activists who raise awareness on various issues, particularly those related to migration and politics in the Muslim world.¹³ The involvement of this group of migrants in the West Asian conflicts seems plausible given their disenchantment with their current situation.

The return of the migrants is also problematic for the sending countries. And though there is rhetoric in some states about the need for return, there are few alternatives that these states can provide for the returning migrants in terms of employment. Both sending and receiver countries are also aware that their image in the international community is influenced by this movement. For the Uzbek state, anxious to portray an image of a strong ‘self-reliant’ and economically vibrant state, the large number of labour migrants to other countries becomes an embarrassment. During a trip to the Jizzak region on 19 June 2013 Uzbek President Islam Karimov commented rather harshly on the Uzbek labour migrants engaged as janitors in Moscow by referring to them as “lazybones” and “street beggars”. His comment clearly indicated that by travelling as migrant labour they are showing the state in poor light

Who I think lazy ones are? Those going to Moscow to sweep streets and squares. What is it about that place? This is disgusting. The Uzbek nation is demeaning itself (by doing this) supposedly one has to travel that far (to earn) for a piece of bread. Nobody is dying from hunger in Uzbekistan, thank God! I call them lazy because they are disgracing all of us by pursuing ways of earning quickly.¹⁴

Karimov’s comments were met with outrage by the migrants who argued that they had traveled to survive since there were no appropriate jobs at home. There have also been comments on the state of the Uzbek economy if not for the multibillion dollar transfers from these people. In 2012 alone according to the Central Bank of Russia, remittances provided about six billion USD to the

Uzbek budget.¹⁵ On the other hand, the image of the Kazakh state as tolerant has been affected by its attitude towards migrants.

Weiner argues that there are four sets of variables that shape international migration.

The first can be characterized as differential variables, such as wage differentials, differences in employment rates, differences in land prices and even differences in degree days. A second set of variables are spatial such as distance and transportation costs. A third group can be characterized as affinity variables such as religion, culture, language and kinship networks. And the fourth are access variables, the rules for exit and for entry. Differential and spatial variables are usually the concern for economists; spatial variables are of particular interest to geographers; affinity variables attract the interest of sociologists and anthropologists and access variables are the concern of political scientists and students of international relations.¹⁶

However, for the migrant all of these come into play simultaneously and as such there is need to take note of all of these in totality. How and why states make their access and exit rules, the interplay between domestic and international considerations, the relationship between regime types and access rules and how the rules are affected by internal political considerations all become equally significant and need to be taken note of for an understanding of the everyday dilemmas faced by migrants.

Three broad themes emerge from a study of the migrant experience. The first is whether there are common patterns motivating migration from the post-Soviet states given the fact that motivations tend to morph into one another. The second relates to the problem of remaining legitimate in a context where both labour and accommodation are highly regulated. Most migrants tend to live in a state of “limbo”, illegal but tolerated. Finally, there remains the need to look at the impacts of migration beyond the narrowly economic. Migration not only feeds into the nationalist discourses of the sending and receiver states but also becomes a lens through which the relationship between the birthplace and the adoptive home is negotiated by the migrant himself.

Migrants and the State in Kazakhstan

Since the Central Asian migrant experience has been dominated by racism and intimidation in Russia many prefer to work in Kazakhstan. Kazakhstan’s resource-fuelled economic boom and thriving market economy have turned it into a flourishing migrant receiving state. This image of Kazakhstan as a receiver has benefitted from a consistent state policy to encourage the return of the ethnic Kazakh diaspora referred to as the *oralman* under a state sponsored repatriation programme. However, unlike the *oralman* programme, migrant workers from other Central Asian states remain unaccounted and invisible to state authorities due to lack of appropriate legal framework and labour policies that dooms them to an illegal and irregular status. Despite lower wages many migrant workers from Central Asia choose Kazakhstan to look for jobs since it is closer to their home countries and easier for them to adapt to local cultural norms. Since most work illegally, there are few correct estimates with numbers varying widely. About two thirds are from Uzbekistan, some 25% from Kyrgyzstan and the rest from Tajikistan and other CIS countries. At least half of them work in construction and in work that is shunned by the locals. Several others work in the expanding service sector, catering, transportation, delivery, retail and sales and the rest work as seasonal labors in agriculture, in tobacco, cotton fields, food stuff packaging and processing. The Central Asian migrant labour movement had traditionally been a seasonal one where most travelled as unskilled labors with no intention to settle.¹⁷

The ready availability of cheap semi-skilled and short term migrant labour has contributed significantly to spurring rapid growth in construction and the service sector in cities like Almaty, Astana, Shymkent, and Aktau. However no official statistics or data is available on the role of the migrant workers in the labour force or in the informal economy. It is evident that though the state authorities continue to combat illegal migration, regarding it as a security threat or as promoting criminal activities, they covertly allow influential recruiters or employers to hire the *gastarbeitery*. The only change is a December 2013 law that allows individual Kazakh citizens to hire foreign migrant workers with work permits. The law clearly states that it is intended to make it easier for Kazakhs to hire household help not for profit by private businesses.¹⁸ Migration policy of the emerging Eurasian Union has also been the focus of attention. On January 1, 2012, an agreement on the Legal Status of Migrant Workers and Members of their Families came into effect between Russia, Belarus and Kazakhstan as part of the Customs Union. The intention was to establish a legal framework necessary for the emergence of a common labour market within a single economic space supported by the Customs Union.¹⁹

While there is scant state or legal focus on the migrants, the urban residents and the media tend to be critical. Reflective of this negativity is this article which says:

Gastarbeiter---- an ill shaven person with a pale look and the smell of cheap deodorant. This labour migrant is shabbily dressed with a scared look. He is afraid of everything, cold, police, dark streets on which ill fed lads walk with hands tucked into their pockets, ever so watchful babushka in the bazaars who suspect a thief or terrorist in the face of foreign nationality. He is vulnerable from all corners because he has no rights, is cut off from his homeland and doesn't know the laws of a foreign land.²⁰

Bhavna Dave argues that despite its carefully cultivated image as a peaceful and tolerant state with a long tradition of hospitality, Kazakhstan is neither a migrant welcoming nor a migrant seeking state. The term migrant or migration is used in law, official statements and media reports to refer to the ethnic Kazakh returnees – *oralman* – and to the internal rural migrants to cities. However, there are increasing reports of how the *oralman* faces innumerable problems in negotiating the legal institutional and bureaucratic obstacles in formalizing their status.²¹ Some of these had meant the suspension of the programme two years ago in the wake of the unrest in western Kazakhstan which was partly attributed to the social discontent stemming from the mismanaged migration of Kazakhs from abroad.²² The programme has been restarted in an attempt to limit Russia's potential ability to influence Kazakh politics particularly in northern Kazakhstan. Under new terms, perks to attract ethnic Kazakhs have been reintroduced including paid travel and subsidized housing, but to be eligible for the benefits migrants are required to settle in government selected areas. Of the seven target areas, six are in northern Kazakhstan, along the Kazakh border with Russia, which has sizeable Russian population. While Kazakhstan claims that this had nothing to do with demographics and everything with economy, the fact that Kazakhstan is also offering incentives for internal migration northwards seems to indicate that the Kremlin's policies in Crimea and the armed separatist movement in the Donbass have a role to play in the recent reinstatement of the policy.²³

Astana has felt particularly affected by the crisis in Ukraine since the arguments used to question the Ukrainian borders were seen by many as being those that could be used to justify a similar intervention on Kazakh territory. In fact northern Kazakhstan has been as present in Russian ultranationalist rhetoric as the Ukrainian territory. This is part of the reason why economic integration with Russia arouses suspicion among significant sections of the Kazakh population. Being aware of such reactions in a televised interview with a local channel *Khabar* on 26 August 2014, Nazarbayev said

If the rules set forth in the agreement are not followed Kazakhstan has the right to withdraw from the Eurasian Economic Union. I have said this before and I am saying this again, Kazakhstan will not be part of organizations that poses a threat to our independence.²⁴

Moscow's reaction was immediate. On 28 August 2014, in response to a question at the *Nashi* youth nationalist movement President Putin questioned the historical legitimacy of Kazakhstan as a state, insinuating that it was a 'Soviet error' and indicating that an overwhelming majority of the Kazakh population was committed to the strong relations with Russia and staying within the Russian sphere (*Russki mir*). However, he did not clarify where the conviction about the will of the majority came from.²⁵ Twenty-four percent of Kazakh citizens are ethnic Russians, concentrated in the north of the country that shares a border with Russia. Till date, Kazakh Russians have shown little interest in secession and it was generally assumed that they are well integrated within the new Kazakh state. However, events in Ukraine have indicated the capacity of inter-ethnic issues to divide society. The Kazakh government opted for a discrete response and announced the celebration of the 550th anniversary of the Kazakh state in 2015. The reinstatement of the *oralman* project has to be seen within this context.

The Kazakh Migration Law of August 2011 identified three key directions and objectives of migration. First, facilitating repatriation, settlement and integration of the *oralman*, denoting an ethno-national vision; second maintenance of national security and prevention of illegal migration, reflecting a 'securitization' perspective; and third management of internal migratory processes from rural to urban areas, particularly resettlement of citizens residing in ecologically depressed regions to other regions, which addresses issues of social welfare and equal distribution. The law also contains a quota for highly skilled foreign labour. The quota is miniscule. It was set at 66,300 in 2009 but then reduced to a third in 2011. The law is however silent about the status of CIS labour migrants who can enter the country legally under a visa-free regime, indicating that the purpose of the visit is 'personal' on the migration card. Such migrants are required to register within five days, may only remain for the authorized period of stay and cannot work.

An 'illegal migrant', under Kazakh Migration Laws is simply defined as a person who has 'violated the laws of the Republic of Kazakhstan pertaining to migration'. Migrants are routinely charged for violating the terms of stay under Article 394, Part 1 of the Code 'On violation by foreign citizens or stateless people of rules of stay in Kazakhstan' and deported for repeated violations under Part 2 of the same code. The one month limit is normally negotiated by leaving the country to reenter on a new migration card with a new one month period.²⁶ Many find it easier and cheaper to pay someone to take their passport for a new entry stamp. An entire informal industry has developed for acquiring documentation, though many simply overstay and pay the administrative fine of about \$100 giving them a 12-day grace period within which to leave the country. A complex web of personal connections, strategies and informal arrangements enable the migrants to acquire the relevant documentation to maintain their status as a 'visitor' and keep their real status invisible to the law. Every lacuna in the law and every restriction imposed by the law are dealt with by relying on informal connections and personal networks and resorting to quasi-legal practices.

The state, on the other hand, remains trapped in a self-limiting discourse within the framework of 'nationalism' and 'securitization'. This prevents it from addressing the complexities of a rapidly growing economy and adopting appropriate migration laws. This is true of all the states in the region and results not just in depressed trade flows but also increasing numbers of 'illegal' migrants.²⁷ Boundary enforcement measures are introduced and justified in terms of protecting the economic and political security of the state. Nick Megoran, through his study of the portrayal of Uzbekistan as a 'threatened state' has demonstrated how governments frame the state border not merely

as a legal line on the map but rather as a moral border where the state is depicted as a realm of order, progress, stability and wealth surrounded by disorder, backwardness, chaos and poverty. However, such boundaries also tend to overlook economic considerations and fail to come to terms with everyday experiences of negotiating borders. The likely result is further erosion of its ability to regulate or manage migration flows and the informal labour market. However, this is also a way through which the state covertly opts to let migrant workers remain invisible and illegal while utilizing the cheap labour that they provide. To acknowledge the scale of the undocumented and informal labour would entail an obligation to enact appropriate legislation.

The Central Asian *gastarbeiter* experience is closely interlinked with a process of internal and trans-national migration that is connected with what is popularly known as *Kitaiskii bazaars* in the region and the consequent influx of both Chinese goods and migrants. On the one hand these markets have created opportunities for internal migration from rural to urban centres within Central Asia but have also encouraged the specter of ‘social problems’ that every migrant situation creates. It is also here that the interface between the migration and trade comes to the forefront bringing into focus the debate on the ‘migration state’.

Markets and Migrants

Almaty, which is situated in southern Kazakhstan, is close to the Chinese border. One of the most interesting places in the outskirts of the city is Barakholka, a large out-of-town bazaar that lies to the north-west of Almaty, reputedly stretching for nearly five kilometers. Nestled in the foothills of the Tien Shan, it is a noisy, congested and chaotic maze of zigzagging aisles where thousands shop every day. The market, which stretches along-side a road leading out of town, is organized into sections, each named differently – ‘Europe’, ‘Evrazia’ and so on. Barakholka is a rabbit warren of stalls (actually comprised of several different bazaars, each offering specific merchandise). Most of the bazaar is outside and trying to find a particular section is nearly impossible. One can spend hours turning corners and walking through long barn like buildings weaving through the crowds. The bazaar sells literally everything that one would want to buy from clothes to food and toys, hardware to handicrafts. It is also a market where Uzbeks, Uighurs, and Dungans converge to sell products of Chinese make. Inside the labyrinths of shops and tents there are restaurants that reflect the ethnic diversity of the market. There are also always hawkers who walk through the narrow aisles selling tea, fruit and somsa, yelling alternately in Kazakh and Russian.

Typically the legal owner of a stall is a Kazakh as only a Kazakh national or permanent resident can own a stall. They then rent them out to others so all those selling goods are either migrants or employees. And virtually all the police, migration officials, and those in charge of migrant’s registration, tax collection, health, and safety inspection, compliance with hygiene and sanitary standards and those organizing raids and checks are Kazakhs. Dave talks about Gulnara whose husband is a policeman and who owns three retail outlets at Barakholka. One is leased to a Kyrgyz woman, who together with members of her extended family (shuttling back and forth between Almaty and Bishkek to manage their legal status), sells garments made in Bishkek, Her husband drives a taxi between Almaty and Bishkek, and also carries passports of fellow Kyrgyz migrants to secure a new migration card. The other two are leased to Kyrgyz and Uzbek migrants selling fruit and vegetables. Gulnara is a ‘fixer’ who recognizes that her business interests and the well-being of the migrants are interlinked. She also runs a marriage agency that helps migrants obtain citizenship or residency in Kazakhstan through marriage.²⁸

Barakholka is a typical example of what is referred to as *Kitaiskii bazaar* (*Khitoy bazaar* in the local language) in Central Asia. From the early 1990s Barakholka has been a place for the resale of Chinese goods transported from Xinjiang. It was quickly taken over by Dungan and Uighur traders since it was located near a former kolkhoz, *Zaria Vostoka* which had a Dungan majority at the time of its foundation in the 1930s but then came to be numerically dominated by the Uighurs arriving from China in the 1960s. The Uighurs who had close links with relatives in Xinjiang set up cross border trade by investing in Barakholka, or by developing related businesses such as restaurants, the hiring out of warehouses or the supply of lodging for traveling traders. Smaller markets selling Chinese goods were also set up on both sides of the border in Zharkent and Yining, allowing traders to commute without having to cross the entire Ili valley from Almaty to Urumchi. This cross border shuttle service came into competition with the new Almaty Urumchi railroad which enabled trade to take place across greater distances. As a result trade practices became more diversified. The Central Asian Uighurs started to spend less time in Xinjiang where they went only to purchase goods while the Chinese Uighurs who went to Central Asia stayed longer to establish their own stands at Barakholka or at one of the other bazaars of the region.

This pattern has been repeated at hundreds of markets, making Chinese goods ubiquitous across Central Asia. Initially, the traders at these bazaars were locals bringing scarce goods from just across the border to sell. But in recent years, they have been replaced by an influx of Chinese tradesmen who have set up permanent shops and have become a fixture of Central Asian urban life. Like Barakholka and Ya Lian bazaars in Almaty, the Dordoi and Karasuu in Bishkek shows the enormous economic outreach of Chinese products in Central Asia. The story is similar in Bishkek's Osh Bazar. Kyrgyzstan in particular is benefiting from the re-export of cheap Chinese goods to other Central Asian states and even Russia. The Chinese traders in Kyrgyzstan can be divided into two broad categories – the small operators and the wealthier Chinese businessmen who are referred to as *loben* or *bashlik*. The small operators often make trips between China and Kyrgyzstan themselves and do not seek to obtain long stay entry permits. They rent containers in which they stock and resell their goods and employ local workers, Dungans or Kyrgyz. The *bashlik* employ large numbers of locals for reselling and performing transactions. In addition to their sites in the market some Chinese entrepreneurs have opened factories principally in the Chui Valley.

China's trade with the Central Asian states has traditionally been dominated by barter trade. Over the last few years various diversified trading channels have expanded the bilateral trade. Border trade, local trade, border residents markets and tourist purchases now flourish in towns like Yilin and Urumchi. In addition special economic zones have been opened along the borders. For instance, the opening of a special economic zone in Yili, in north western Xinjiang near the border with Kazakhstan has the potential to transform the nearby border port at Khorgas into a centre of trade with Kazakhstan, including container transportation, processing facilities and the promotion of tourism in both Kazakhstan and Xinjiang. This is supported by the fact that the area is China's only Kazakh autonomous prefecture populated mainly by ethnic Kazakhs. In the course of the last decade economic and technical cooperation has increased significantly between China and Central Asia. A number of joint ventures are now in operation, and Chinese entrepreneurs have signed agreements, contracts and letters of intent with their counterparts in Central Asia. The most important factor in the development of bilateral trade is that both Central Asia and China's North West are located in Inner Asia and are completely landlocked. The operation of rail and road linkages like the second Euro-Asian continental bridge will therefore be crucial for the operation of trade. The opening of the Khorog-Kashgar road link between China and Tajikistan is also significant in this context. The road route is

expected to promote a significant expansion in trade between Tajikistan and China over the medium to long term and boost the share of Chinese goods in the Central Asian market.

Attitude towards Chinese goods, however, is often ambivalent. In Kyrgyzstan, for instance, the flood of Chinese imports into the country since 1991 has been a blessing. Affordable imports have been a cushion against persistent inflation. At the same time an open trade policy has created an avenue for Kyrgyz entrepreneurs to gain profits by re-exporting Chinese goods to larger better protected markets in Kazakhstan, Uzbekistan and even Russia. On the other hand, the rise of China's economic influence has fostered sovereignty concerns, with many Kyrgyz complaining that their country has become the dumping ground for Chinese products. There is also a latent fear, particularly in the states bordering China that Beijing is hungry for land. And if that is the case, even a small immigration of Chinese to the region would swamp the local population. Though Kyrgyzstani consumers choose China on a daily basis, the local media plays on fears of Chinese in-migration. Research by the Central Asia Free Market Institute (CAFMI) confirms that China has a hammerlock on Kyrgyzstan's informal economy. Over 75% of the goods at Dordoi and 85% of goods at Kara Suu – the country's two largest bazaars come from China. Since much of the trade is informal, numbers about the volume of trade varies widely. Kyrgyzstan's heavy reliance on Beijing, however, increases the Kyrgyz economy's vulnerability to swings. Activity at the Karasuu bazaar experienced a negative trend after Kazakhstan and Uzbekistan sealed their respective borders after the events in Osh in 2010. Also quality control is a major issue.

There is also apprehension that the influx of goods and possibly migrants will lead to 'social problems'. On the Central Asian side, there has also been some unease about a possible Chinese influx that could result from large scale Chinese economic penetration into the region. Chinese bilateral agreements on joint ventures with all the states have led to large scale resettling of Chinese in the Central Asian states. Many Chinese who came to give economic assistance then stayed on after the expiry of their visas. Some married local women and acquired property. Central Asian authorities have not moved to expel the illegal settlers for fear of antagonizing the Chinese government but a degree of concern is evident from a reading of local newspapers. Similarly, there is concern about the movements of locals from rural settlements to urban markets created by the massive influx of Chinese goods. These concerns have been reflected in the social media. An interesting example of this reflection is the documentary *The Other Silk Road* (a film by NCCR North-South and PANOS South Asia) which traces one such migrant movement from Ylailalaa, a rural settlement in the southern Osh province of Kyrgyzstan to the markets of Bishkek and Almaty and then on to Moscow. The narrative is of the people involved in this movement and of the effect of this movement on their lives and the lives of those left behind. The context of this migration is defined within the general problems of the post-Soviet space that was suddenly placed within a 'globalized' world where the collapse of a socialist state and collective farming transformed individuals into entrepreneurs. This in combination with the fact that southern and western Kyrgyzstan shares a long border with China meant that trading in manufactured goods brought from across porous borders became a lucrative possibility. This resulted in the migration of younger people from the heavily populated and resource-poor southern Kyrgyz regions to the north and the capital Bishkek. The Osh and Dordoi markets in Bishkek therefore became host to a large number of migrant traders from the southern regions who live in the outskirts of Bishkek and trade in a wide range of mass consumer products, home electronics and luxury commodities. The movement did not stop here. A significant number of them also moved further north to Almaty and even Moscow.

The film evokes the metaphor of the Silk Road to define this contemporary movement and the trade that is so intrinsic to the definition of the route. Ylailalaa becomes the point of reference

from where this movement begins and where, it is hoped, it will end one day as the migrants return. The narrative is of the period in between. It is a narrative of individuals and families who find new 'homes' in distant places and then grapple with the problems that this new beginning poses. But it is also a narrative of the older and the younger population who shares the benefits of this movement in terms of remittances but also lives in the hope that traditional and familial ties will ensure the return of the migrant population. Here there is portrayal of the social consequences of migration, including changes in life styles that living in an urban settlement entails, and what this would imply in terms of consideration of a return back home.

Set in the background of the pristine natural beauty of Ylailaala and the busy markets of Bishkek the film records the transformation of the region in terms of people displaced by economic constraints. As a micro study it is based on the experiences of a family who exemplify the situation but it also addresses the larger questions that migration poses. This is particularly significant in the Kyrgyz context since the migratory groups within the state are not restricted to the Kyrgyz. As a state sharing a long border with China it involves the question of a very large number of Chinese migrant workers and traders mainly Uighurs from western China, who are often the cause of xenophobic reactions from the local population. It can only be assumed that the problems encountered by the Kyrgyz migrants in Moscow are similar to the ones that the Chinese encounter in the Karasuu market on the Kyrgyz border with Uzbekistan.

In fact internal conflicts within the bazaars have occasionally threatened local stability. Particularly since the Tulip Revolution fires have struck the Uighur and Chinese sections of the Dordoi, Madina and Karasuu bazaars a number of times, most recently during the Osh riots in 2010. While the cause of the fires has been difficult to ascertain, the authorities have been sensitive to demands by small groups of sellers. In early 2007 the Kyrgyz government announced that it would introduce a bill to restrict foreign citizens working in wholesale and retail to 4,500. It was explained that the bill did not target either investors or company heads but those who undertook individual entrepreneurship. It was aimed at reducing competition from Chinese traders and therefore decreasing possibilities of conflict in the bazaars. It was also meant to facilitate the return of Kyrgyz workers who had migrated to Russia. However, implementation has been delayed out of concern that the decision would impact on the state's relations with Beijing. Also, the decision did not receive unanimous support from Kyrgyz economic and political circles. It has been argued that the Chinese traders bring money to Kyrgyzstan by paying for licenses for their shops and rents for apartments. In any case there is no guarantee that the Kyrgyz migrants settled in Russia and Kazakhstan would return. In fact with competition between Kazakhstan and Kyrgyzstan growing over the transit of Chinese products, Almaty would acquire the Chinese wholesale bazaars that would be obliged to leave Kyrgyzstan. New conflictual issues have emerged with Kyrgyzstan experiencing the protest of truck drivers who are not allowed to enter Chinese territory in contrast to Chinese drivers who have access to all Kyrgyz roads. It has been argued that this leads to loss of work opportunities for locals. In spring 2010 these large scale strikes blocked truck flows between Irkeshtam and Osh for several days.

A number of issues therefore impacts on the formulation of a 'Chinese question' in the public space in the region. As Marlene Laruelle and Sebastien Peyrouse in their book *The Chinese Question in Central Asia*,²⁹ point out, social transformations of greater magnitude can also be explained by Chinese proximity. Even though the labour migration flows to Russia are the most visible, similar movements are in the process of taking shape in the direction of China. Less visible, in statistical terms, are the effects that the diversified interaction between the Central Asian states and China are creating. The local social fabric is being significantly modified by the economic opportunities that are

now being made available by Beijing. Similarly, varied groups are now involved in playing the role of economic mediators and minorities are rediscovering their role as shuttle traders. The Uighurs who was the first to take on the role was later joined by the Dungans and China's Kazakhs. Other small interconnected networks have also started to appear. A whole range of new professionals are also being created all linked to the service economy: transportation, freight, logistics, translation, legal and commercial services, etc. Yet, much of the bazaar-related activities continue to be informal and carried out principally by marginal groups on both sides of the border. This is emblematic of a lack of coordination that has resulted from conflicting strategies and contradictory commitments. With Kyrgyz accession to the Customs Union, there is apprehension that the re-export industry will suffer a decline with restricted market access.

Conclusions

Globalization has transformed the world. On the one hand it has brought societies and economies closer together, initiated flows of investments, goods, ideas and images in circulation and ended the possibility that states will act as containers of their population. But the global world is also enmeshed in instabilities and zones of disorder. It has generated refugees as also migrants looking for employment and often the distinction between the two is blurred. Once this is coupled with the fact of the growing ease of movement and communication which globalization creates it is easy to understand why there has been a dramatic increase in population movement. Globalization has placed the state in a new dilemma, one in which it seeks labour in order to remain competitive but is also apprehensive about the kinds of threats that these movements can bring with them. This points to the probability that the global world has two faces, a world of benefits and opportunities and also one that offers potential for all forms of crime, trafficking and terrorism. All of these pose a new danger to states. The migration-security nexus is an expression of the state response to this new situation, a situation where the threats to the state comes principally from these new flows and diffuse networks. In most post-colonial situations, these flows were from the newly independent states to the metropolis, and founded upon assumptions of the fundamental incompatibility of certain 'cultures' and 'people'. However as William Walters argues, there is no inevitable connection between migration and security.³⁰ Conventional international relation perceives migration-security as a reaction on the part of states to emerging scenarios that are perceived as 'threats'. As a result a whole series of dangers and fears come to find embodiment in the social figure of the immigrant, the refugee and the human smuggler. And by extension a series of measures are put in place to securitize both spaces and flows. This, however, ignores the fact that securitization of borders has rarely provided a solution to illegal immigration. The problem is not how to balance security policies with free trade practices but to recognize how this security perspective obstructs and marginalizes the space in which different politics of migration could take place and dualisms like national/foreigner, citizen/illegal and worker/scrounger could be overcome.

Notes and References

¹ The term migration state is borrowed from James F Hollifield, "The Emerging Migration State", *International Migration Review*, Vol 38, No 3, 2004. He argues that the state today is no longer a garrison state or even simply a trading state. In an increasingly interdependent world, states are linked together by international trade and finance. Hollifield argues that migration and trade are inextricably interlinked. Hence the rise of the trading

state necessarily entails the rise of the migration state where considerations of power and interest are driven as much by migration as by commerce and finance.

² The word *gastarbeiter* was used in Germany to define the unskilled and semi-skilled migrant labours from Turkey and other countries. Though no longer used in Germany, the Russianized plural version, *gastarbeitery* is used for migrant workers from Uzbekistan, Tajikistan and Kyrgyzstan to Russia and Kazakhstan. However, in contrast to the *gastarbeiter* in Germany who were brought in legally as contract workers for a fixed term and offered legal and economic protection, these migrants have no job contracts or work permit.

³Mumin Shakirov, "Diary of an Uzbek Gastarbeiter", *Open Democracy*, March 18, 2009, <https://www.opendemocracy.net/article.../diary-of-an-uzbek-gastarbeiter>

⁴ Myron Weiner, "On International Migration and International Relations", *Population and Development Review*, Vol 11, no 3, 1985, pp 441-445.

⁵Hollifield, "The Emerging Migration State".

⁶ Up to 27% of the population of Uzbekistan, 18% of the population of Tajikistan and 14% of the population of Kyrgyzstan are labour migrants. Most are men and over 50% do menial work. While at one time the movement used to be seasonal, due to economic crisis the movement has become more chaotic. See *International Organization for Migration: Kazakhstan*, www.iom.int/cms/en/sites/iom/home/where-we-./kazakhstan

⁷ Barbara Schmitter Heisler, "Sending Countries and the Politics of Emigration and Destination", *International Migration Review*, Vol XIX no 3, 1985, pp 469-484.

⁸ Vsevolod Marinov, "Gastarbeiter in Russia", *The Voice of Russia*, 21 July 2008, sputniknews.com/voiceofrussia/2008/07/21/204083

⁹ With fewer dollars entering Uzbekistan, the Uzbek sum has fallen 15% against the dollar on the black market. The official exchange rate has fallen by about 11%. See "Uzbekistan: Rouble's rout Breeds Uncertainty for Central Asian Markets", *Eurasianet Weekly Digest*, 23 December, 2014.

¹⁰ For a typical migrant stories see Shaun Walker and Alberto Nardelli, "Russia's rouble crisis poses threat to nine countries relying on remittances", *The Guardian*, 18 January, 2015. Aziz, a migrant from the Ferghana, notes that "life is miserable enough anyway, the only reason to be here was the money, I think it is time to go home". See also Vladislav Schnitzer "Trials and Tribulations of Uzbek Gastarbeiter", *The Moscow Times*, 15 May 2004 and "Uzbekistan: Rouble's rout Breeds Uncertainty for Central Asian Markets".

¹¹ Ivan Komarov and Anastasia Verseneva, "Priehzhe iz Srednei Azii Massovo Pokidayut Possiyu", *Gazeta.ru*, 21 January 2015.

¹² *Tsentralnaya Azija: Kuda Nodatsya Trudovomu Migrantu*, *Deutsche Welle*, 21 January 2015, www.dw.de/p/1ENPF. See also P Stobdan, "ISIS in Central Asia", *Issue Brief, IDSA*, 22 October 2014, where he notes that the possibility of Central Asian migrants joining the ISIS remains significant. Concerns in the region are less today about the return of the Taliban and more about the return of trained ISIS jihadists. However, no common strategy exists to deal with them. Also Bayram Balci, "From Ferghana Valley to Syria ---The Transformation of Central Asian Radical Islam", *Eurasia Outlook*, 25 July 2014 who argues that it is mostly Uzbeks of the "diaspora" that is Uzbek migrants from Russia, but also Uzbeks from Kyrgyzstan who are getting involved in jihadi action in Syria.

¹³ For a detailed discussion see Sophie Roche, "The role of Islam in the lives of Central Asian migrants in Moscow", *CERLA Brief*, No 2, October 2014.

¹⁴"Islam Karimov: Far from Reality", *Ferghana.News*, 24 June 2013, enews.ferghananews.com/migration.

¹⁵ See Islam Karimov: "Far from Reality". Also according to Walker and Nardelli, "Russia's rouble crisis poses threat to nine countries relying on remittances", 31.5% of Kyrgyz economy, 42% of Tajik economy and 12% of Uzbek economy is dependent on remittances. With the Eurasian Union bringing together Russia, Belarus and Kazakhstan and now also Kyrgyzstan and Armenia, the plummeting rouble and consequent short fall in remittances will affect the GDP of all the states. Also these figures are based on official figures the real amount transferred in person by migrants is significantly larger. See also *MPC Migration Profile: Russia*, Migration Policy Centre June 2013, www.migrationpolicycentre.edu. The Profile provides details of migration figures, work permits, remittances all classified by state as also the legal framework governing the status of legal migrants

¹⁶ Weiner, “On International Migration and International Relations”.

¹⁷ There have been exceptions. In the aftermath of the Osh conflicts in 2010, the profile of the Uzbek migrant from Kyrgyzstan changed dramatically. Entire families including women and children were seen to be on the move for good. See Abdujalil Abdurasulov, “The quest for home”, *OpenDemocracy*, 18 September 2012, <https://www.opendemocracy.net/abdujalil-abdurasulov>.

¹⁸ Richard Weitz, “Kazakhstan Adopts New Policy Towards Foreign Migrants”, *Eurasia Daily Monitor*, Vol 11, Issue 10, January 17, 2014.

¹⁹ Weitz, “Kazakhstan Adopts New Policy Towards Foreign Migrants”

²⁰ Cited from Bhavna Dave, “Getting by as a Gastarbeiter in Kazakhstan”, *Open Democracy*, 20 September 2012, <https://www.opendemocracy.net/bhavna-dave/getting-by-as-a-gastarbeiter-in-kazakhstan>.

²¹ Gulmira Kamziyeva, “Astana Develops New Oralman Repatriation Programme”, *Central Asia Online*, 2 November 2011.

²² Disaffection in the energy rich western regions of Kazakhstan are fuelled by the perception that the local people do not benefit sufficiently from the petro dollars that drives the Kazakh economy. The OzenMunaygaz had been at the centre of protests in Zhanaozen which involved energy sector workers protesting over pay since May 2011. Violence broke out on December 16, the Kazakh independence day, with the injured admitted with gunshot wounds. The violence came as a shock to the state which has an image of a state as a bastion of stability and a magnet for foreign investment. For details see Joanna Lillis, “Kazakhstan: Violence in Zhanaozen Threatens Nazarbayev Legacy”, *Eurasianet.org*, December 21, 2011.

²³ Joanna Lillis, “Kazakhstan: Astana Entices Kazakhs from Abroad Amid Ukrainian Crisis”, *Eurasianet.org*, July 14, 2014.

²⁴ Cited from Nicolas de Pedro, “Kazakhstan’s Eurasian dilemma”, *Opinion CIDOB*, no 283, December 19, 2014, E-ISSN-2014-0843..

²⁵ Cited from Nicolas de Pedro, “Kazakhstan’s Eurasian dilemma”.

²⁶ Dave, “Getting by as a Gastarbeiter in Kazakhstan”.

²⁷ Border control policies of the Uzbek state for instance have been identified as theatrical/performative. See Nick Megoran, Gael Raballand and Jerome Bouyjou. “Performances, Representation and the Economics of Border Control in Uzbekistan.” *Geopolitics* 10, no 4, 2005.

²⁸ Dave, “Getting by as a Gastarbeiter in Kazakhstan”.

²⁹ Marlene Laruelle and Sebastien Peyrouse *The Chinese Question in Central Asia, Domestic Order, Social Change and The Chinese Factor*, London: Hurst and Co, 2012.

³⁰ William Walters, “Migration and Security”, in J Peter Burges (ed) *The Handbook of New Security Studies*, London: Routledge, 2010.

Reconfiguring the Concept of Asylum

Simon Behrman *

Introduction

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 there is certainly no mention of a right of asylum in the 1951 Convention or any current regional legal instruments. During the drafting process of the Universal Declaration on Human Rights states insisted on changing the original draft of Article 14, which referred to a right to be ‘granted’ asylum, and was 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?

What follows is an interrogation of how ‘asylum’ has been configured in the modern era and how it should be reconfigured along the lines of the historic meaning of the word and its practice over many centuries preceding the birth of international refugee law. So I begin by showing how the origins of international refugee law lie squarely within the desire of states to manage and control the movements of forced migrants, rather than ‘humanitarian’ concern for them. I will then discuss the concept of asylum as it has been understood and practiced from antiquity up until the modern age, grounded within its etymological root as ‘freedom from seizure’. This tradition is a rich one, which has drawn variously on theological, spiritual and political notions of justice and contestability, but which crucially identifies itself as outside of law and State sovereignty.

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

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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 opposition 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. Amongst more contemporary scholars Atle Grahl-Madsen recognises this when citing Vattel: a State is 'free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation'.⁶ Léopold Bolesla-Koziebrodzki has pointed out that the right of 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 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

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 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, insofar as it actually exists, 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 Nonetheless, perhaps to avoid any confusion on the question, the phrase did not make it into the final draft.

Therefore it should not be surprising 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 asylum to persons who do not qualify as refugees as that word is used in the Convention.’¹⁴

Indeed, 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 that followed 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.¹⁵ 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.¹⁶ Because these Italian 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’.¹⁷ 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’.¹⁸ Noiriél 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.¹⁹ In short the Nansen Passport system, the precursor of modern refugee law, was primarily about stabilising, monitoring and controlling the movement of refugees. 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’²⁰ arrangements of the 1920s were followed by more formal and far-reaching attempts to create a system of international refugee law with the 1933 Convention, and a further international agreement at Evian in 1938.²¹ The 1933 Convention was the first legally binding international treaty on asylum, and would form the basis for the 1951 Convention.²² 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.²³ 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.²⁴ The 1933 Convention also allowed signatories to derogate from all aspects except for one: Chapter XI, General Provisions.²⁵ 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*.²⁶ This was the first enunciation of this principle, which has since become a central plank of international refugee law. However, the Convention still allowed states to expel refugees for ‘reasons of national security or public order’.²⁷ The U.K. made a reservation to Article 3 stating that ‘public order’ could include criminal or ‘moral’ issues.²⁸ Similar exclusion clauses were later included in the 1936 Arrangement and in Article 5 of the 1938 Evian Convention.²⁹

By 1938 it was clear that there needed to be a more significant response to the exodus of Jews and others fleeing Nazi Germany. The matter became even more urgent 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.³⁰ 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.³¹ (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.’³² 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 those who need it. One can easily imagine Germans, Jewish or otherwise, who

having felt merely harassed or uncomfortable living under the Nazi regime, had chosen for reasons of ‘personal convenience’ to move 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 people who have migrated 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*’.³³

In sum it can be said that ‘the interwar years...helped to establish refugees as a special category of migrant’.³⁴ 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 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”’.³⁵

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 offered was one who had lost the protection of their State, and for whom therefore, ‘the link between him and international law’ had broken down.³⁶ Also writing in 1938, although from perhaps a less cynical perspective, John Hope Simpson, as part of his survey into the refugee crisis in Europe, argued that refugee assistance had been hobbled by political partisanship.³⁷ 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 then voluntarily placed itself, curiously enough, under the direct control of the military Supreme Commander of Allied Forces.³⁸ And they 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’.³⁹ 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’.⁴⁰ Further the bureaucratisation of refugee assistance has led to 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.⁴¹ 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.’⁴² 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 regime essentially reflected the concerns of states that this ‘surplus population’ not endanger post-war political stability and economic recovery.⁴³ Thus many 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’.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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’.⁴⁷ Annex 1 then lists those worthy or not of being refugees, creating categories of those considered to be ‘unworthy of international protection and assistance’.⁴⁸ In the main this referred to former Nazis or their collaborators,⁴⁹ but economic migrants were also specifically excluded.⁵⁰ 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'.⁵¹

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 the 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.

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.'⁵²

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'.⁵³

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.'⁵⁴ 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'.⁵⁵ 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, 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',⁵⁶ 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.'⁵⁷

Further, Noiriël 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.⁵⁸ 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.⁵⁹

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'.⁶⁰ Discussions on the refugee definition were perhaps the most extensive of the entire process with over 500 pages of official documents devoted to it alone.⁶¹ 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.⁶² 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.⁶³ 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.⁶⁴

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'.⁶⁵ 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.⁶⁶ In return for a settled universal definition of a refugee, the temporal and geographical limitations (relating to events in Europe prior to 1951) had to be put in place.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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, mainly those who were poorer and darker. 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.'⁷¹

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 Koreans, but those in the Indian sub-continent were denied aid, in spite of repeated requests from both India and Pakistan.⁷²

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.⁷³ 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’,⁷⁴ 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 began 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’.⁷⁵ The negotiations that led to the 1951 Convention are probably best summed up by one 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, and a footnote to the effect that even the soup might not be served in certain circumstances.’⁷⁶

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.⁷⁷ 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’.⁷⁸ This new emphasis 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.⁷⁹ 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’.⁸⁰ 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.⁸¹ 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 restrict the entry of those seeking asylum. West Germany, for example, set up a ‘recognition procedure’ based in Nuremberg, 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 also be assessed as to ‘refugee quality’ before being released.⁸² 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, West 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 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 implicit in the 1951 Convention. As a result, the overwhelming majority of contemporary forced migrants from the Global South, fleeing conditions of civil war, natural disasters and economic hardship, were placed outside this ‘universal’ refugee construct.⁸³ 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.⁸⁴ 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 asylum claimants while escaping the political embarrassment entailed by use of an overtly Eurocentric refugee policy.’⁸⁵

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, a necessary part of policing this distinction, ends up as a mechanism for making subjective judgements on whether or not the refugee is worthy of being granted asylum.⁸⁶ B.S. Chimni identifies this problem when he writes that the Convention’s ‘objectivism tends...to substitute the subjective perceptions of the State authorities for the experiences of the refugee’.⁸⁷ 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 ever 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, 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.⁸⁸ Moreover, the venerability of this tradition was keenly felt. For example, at the close of the 15th century, in an English 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.⁸⁹ There is evidence that sanctuary cities described in the Book of Numbers influenced the creation of sanctuaries set up in various English towns in the 1540s.⁹⁰ While my research has focused on what might be termed the Western tradition of asylum, there is certainly evidence of it elsewhere as an ancient practice across

many cultures. There is some evidence, vague it must be said, of asylum in India and China before the Christian era.⁹¹ An Arab tradition of asylum can also be traced to pre-Islamic times.⁹² And following his conquest of Mecca, the Prophet Muhammad declared two sites as sanctuaries for those who had opposed him.⁹³ In short, the practice of asylum is ancient and widespread. Moreover, what characterised the many different forms in which asylum was practiced across huge expanses of space and time was that it was conceived of as a space in which the law and the power of secular authorities were non-operative.

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.⁹⁴ 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.'⁹⁵ 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 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 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'.⁹⁶ 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 inviolable', and thus were off limits to kings, armies and sovereign orders that rose and fell throughout the internecine wars of the period.⁹⁷

The political and spiritual elements of asylum are particularly evident with the rise of the Christian Church and the terminal crisis of the Western 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 resistance to Roman occupation 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 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 Hospitality and Law

The Roman authorities moved to bring asylum within a legal framework, and in doing so, presaged modern refugee law by categorising those deemed worthy or not of sanctuary. For example, a 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.

Anne 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 then 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 tomorrow when others might judge them as worthy or not of being granted asylum?¹⁰² Augustine’s declaration that asylum was open to all was a rejection of a series of laws of the last decade of the 4th Century, which in various ways sought to distinguish between deserving and undeserving fugitives.¹⁰³ It was also, in my opinion, a rejection of law as a method of regulating the asylum. Instead of laws demarcating the deserving from the undeserving refugee, Augustine was in favour of the church as the City of God, to be open to all, an approach much more in tune with notions of hospitality than of 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, but 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 was never 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 effectively abolished in 1623. Yet 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; solidarity based on shared religious beliefs was the determining element in guaranteeing protection for refugees. 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, and political and/or religious solidarity with those seeking protection.

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 with the Huguenots:

‘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. Indeed, 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. One attempt by Palmerston’s 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, while Marfleet is correct to identify the modern nation-state as one key moment in the transformation of asylum, the process of subordinating the question of asylum to sovereign right was only completed with the coming of refugee law in the 20th century. 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.¹¹² This process is 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 rather than 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 within communities of solidarity free from seizure by states of reception as much as by states of origin.

Notes

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

2 *ibid*, ii.21.V.

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

4 Quoted in Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol”, in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann(Oxford: OUP, 2011), 42.

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

6 *ibid*.

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

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

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

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

11 Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With A Commentary* by Dr Paul Weiss (Cambridge: 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”, *Harvard International Law Journal* 31(1990): 130.

13 *ibid*, 134.

14 Fruchterman, “Asylum”, 177.

15 Michael R. Marrus, *The Unwanted: European Refugees from the First World War Through the Cold War* (Philadelphia: Temple University, 2002), 51.

16 John Hope Simpson, *Refugees: Preliminary Report of a Survey* (London: Royal Institute of International Affairs, 1938), 56.

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

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

19 Noiriel *Réfugiés et sans-papiers*, 106.

20 Paul Weis, “The International Protection of Refugees”, *The American Journal of International Law* 48 (1954),194.

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- 21 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.
- 22 Skran, "Historical Development", 14.
- 23 Simpson, Refugees, 86. In 1931 The League of Nations had stipulated 31 December 1938 as the date by which the Nansen Office's work would cease.
- 24 Simpson, Refugees, 59; Skran, "Historical Development", 18.
- 25 Skran, "Historical Development", 24.
- 26 *ibid*, 24-25.
- 27 League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations Treaty Series, Vol. CLIX No. 3663, Article 3.
- 28 R. Yewdall Jennings, "Some International Law Aspects of the Refugee Question", *British Year Book of International Law* 20(1939), 105, footnote 3.
- 29 Simpson, Refugees, 106.
- 30 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, *Unwanted*, 171.
- 31 League of Nations, Convention Concerning the Status of Refugees Coming From Germany, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461, Article 1.
- 32 Skran, "Historical Development", 31.
- 33 Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford: OUP, 1993), 17.
- 34 Skran, "Historical Development", 36.
- 35 Louise W. Holborn, "The Legal Status of Political Refugees 1920-1938", *American Journal of International Law* 32(1938),703.
- 36 Jennings, "Some International Law", 99.
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