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**UNIVERSITY OF SOUTHAMPTON**

**ASYLUM AND THE POLITICS OF REFUGE:  
A COMPARISON OF BRITISH AND GERMAN  
POLICIES AND PRACTICE**

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**THESIS SUBMITTED FOR PhD EXAMINATION**

**Faculty of Social Sciences**

**September 1998**

UNIVERSITY OF SOUTHAMPTON

ABSTRACT  
FACULTY OF SOCIAL SCIENCES  
POLITICS  
Doctor of Philosophy

ASYLUM AND THE POLITICS OF REFUGE:  
A COMPARISON OF BRITISH AND GERMAN POLICIES AND PRACTICE  
by Liza Schuster

This thesis combines an analysis of asylum from a historical and conceptual perspective with a comparative study of British and German asylum and refugee policies. It is argued that the policies of Britain and Germany are constructed in response to the needs of states, rather than individuals, and that policy is constrained by the nature of these states *qua* liberal democratic nation states. The thesis focuses on the way asylum seekers and a 'refugee problem' are constructed by the receiving states in response to the needs of each state. The different challenges raised by asylum seekers - to the nation state, the welfare state and liberal democracies are discussed, as are the reasons why states continue to grant asylum.

The first part of the thesis, comprising chapters one to three, explores conceptual distinctions between migrants and refugees, and examines the different moral and political obligations that are owed to each depending on one's theoretical position. Debates in international and political theory are engaged with and the empirical assumptions that constrain the theoretical arguments are questioned. The thesis then traces the historical development of asylum, chronicling the evolution of asylum as an instrument of state. Finally the international context within which national asylum and refugee policies are framed is outlined. The second part, consisting of chapters four to seven, looks at the asylum practice of two liberal democratic states in some detail. By exploring changing policy and practice in Britain and Germany we seek to explain the gap between the normative rhetoric of these states and their actual behaviour.

# Asylum and the Politics of Refuge: A Comparison of British and German Politics and Practice

## TABLE OF CONTENTS

	<b>INTRODUCTION</b>	7
	Immigration and Asylum	9
	Asylum Seekers and the State System	10
	Methodology	13
	Outline of the Thesis	24
1	<b>THEORETICAL AND CONCEPTUAL ISSUES</b>	27
	Asylum Seekers - Political or Economic Migrants?	28
	Security Threats and Human Rights	33
	Asylum as a Moral and Political Philosophy Issue	41
	The Practical Limits of Moral Obligations & Legitimate Restrictions on Migration	57
	The Question of Legitimacy	62
	Conclusion	64
2	<b>ORIGINS AND DEVELOPMENT OF ASYLUM</b>	68
	The Origins of Asylum	69
	Asylum in Early Christian Times - Church Asylum in Ascendance	76
	From the Reformation to Westphalia - Church Asylum gives way to Territorial Asylum	81
	The Revolutions of 1789 and 1848 and the Emergence of the Political Refugee	87
	The Two World Wars	95
	Conclusion	102
3	<b>CONSTRUCTIONS OF THE REFUGEE PROBLEM SINCE THE SECOND WORLD WAR</b>	103
	The Construction of a Problem	104
	The Construction of Solutions	108
	The Development of a European Response	117
	A Reconstruction of the Refugee Problem	123
	New Solutions - Containment and Asylum	126
	Conclusion	129
4	<b>REFUGEE AND ASYLUM POLICIES IN BRITAIN</b>	133
	The Post-War Period 1945-1970	135
	The Re emergence of Asylum	142
	The Start of the Retreat 1979-1989	146
	1989 to the Present	149
	Threats	157
	Prospects for the Future	166
	Conclusion	168

<b>5</b>	<b>REFUGEE AND ASYLUM POLICIES IN GERMANY</b>	171
	The German State Re-invented	173
	1973-1989 Closing the Border	186
	The Refugee Problem - A Convenient Fig-Leaf?	199
	Conclusion	209
<b>6</b>	<b>A CRITICAL COMPARISON OF THE BRITISH AND GERMAN EXPERIENCE</b>	212
	Britain and Germany: The Differences	212
	The Similarities: Nation-States, Sozialmarktwirtschaften and Liberal Democracies	227
	A Balance Sheet	239
<b>7</b>	<b>RETHINKING THE POLITICS OF ASYLUM AND REFUGE</b>	244
	A Summary of the Themes	244
	Particularist and Universalist Perspectives	250
	A Particularist Future	254
	Limited Universalism	257
	The Need for a Radical Alternative	259
	<b>BIBLIOGRAPHY</b>	263

## ACKNOWLEDGEMENTS

I would like to thank John Solomos for being supervisor, mentor and mate - I couldn't have done this without him. I am grateful to the Economic and Social Research Council for funding this research (Grant No. R00429434295). Thanks too, to Mathias Albert, Russell Bentley, Peter Billings, Chris Brown, Dave Carter, Thomas Diez, Tony Evans, Volker Hügel, Peter John, Laurence Lustgarten, David Owen, Vicki Preece, Raia Prokhorovnik, Nick Rayner, Julie Reeves, Arvind Sivaramakrishnan, Corinne Wales and Sandy Wilkins who have read and commented on drafts of the different chapters. Thanks also to Ian Forbes who set me on the road. I am also grateful to all those in Britain and Germany who generously allowed me to interview them, the staff of the Landeszentrale für politische Bildung, and the Humboldt University in which I spent many happy hours. Special thanks are due to Terry Sullivan for continuing to care, Philip Spencer for being a bit of a guru, and especially to Richard Roberts, Breda Schuster, and Nikki Schuster-Farrell for being there all the way through.

## **DEDICATION**

Dedicated to Khosrow, Roma, Hari, Rushna, Sonia, Youcef, Moussa, Fred, Adama...

## INTRODUCTION

All European<sup>1</sup> states have the legal right to grant asylum, but, with the single exception of Germany<sup>2</sup>, are under no obligation to do so. Asylum is a right of states, not of individuals, whose only right is to request and to enjoy asylum once it is granted (Art.14 Universal Declaration of Human Rights). And yet, in spite of the degree of control which states, such as Britain, have over the granting of asylum, there has been growing concern among European states that this right has become a costly liability. The number of people applying for asylum in Europe has been increasing for some time, but in the years after 1989 the rate of increase accelerated. To a large extent, this was due to the war in Yugoslavia, which sent millions fleeing northwards across borders that had been opened following the collapse of the Soviet Union. To these can be added people fleeing other upheavals in Eastern Europe and further afield, such as the Horn of Africa. The changing situation in Eastern Europe coincided with the accelerating drive to create a Europe without internal frontiers. It was this transformation that was seen by a number of states as necessitating the creation of strong external borders.

These events have provided fertile material for research on the political and social context of asylum policies. There has been an explosion in the past decade in the number of works in comparative politics and international relations dealing with asylum (Cohen 1991; Joly 1989, 1996; Joppke 1998; Loescher 1992). It is important to note, however, that the concern with asylum is not confined to comparative politics and international relations. Asylum has become an issue in political and social theory (Carens 1991, 1992, 1994; Linklater 1998; Walzer 1983). This growth of interest has also been evident in other social science disciplines. Before 1989 most of the work in this area was being done by lawyers, historians, sociologists, anthropologists and advocates. There are a number of studies on the asylum and refugee policies of individual countries (Klausmeier 1984; Münch 1993, 1994; Prantl 1993), comparisons are being made between the asylum laws and policies of various states (Cohen 1991;

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<sup>1</sup>The history of asylum in Latin-America is very different to that of asylum in Europe, and the response of host states in Africa very different to the response of European states, but this work is concerned with two European states (acknowledging all the while that Europe is only marginally affected by the world's refugee problem). For this reason, the history of asylum and asylum policy outside Europe only enter the discussion when they directly affect British or German asylum policy and practice.

Gibney n.d; Joppke 1998b; Lambert 1995; Mallet 1991/2), the significance of refugees and asylum seekers for security issues is being investigated (Loescher 1990, 1992a, 1992b; Waever et al 1993; Weiner 1990; Widgren 1993), and the importance of a harmonisation of asylum policy in the European Union is being scrutinised (Collinson 1993a, 1993b; Hailbronner 1990, 1993; Joly 1989, 1992; Kerber 1997).

It is now recognised that the asylum issue is not temporary, or easily soluble, but a permanent feature of the twentieth century<sup>3</sup> and as such, raises some fundamental questions about the actual obligations of states to a particular group of non-citizens, obligations that are increasingly being questioned. Whereas the Cold War obviated any real need to defend the granting of asylum, non-theorists<sup>4</sup> concerned with refugees and asylum are now obliged to examine the norms and values which underpin state policy and practice if they wish to offer coherent, feasible and morally justifiable alternatives to current policy. One of the best examples of this kind of work is James Hathaway's essay 'A Reconsideration of the Underlying Premise of Refugee Law', which argues that 'the pursuit by states of their own well-being has been the greatest factor shaping the international legal response to refugees since World War Two' (1990: 133). At the same time, theorists such as Michael Walzer and Joseph Carens have discovered in asylum a tough proving ground for their theories of justice, sovereignty, citizenship or political obligation. In the light of contemporary developments, those theories must be able to take account of asylum seekers, whose plight and numbers mean they can no longer be (dis)regarded or overlooked as an anomaly, or as irrelevant, and whose position as vulnerable outsiders make them the hard case which tests all theoretical claims to their limits.

It is my intention in this thesis to contribute to debates primarily in the area of comparative politics, but also to argue that the narrowing and polarising of the debate in political theory to two positions, i.e. the human rights of asylum seekers vs. the citizenship rights of host populations, overlooks the common ground between these two positions in relation to restrictions on entry. The core concerns of this thesis will therefore be to demonstrate and criticise the consensus that exists at the level of both

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<sup>2</sup>Chapter five discusses whether this is a *de jure* rather than a *de facto* obligation.

<sup>3</sup>While there have always been refugees, what marks out the twentieth century is the continuous presence of large numbers of people in countries not their own who have been forcibly displaced from their homes (Marrus 1983; Zolberg 1983).

theory and practice about the obligations that states owe to a particular group of non-citizens - asylum seekers. It does this by examining history of asylum practice, and the debates surrounding it, in Britain and Germany.

### **Immigration and Asylum**

The issue of asylum is usually treated as part of the wider issue of immigration<sup>4</sup>, and yet there is a fundamental difference between the two. States seem to allow that refugees have a legitimate claim to entry and to their protection, and to the rights guaranteed in the 1951 Geneva Convention Relating to the Status of Refugees. This is the only group of non-citizens with no connection to the state or its citizens, which some states (for example, Britain and Germany) accept they have a responsibility to admit. Neither Britain nor Germany accept any obligation to admit migrants (unless they are close family members of British or German citizens). However, the focus of this work is not on refugees *per se*, but on asylum seekers, some of whom will be recognised as refugees and granted asylum. All those who claim to be refugees, but who have not yet been recognised as such, are asylum seekers. In the media, in political discourse (see Hansard and the texts of the Bundestag debates) and in much writing on this group (Hollifield 1992; Kussbach 1992; Lohrmann 1981; Quaritsch 1985; Spencer 1993; Widgren 1993), it is treated as axiomatic that the group 'asylum seekers' consists of a very small sub-group of 'genuine asylum seekers' (those who will ultimately be recognised as refugees), together with a much larger sub-group of 'bogus' asylum seekers, who are not refugees, but 'economic migrants' who wish to migrate to, settle and work in the host state. While disputing this view of 'asylum seekers', this work examines the reasons why these two states are prepared to accept obligations to some asylum seekers and under what conditions.

States attempt to filter this group through the asylum process using a definition of refugees, which distinguishes political from economic motives for flight. As has been pointed out elsewhere (Dowty 1987; Hein 1993; Richmond 1994; Zolberg 1983a), distinctions between political and economic causes of flight are difficult to sustain, as are distinctions between push and pull factors, or voluntary and involuntary migration,

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<sup>4</sup>This term is not used in any derogatory sense. If anything, the contrary is true.

<sup>5</sup>In Germany the situation is somewhat different. While there are laws regulating the asylum procedure, and a constitutional provision for asylum, immigration is more contentious, since it is argued by the government that there is not and has never been any immigration into Germany (see Chapter Five).

since all human decisions are constrained or compelled by a variety of factors. Nonetheless, the definition employed by signatories of the 1951 Convention attempts to draw just such a distinction. Refugees are those who have *been recognised by a state* as having:

a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and who are outside the country of their nationality and unable or, owing to such fear, are unwilling to avail themselves of the protection of that country; or who, not having a nationality, and being outside the country of their habitual residence...are unable, or owing to such fear, are unwilling to return to it (Art.1 Geneva Convention on the Status of Refugees).

Asylum seekers are those who, having crossed an international border, have requested asylum in a state not their own, that is, recognition as a refugee by a state not their own. Asylum is permission to remain in that state, to enjoy most of the rights of the citizens, including access to welfare rights. Perhaps one of the cruellest ironies is that, having been forced to flee from the persecutions of one state, it is to another state that they must look for protection, and that having done so, they are greeted by 'further displays of state power and violence' (Daniel and Knudsen 1995: 7).

### **Asylum Seekers and the State System**

Asylum seekers present a challenge, not just to individual nation-states, but to the nation-state *per se* and to the international system of states (Joppke 1998a). Because liberal democratic states accept that they have a certain responsibility for refugees, and because some of the asylum seekers will be refugees, the claims of all asylum seekers should be examined. However, this creates a burden for those states, which, ideally, would prefer to sift the claims at a distance, so that they need only admit the 'genuine' asylum seekers, that is, refugees. This is in fact what the two states examined in this thesis, Britain and Germany, have attempted to do by enacting legislation such as the 1993 Asylum and Immigration Appeals Act, the 1996 Asylum and Immigration Act in Britain and by amending Germany's constitutional provision for 'political persecutees' in 1993. Ultimately, these legal instruments are about control of entry and of the right to remain<sup>6</sup>, because these two issues are central to state sovereignty, and this is what is seen as being threatened by asylum seekers, including refugees.

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<sup>6</sup>Restricting access is not sufficient, the state must also have the power to remove those it does not wish

This challenge can be met in different ways. Where the challenge is perceived as a threat, the response is to reinforce certain features of the state, such as borders. Where the challenge is regarded an opportunity, it is accepted that the nation-state needs to, and is changing, and that it is no longer, if it ever was, the only sovereign actor and focus of loyalty. The arguments for the latter position tend to rely on the spread and institutionalisation of concepts such as human rights (Jacobson 1996) which attach rights to individuals *qua* human beings, rather than as citizens of particular states. Advocates of this position argue that to assume that the nation-state can insulate itself from population movements in an increasingly mobile world is to blind oneself to the impact of global capital that takes little account of national boundaries. It would be equally mistaken to assume either that there is a global attachment to human rights or that they can be guaranteed in the face of abuses by individual *sovereign* states, who can and do make it very difficult for people suffering human rights abuses to seek asylum (Jacobson 1996; Soysal 1994). Without denying the force of such liberal concepts as individual human rights in creating norms, these norms have no power at all where they are not accepted, and they can be and are set aside even in liberal democracies for *raison d'etat*. It will be argued that this triumph of *raison d'etat* is inevitable given the nature of the state system, and further, that without changing states *beyond recognition*, *raison d'etat* will always triumph.

This thesis is a radical critique of the dominant values and norms underlying state practice generally, and asylum practice in particular, insofar as it does not accept as inevitable or just the current system of states. Taking this position means that the faults and flaws in the current system can be more clearly seen as contingent on certain features of the state. While agreeing with Carens that current reality must be judged in the light of our highest ideals, that 'If we are forced to choose between the lesser of two evils, it is essential not to delude ourselves into thinking that the lesser evil is really a good' (1996a: 167), the approach taken here goes further than that of cosmopolitan liberals such as Carens. It is argued that the current international state system is an essential part of the problem. In which case, there is a challenge to think beyond it, to explore alternative possibilities. Rejecting the possibility of such a revolutionary change is defeatist and a betrayal of those whose suffering, like that of refugees and asylum seekers, is due in large measure to the actions of states. This

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to remain.

thesis does not offer such an alternative - but it seeks to show the necessity of finding one. It is concerned to demonstrate that the large number of asylum seekers and refugees are an indication of *a problem with the system*, not merely *a problem for the system*. Catherine MacKinnon (1989: xiii) has referred to 'the power of the state and the consciousness- and legitimacy-conferring power of law as political realities'. While criticising the state and refugee law, this thesis recognises them as political realities, but as realities to be changed, not accepted.

Part of that reality is that we live in a world divided into states. Each state makes a claim to a territory and to a population. Most of the world's population is at home in a particular territory and has the citizenship of the state that controls that territory. However, large numbers of people are outside the territory of their country of origin, and without the protection of that state. Most of these people are seeking the protection of another state. In Western Europe, which receives only between 5% and 8% of the world's refugees, most will receive a degree of temporary and contingent protection, in that they will not be refouled, that is, returned to the state from which they fled. However, only a few, less than a tenth of applicants, will be given the full protection guaranteed by the grant of asylum. Nonetheless, asylum is still perceived today as a means whereby states can fulfil duties to those non-citizens to whom its owes certain obligations. Contained in this statement are certain assumptions: about the obligations of the state to citizens and non-citizens, that there is a *significant* difference between the two, and about the political use of asylum by the state. While the first two assumptions have provided fertile ground for political theorists such as Michael Walzer (1983), Andrew Linklater (1990) and others, discussion of the latter, with some exceptions (Carens 1995), has fallen to international lawyers such as Andrew Shacknove (1993), James Hathaway (1990) and Alexander Aleinikoff (1992) and sociologists like Robin Cohen (1991). A growing body of literature in political theory and international relations is, however, rising to the challenge presented to theories of the state by the 'refugee crisis', although in some cases, it seems as though these theorists are (Barry 1992; Walzer 1983), however unwittingly or reluctantly, providing a *posteriori* justification for policies of restriction. Some of these writings attempt to

reconcile moral obligations to refugees with the actual capabilities of states to fulfil those obligations<sup>7</sup>.

It is widely acknowledged that in the twentieth century, one of the most important functions fulfilled by asylum was that of a legitimating device, in particular during the Cold War (Cohen 1991; Gibney 1992; Klausmeier 1984). With the end of the Cold War, this function has been much reduced<sup>8</sup>, and the practice of asylum has become more restricted. This legitimating role has served to deflect attention from other, more concrete, purposes which asylum has historically fulfilled for the state. Although such benefits have not been in evidence for some time, they serve as a reminder that the granting of asylum has rarely been purely altruistic. The following pages will demonstrate that asylum in the current system of nation-states still has a role to play for the state, and as such, though it may not be in the form one would expect, or hope, asylum itself will survive.

### **Methodology**

In developing this thesis I have chosen to combine an analysis of theoretical and historical issues with detailed case studies of trends and developments in Britain and Germany. The methodology chosen for this thesis might be called 'praxis' since it involved a constant shifting between theory and evidence. I started with a question, rather than a hypothesis, and then went in search of answers, but as I searched I modified the questions I asked and the arguments I was trying to make. My interest in this field arose out of earlier work on the German asylum debate in 1992/3. It seemed to me at the time that German asylum policy was being constructed, not in response to evidence, nor even in ignorance of the evidence, but against or in spite of the evidence - and so the question was - why? Having met a number of asylum seekers in Germany, and used their experiences as case studies for my dissertation, the human costs of policy were very clear. Although the situation in Britain was very different in terms of numbers, the same story - of policy constructed in response to false or non-existent evidence - could be told. Again - why? As I worked, frustration and anger changed the question to 'given that they are so unwilling - why do states grant asylum at all?'

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<sup>7</sup>A recent doctoral thesis by Matthew Gibney 'Political Theory and the International Refugee Crisis' (submitted to King's College, Cambridge, May 1995) addresses this problem head on.

<sup>8</sup>In Chapter 2 the possibility that since it has become so clearly associated with liberal democracies it continues to act as an internal legitimating device is discussed.

The nature of the questions being asked naturally shaped the answers and explanations that I found, but these in turn changed the questions being asked. Functional explanations for the granting of asylum have been chosen in order to bring out the utility of asylum as an instrument of state in a way that moralistic, ideological or religious explanations on their own cannot. It is not intended to suggest that this is the sole explanation for the development of asylum, only that it has not received the attention it deserves. The demands of a common humanity, the ancient obligations of hospitality have all been served and continue to be served by the institution of asylum. However, it remains doubtful whether such demands would have been (will be) sufficient to ensure asylum's availability to fugitives.

Originally, one of the main concerns of the thesis was going to be with the responses of asylum seekers and refugees, but as the thesis developed it became concerned more with the search for an explanation of the increasing reluctance of states to grant asylum and the various strategies employed to reduce the numbers of those who can apply for, and those who are granted asylum. The core of the thesis crystallised around the question - why *do* states grant asylum at all? As a result, institutions - the state and asylum - replaced the human subjects at the centre of the thesis. This was a source of considerable misgiving, but since it is the states of Britain and Germany who control the future of those who seek protection within their territories, it seemed permissible to focus on this powerful entity - the state - and its instrument - asylum. The need for research on the role of asylum seekers and refugees as political actors in the host state remains, but it falls outside the scope of this thesis.

From the outset, it was clear that a comparative approach would be necessary, if claims were to be made about states and liberal democracies in general. Had the thesis focused solely on Britain or on Germany, it is possible that any argument put forward could have been undermined by reference to unique features of that state. By examining those particular features (history, political structures) and their impact on policy, it was then possible to evaluate the common factors at work in each country. By taking a comparative approach, this thesis demonstrates that common trends towards restrictions that fall short of doing away with asylum completely are attributable to features (statehood, representative democracy, liberal norms) shared by Britain and Germany. So that while one explanation for the difference in the number of asylum

seekers entering Britain and entering Germany must be the geographical situation of the two countries, it cannot explain why the difference in numbers led to pursuit of the same strategy.

Furthermore, taking a comparative approach meant that hypotheses that arose in respect of one country could be tested in another, and if they did not stand up as well, or at all, then a further line of enquiry would be opened up. An example would be the intensity of the asylum debate in Germany in 1992/3. The numbers of asylum seekers at the time was the accepted explanation, but large numbers and sharp increases in previous years had not the same effect. In searching for an explanation, a number of differences between the two countries were examined, including their history in relation to asylum, their ability to actually manage the numbers, their political structures and the existence of a written constitution. In this way, the analysis of each country fed into and deepened the analysis of the other.

The reasons for choosing Britain and Germany as case studies are that there are sufficient similarities between the two states to make a comparison possible. The granting of asylum is, apparently, accepted practice in both states and though the practice has been restricted by both, neither state has considered abolishing it altogether (so far). Britain and Germany are both signatories of the major international and European conventions relating to asylum (for example, the Geneva Convention Relating to the Status of Refugees (1951) and the Dublin Convention (1990), even though Britain signed up to these much later than Germany) and are they both key actors within Europe. While they have had very different approaches to Europe, in relation to asylum issues they have been mutually influencing and reinforcing each other's evolving practice. They also provide interesting points of contrast. It has not been possible to trace the development of asylum policy in Germany during the early part of this century in any detail since most of the standard works on asylum in Germany (Bade 1994; Kimminich 1983; Münch 1993) concentrate on German asylum law and policy from 1949 onwards<sup>9</sup>. Discussions on asylum in the German literature prior to this date deal only with asylum in international law<sup>10</sup>. In part this may be

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<sup>9</sup>An exception is Bröker and Rautenberg (1986). In chapter six, the challenges arising from the differences between the two states will be taken up and explored.

<sup>10</sup>There is no work devoted to refugees seeking asylum, of whom the Ostjuden were only a minority, during the period 1871 - 1945. While this might be understandable during the ascendancy of the Third

explained by German unwillingness to grant asylum during the first half of the twentieth century. Certainly the granting of asylum to German nationals by other states was regarded as an unfriendly act. An alternative explanation might be that in writing the history of asylum in the Federal Republic, there was no need to go further back in history since the founding of the Federal Republic marked a distinct and deliberate break with the past. Furthermore, attention has usually focused on the exceptional nature of Germany's post-war asylum provision (Kimminich 1983; Münch 1993; Quaritsch 1985), occluding similarities with other states and the continuing significance of German ideas of belonging and exclusion, and the welfare state, both of which can be traced back to the end of the nineteenth century. Chapter Five attempts to redress this balance, arguing that, as in Britain, the structure of the state itself as a *Rechts-, Volks- and Sozialstaat*, and the tension between Germany's image of itself as liberal and democratic state and the priority given to national interest, all play a significant role in shaping German asylum policy.

The changes which occurred in Europe in and after 1989 had a far more direct and immediate impact on Germany than they did on Britain. Within a few months, unification had meant the Federal Republic of Germany had increased her population by 16 million. In addition, the break-up of the Soviet Union meant hundreds of thousands of ethnic Germans from the former Soviet Republics were entering Germany. The war in Yugoslavia drove 350,000 refugees across Germany's borders, while during the same time Britain accommodated less than 10,000 Yugoslav refugees. While Britain's treatment of refugees and asylum-seekers once they have entered the state may have been considered more liberal than Germany's until 1996, Britain's ability (due in part to her island status) to keep potential asylum-seekers at a distance is far greater than Germany's. A further complication that cannot be overlooked, is the federal structure of Germany. The autonomy of the *Länder* vis à vis the national government has meant different asylum practices in different parts of the country, which has in turn affected national policy. Such pressures are absent in Britain's centralised state.

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Reich, it is curious that this large group is virtually ignored during time of Wilhelm, and the Weimar Republic.

Although the comparison of Britain and Germany is central to the thesis, it was important to situate these case studies historically and conceptually. This is why I examine in some detail the role of particular ideologies and theories - liberal and democratic - in shaping the policy and practice of these two states. This multi-disciplinary approach is demanded by refugee studies, which make it necessary to 'incorporate the knowledge, methods, theories and concepts of a number of disciplines' (Harrell-Bond 1988: 2). Refugees do not merely cross international boundaries. They don't fit neatly into any one discipline either. Policy is framed within particular historical, political, economic and social contexts. The framing, enactment and implementation of the law are expressions of policy, which is in turn shaped by ideology and exigencies. And yet, studies have tended for the most part to be narrow in focus. There have been excellent historical studies of refugees in Europe (Bramwell 1988; Holborn 1975; Marrus 1985), or of particular refugee groups, such as the Jews (Wasserstein 1979; Wertheimer 1987). Contemporary groups of refugees from Khmer women on the Thai-Cambodian border (Muecke 1995), to the Hmong in Thailand (Conquergood 1988) and Bosnians in Glasgow (McFarland & Walsh 1994/5) have been studied in camps or resettled in communities by anthropologists and ethnographers. The increasing number of humanitarian agencies in the field have carried out work on emergency responses and aid to refugees in camps. Others have studied the displacement, movement, resettlement or repatriation of refugees<sup>11</sup>.

However, it was not until the eighties that an attempt was made to develop theoretical explanations for the existence of refugees (Zolberg 1983a, 1989), with the emphasis on the causes of flight. Much more recently, political theory has focused the debate on whether the state has obligations to non-citizens specifically on the issue of asylum (Carens 1991, 1992, 1996; Gurtov 1993), though this issue was already being addressed by Michael Walzer in *Spheres of Justice* in 1983. When I began this thesis in 1994 I was unaware of any attempt to marry theoretical and empirical work on asylum<sup>12</sup>, or to draw evidence from more than two disciplines together, and yet it seemed (and still seems) that any attempt either to critique current practice or offer alternative models would have to examine the historical and legal development of

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<sup>11</sup> The documentation centre at the Refugee Studies Programme in Oxford has an extensive collection of studies on all these different aspects of refugeedom.

<sup>12</sup> Since then Matthew Gibney (1996) and Christian Joppke (1998) have completed studies that do combine empirical studies and political theory.

asylum<sup>13</sup>, in addition to analysing the ideological norms and values that had shaped and influenced that development.

As a result, though not a lawyer or an historian, it has proved necessary to use the work of scholars from law, history, international relations, political science, sociology and political theory. The result of this multidisciplinary approach has been that the literatures of the different disciplines have all become relevant, as have their different methodologies. Different methods and approaches are used in different chapters, sometimes even within individual chapters. In trying to unravel the reasons why states grant asylum, I began with an historical analysis. Since this chapter was to be an examination of the development of asylum, use was made of historians of particular periods and issues (Bade 1987, 1984; Ehrenberg 1973; Gibbon 1896; Lindberg 1992; Lloyd 1979; Macauley 1946, Moore 1987; Painter 1968; Turton 1974) as well as historical studies of asylum and/or refugees (Bulmerincq 1853; Kushner 1990a, 1990b; London 1989, 1990; Marrus 1985; Holborn 1975; Noiriel 1993; Porter 1979). From the birth of the state, asylum has been used as an instrument of the state, and so in order to explore the possibility that asylum served different purposes for the state as the state evolved, I had recourse to historians of political ideas, such as Quentin Skinner (1978) as well as the work of those writing on state practice both as it was at the time, and as they thought it should be, including Grotius (1990), Machiavelli (1970) and Kant (1984) among others. All of these different areas could have been treated separately and differently, but since the goal was to underline a particular relationship, and the way the relationship was structured by the needs of the state (and states), a narrative format was chosen.

Since many of these writers, for example, Grotius and Machiavelli, were jurists or in the service of the state, they provided important insights into the law, that instrument and expression of state policy. The use of legal texts, that is, the texts of the laws themselves, as well as the original drafts, continued to be important throughout the thesis, as a means of uncovering the intentions of the drafters of the law. In Chapter Three, extracts from the United Nations Charter, the 1951 Refugee Convention, and

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<sup>13</sup>Initially I was determined not to have the obligatory historical chapter, but as patterns started to emerge from the brief historical notes that many refugee books contain, I began to realise that a more detailed examination of asylum's development could contribute a great deal to understanding current practice.

the Declaration on Territorial Asylum (1967), are used to show the way certain norms -such as non-intervention and sovereignty- are used in legal instruments to deprive those instruments of any power over their signatories<sup>14</sup>.

The records of the parliamentary and committee debates framing those laws revealed many of the dilemmas raised by the issue of asylum. The parliamentary debates examined were those from 1991 onwards in Britain and 1992 in Germany. In the British case I concentrated on the House of Commons debates in Hansard, while in Germany I recorded the debates from television and radio. The amount of material was enormous, and for this reason I decided to rely on secondary sources prior to the 1990s. The analysis of these debates was carried out in different stages. As a theme was taken up, I would read through (or listen to) the debates looking for references to that theme, such as references to benefits, or to tradition – examine the context in which these references were made, who was speaking, which party they belonged to and whether they supported the party's official line in the debate. Later I would return, looking for other references. Occasionally, I would be sent off on a tangent, noticing the repetition of a certain phrase and would refocus my search, looking for its first appearance. It was only on the fourth or fifth reading that I noticed, for example, how careful Tony Blair was in the way he attacked the Government's proposals in 1992, focussing his critique exclusively on the detail of the law.

In the absence of translations of many of the German sources, especially the collections of essays, and the work of jurists, whose area of expertise would be of little interest to non-German speakers, I have had to translate many of the passages myself<sup>15</sup>. The work of 19th century legal scholars such as Bulmering, Lammasch, von Mohl & Weder offered a valuable and fascinating window into German frustrations with liberal England's asylum policy. Among the many other effects of the opening of the Berlin Wall, was the ease with which I could access these documents in the Humboldt University, in the eastern part of that city. Aside from the texts of the different laws, the Interior Ministry in Bonn and the Home Office in Croydon provided

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<sup>14</sup> An example of what can be discovered by comparing drafts would be the original wording of Article 14 of the Universal Declaration of Human Rights, which promised the right 'to be granted asylum', but which was changed to promise only the right 'to seek and enjoy asylum' because the former would have changed the balance of power from the state to the individual.

<sup>15</sup> When I have used my own translation, the original text is always given in a footnote, so that German speakers may judge whether I have interpreted the original correctly.

a great deal of statistical information. The notes and commentaries that accompany these statistics provided incidentally interesting perspectives from the respective government ministries of the nature of the 'problem' facing the governments and explanations for trends upwards or downwards<sup>16</sup>. Though much of the documentary evidence used came from official sources, any potential imbalance is redressed by the critical approach taken throughout the thesis.

In the theoretical chapter the different theorists are used to explore and reveal the assumptions and premises which unite the different positions and limit perspectives. Debates in international and political theory are engaged with and certain empirical assumptions that shape these theories are called into question, including the issue of whether restrictions on entry are necessary for the preservation of the nation, the welfare state and the liberal polity. The methodology for the chapters focusing specifically on the practice and policies of Britain and Germany includes the use of documentary sources, newspapers and some interviews with those who took part in the debates leading up to the fundamental changes in the law of asylum in Britain and Germany, as well as less formal interviews with those campaigning against the introduction of restrictive legislation and with asylum seekers who are directly effected by the legislation. On marches and demonstrations in Britain and Germany, I found asylum seekers, campaigners and protesters prepared to talk to me. Most of the conversations with asylum seekers occurred in their homes or cafes or in Germany in the hostels in which they live. With some, a close relationship developed and the conversations occurred not just during fieldwork in the first half of 1996, but on return visits I made each year and in letters and phone calls.

In the case of campaigners, these fell into two distinct groups. Interviews with representatives of the more established campaign groups such as Amnesty International, the Campaign Against the Immigration and Asylum Bill or Pro Asyl usually took place in offices of those. During these interviews, I took notes and supplemented them with campaign literature. Interviews and conversations with those who belonged to more radical groups tended to occur on the marches and

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<sup>16</sup> Examples would be HO Statistical Bulletins 17/94-15/97 and BMI reports A1 - 937 020/15 'Survey of the Policy and Law concerning Foreigners in the Federal Republic of Germany, or A3 - 125 415/10 'Report of the Federal Ministry of the Interior on Initial Experiences of the New Asylum Procedure Regulations 1993'.

demonstrations, and notes would be written up on train journeys afterwards. However, although these interviews and those with the asylum seekers were interesting and did inform the thesis, this was only indirectly. Since the analysis became much more state-centric than I first anticipated, it was primarily the interviews with representatives of the established campaign groups, political parties and governments that I drew on directly (9 in Germany and 6 in Britain).

I had hoped that it would be possible to talk to more supporters and opponents of the proposed legislation, both inside and outside parliament, that I would be able to interview a representative sample of policy-framers and makers in each country. However, in Britain, it did not prove possible to talk to a member of the Conservative government in spite of a number of requests to those in the Home Office. Of Labour party members, only Jeremy Corbyn, a backbencher, would speak to me, though Max Madden was willing to be interviewed, but it proved impossible to find a mutually convenient time. In Germany, access proved much easier, and I was able to speak to Volker Klepp of the Federal Office for Foreigners' Affairs, Jürgen Haberland from the Ministry of the Interior, Robin Schneider of the Berlin Office for Foreigners' Affairs, Petra Hanf of the Greens. In all of these cases, I used a dictaphone and transcribed the interviews myself. These interviews were rather formal, and the interviewees tended to be well briefed in advance. Each of these people welcomed me to their offices with a number of official publications and statements that they had gathered for me to take away.

In Britain, interviews were harder to come by, but included Jeremy Corbyn of the Labour Party, David Laubach of the Immigration and Nationality Department (IND), Jude Woodward of NAAR and Jan Shaw of Amnesty International. With Jeremy Corbyn, the interview took place in Westminster and was closer to a long discussion in format. As with Fr Hanf in Germany, the internal politics of the relevant party formed a major part of the discussion. The interview in the IND was interesting because at the last moment, Keith Best, who I was originally supposed to interview could not make it. Mr Laubach, who stepped in at the last moment, felt unable to answer all of my questions, but passed them on to Mr Best, who subsequently wrote to me. I recorded the details of these interviews in notebook. A sticker that I forgot to remove from the cover of my notebook during the interview with Mr Laubach may have contributed to

an unease that I sensed from him. It was a Socialist Workers' Student Society sticker bearing the slogan 'Stop Racist Deportations: Refugees Welcome Here'. In interviews with government representatives and civil servants I asked why particular proposals had been introduced, what were the expected effects of these proposals, and whether the legislation had had the desired/expected effect. With representatives of opposition parties and campaign groups, I also asked for an evaluation of the campaign and their role in the campaign, and in the case of the Greens, for an explanation of their change of position. In general, the interviews with Government representatives were not as helpful as I had hoped, as the politicians and civil servants tended to rehearse the 'official' line which was to be found in the official documentation. Especially in Germany, these interviewees seemed to have been trained to block any attempt at probing questions, while being very polite, and generous with copies of official reports and statistics.

In addition, extensive use was made of newspaper coverage in order to provide an overview of trends in popular debates in each country about refuge and asylum. Having spent the period 1992/3 in Germany writing my undergraduate dissertation on the change to the constitution, I had a large archive of newspaper and magazine cuttings to draw on. I focused particularly on Der Spiegel, the Frankfurter Allgemeine Zeitung and Die Zeit. This meant that there was a definite bias in my German sources towards the broadsheet newspapers, though I would buy Bild, a tabloid paper, whenever they carried a story relating to asylum - usually visible on their front-page. In Britain, there was the same bias towards broadsheets, and again the tabloids were only bought when they carried front-page stories relating to asylum seekers, or when students who knew of my interest brought a story to my attention. The overwhelming concentration on the broadsheets is a weakness, but given financial constraints one that would have been difficult to overcome. As the broadsheets covered a number of ideological perspectives, I felt it more important to include them than exclude them because I could not guarantee a balance. In addition, I was able to draw on the work of Ronald Kaye, who has carried out systematic content analyses of all the British newspapers (1998), though there is as yet no comparable study in Germany.

Finally, over the past seven years, I have spent prolonged periods with individual people, asylum seekers and 'ordinary' citizens, in Berlin, Leipzig and Bonn. Their

challenges of my assumptions and prejudices in the course of long and sometimes very difficult conversations have contributed to this work. My work would have been much diminished if not for the assistance and friendship of a family of Afghani Hindus. Roma and her family arrived in Germany seven years ago, just before I met them, and they are still waiting for recognition. Their generosity with the details of their long and tortuous march through the bureaucratic nightmare, their hospitality and friendship allowed me a glimpse of the limbo inhabited by millions of others in Britain and Germany, and a lesson in the impact of the law on the lives of individuals. Others, citizens of Britain and Germany with whom I worked and lived, and even occasionally asylum seekers themselves, sought to convince me that governments had no choice but to restrict those who came to 'live off their hard-earned wages', while I in turn tried to dissuade them from accepting 'media lies'. I believe that what remains is due to the strength of my arguments, and not a refusal to listen to them and learn from them.

Use was also made of archives in Berlin and Cologne, and of a resource that I believe is unique to Germany - the Bundes- and Landeszentrale für Politische Bildung. These are offices maintained in each Land whose purpose is to make freely available to every citizen (and resident) of Germany a wealth of materials on the history, government and politics of the German state. Here I found compilations of articles, speeches and plädoyer by different actors in the German asylum debate, as well as reference books and academic studies. All of those who worked in these offices and in the archives were extraordinarily helpful, and where free copies were not available to take away, would allow me to borrow material for photocopying. The objective is to ensure that the electorate is informed and politically literate, but it is also a wonderful resource for researchers.

### **Outline of the Thesis**

The thesis is organised into two parts. Part One is composed of Chapters One to Three, and focuses particularly on theoretical, conceptual and historical issues. Part Two is composed of Chapters Four to Seven, and is organised around a comparison of the history and experiences of asylum and refugee policy in Britain and Germany. **Chapter One** offers a brief overview of migration theories in order to highlight the understanding or role of asylum seeking within these theories, and the nature of the distinctions made between asylum seekers and migrants. This leads in to the second

section, which looks at different representatives of the two main theoretical positions - universalist and particularist - and the nature of the obligations each accepts towards asylum seekers (but not migrants). It will be shown that much contemporary theorising about the obligations of the state to non-citizens either fails to question the social and political structure in which we live or, having questioned it, accepts it as inevitable. The structure of the state and the state system itself lies at the root of the refugee phenomenon, and of the difficulties experienced in responding to the needs of those who seek asylum. The assumptions of theorists relating to states, and liberal or social democratic states in particular, underpin the arguments offered by those confronting the issues raised by large refugee movements. Once these assumptions - for example that controllable borders are necessary - are clear, it becomes obvious that many writing about refugees and asylum are operating on the understanding that this is the only world view that is 'real'. It is accepted that there are no alternative ways of understanding the world that are realistic. In the final section, the limitations that are accepted, even by the universalists, are explored.

**Chapter Two** sketches the historical and theoretical evolution of asylum. The evolution of asylum, and its utility for the state granting or withholding it, provides an answer to the question of why the state has granted asylum, and why it will, in all likelihood, continue to grant it. There are different elements in this chapter which are not dealt with separately but which are interwoven: the history of asylum itself which predates the state and a history of the state, and the use it makes of asylum, once the state comes into being. There is also an indication of the history of asylum as it features in theories of the state. The history of asylum is important, because it reveals the conditions under which asylum has been granted, the purpose it has served for the state as the state has evolved, and the impact that changing understandings and features of the state have had on the practice of asylum. Embedding the history of asylum within a history of the state serves to further undermine some of the assumptions referred to in chapter three about the naturalness or inevitability of particular characteristics of states. This chapter follows the shift from universal ethical reasoning through to the more particularistic and exclusionary ethical theories which underlie state asylum practice today, and suggests that asylum has always been granted because the benefits accruing were greater than any costs which might be involved.

Providing both a link between the past and the present, and a wider context for the evaluation of actual policy in two particular states, **Chapter Three** explores how and *why* the ‘refugee problem’ was constructed in the way that it was in the post-war period, that is, as temporary, exceptional and soluble. It goes on to show that this construction was built on a particular conception of the refugee - European and individualised - and that it has constrained solutions to that problem ever since. These solutions and the constraints that hobble them are then discussed. In the second section, the emphasis shifts to the European dimension of the asylum issue, and it is demonstrated that responses at a European level are primarily intergovernmental, since member states will not concede sovereignty, as required by a supranational response. This chapter ends with an examination of the ‘new’ construction and solutions to the refugee problem. Having answered, in different ways, why and how states grant asylum, the next three chapters ask why do Britain and Germany grant asylum, especially when they seem so reluctant to do so? There continues to be significant differences between British and German asylum practice. However, the common drive to restrict and harmonise asylum law and practice indicates certain ‘commonalities’ between the two states.

**Chapters Four and Five** provide expositions of each of these countries separately, tracing the trends and developments in each country’s asylum policy and practice. The significance of certain features of these states for asylum policy is explored, such as political structures, the historical context and the geopolitical situation of each country. Though the development of asylum practice followed very different trajectories in each state, by the early 1990s there has been a marked convergence around the need to control the number of people seeking asylum and the methods used. **Chapter Six** examines why these two countries continue to grant asylum, while demonstrating by the introduction of increasingly restrictive legislation, that they are less and less willing to do so. It is an attempt to draw together the experiences of these two states, to unearth the common values, and ideologies, which shape asylum practice in Britain and Germany today and to ask whether it is possible for states like these to become more responsive to the needs of asylum seekers.

**Chapter Seven** returns to theory and asks ‘what of the future?’ Three alternative scenarios are considered, as well as three different strategies. It is possible that as

inequality, and hence instability grows, the richer and more stable parts of the world will introduce even greater restrictions in order to shield themselves from the conflicts, and refugees, that will result. Alternatively, these divisions may become intolerable, giving rise to global violence, from which liberal democracies will not be able to insulate themselves. The ‘fortresses’ may be stormed, to give rise either to further barbarism, or socialism. Or, most likely, the state will survive much as it has done, by making tactical concessions. How should/can one respond in the face of these possibilities? The three strategies offered are: ‘bending the rules’; ‘changing the rules’; and ‘changing the game’.

## CHAPTER ONE

### THEORETICAL AND CONCEPTUAL ISSUES

Mirroring the increase in the number of people seeking refuge and asylum globally we have an exponential increase in research publications across an enormous variety of academic fields. A wide body of research has been produced exploring various aspects of refugee and asylum policies (Brodorotti and Stockmann 1995; Cohen 1989; Ferris 1993; Keen 1992; Koepf 1992; Richmond 1994). The main concern of this chapter is to provide an overview of key bodies of research particularly as they relate to this study<sup>1</sup>. Because the admissions policy of most states involves a ranking of those who want to enter - citizens, refugees, asylum seekers and migrants, this chapter attempts to unravel the conceptual and normative justifications for making these distinctions.

The chapter has been structured around a review of key theoretical frameworks on migration, focusing specifically on whether these different paradigms treat migrants and refugees as conceptually distinct. If there is a distinction to be made, the basis for making it is also examined (Castles 1993; Dummett 1992; Joly and Cohen 1989; Kay and Miles 1988; Widgren 1993). From this discussion we move to a consideration of the normative basis for distinguishing between obligations to one's fellow citizens or co-nationals and obligations to one's fellow humans (Carens 1994, 1996b; Walzer 1983). Having outlined the different positions, the argument that follows claims that an examination of asylum policy and practice reveals the ongoing struggle within states to reconcile the tensions generated by the attempts of liberal democratic states to be liberal (responsive to the needs of all) and democratic (responsive to and representative of 'its' people in particular).

In examining the first of these arguments, some of the different theories of migration are outlined, such as the rational-choice and structural models, as well as more recent globalisation and security approaches. Each model views asylum seekers slightly differently. Some of these treat asylum seeking as a form of migration (Widgren 1993)

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<sup>1</sup>The development, humanitarian and emergency approaches are omitted from this discussion in order to maintain the focus on Europe. To have included development and humanitarian policy would have necessitated including far more on the countries of origin of asylum seekers and this would have moved the focus too far from the states under examination, though they will be included in future work. The 'root causes' of refugee flows are also not treated separately, since theories about root causes are explicit in some, and implicit in the other, approaches outlined below, whether breaches of international law,

and others as something conceptually distinct (Dummett 1992). International law and the human rights paradigm, for example, treat refugees as conceptually distinguished from migrants in terms of individual motivation: those who leave their states of origin for economic reasons are considered to be voluntary migrants, those who leave for political reasons (such as their political beliefs) are regarded as refugees. By contrast, much public discourse treats asylum seekers, that is, those that claim to be refugees, as 'disguised economic' migrants and as a threat to the receiving state. This perception of migrants, including refugees, as a collective threat to security is given intellectual expression within the Security Studies approach. Here the individuals themselves are of less concern than the numbers of people who move, their country of origin and their potential impact on the host state, whereas in rights based approaches, the focus is on the individual as a rights bearer.

Implicit within these different debates are different normative positions that are often in tension with each other. In the second section of this chapter, two dominant normative paradigms, and some of the theories which fit within these paradigms, are discussed – namely *universalism* and *particularism* (Habermas 1994; Singer 1993; Hendrikson 1992; Miller 1988, 1994). It is suggested that the debates between these two camps obscure shared values and conceptions, and that both are marked by resignation to a norm - a world divided into states (preferably liberal), which insist upon their right to control entry, and hence keep asylum seekers at a distance. In the third section, the practical constraints on the liberal practice of granting asylum are evaluated. Finally it is argued that states grant asylum because it is in their interest to do so, and the rhetoric of moral and legal obligations, while providing a safety net for a small number of asylum seekers, primarily serves to legitimate the claims of states to be liberal and democratic. It will be argued that the primary difference between migrants and refugees is that states recognise an obligation to refugees that they do not extend to migrants. Hence, the insistence on discriminating between 'political' and 'economic' migrants.

### **Asylum Seekers – Political or Economic Migrants?**

It is now almost axiomatic that as the legal gateways for migration to the industrialised states have swung shut, more and more economic migrants are trying to squeeze

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violations of human rights, poverty, political instability or the formation and reformation of states.

through the door reserved for refugees, necessitating stronger measures to distinguish between the two. Tougher measures are being introduced to prevent those who are migrants, not refugees, gaining access to the asylum procedures. Though such measures have achieved a degree of success, in that the number of applications for asylum usually drops after implementation (though not always – see Chapter Four), the pressure at points of entry continues to mount. Faced with such pressures, an insistence grows that most asylum seekers are really ‘economic’ migrants and that only a minority are entitled to admission as refugees. In Chapter Two, the difficulties associated with deciding who is a refugee before they enter the state are discussed, but here the question is whether one can distinguish between refugees and migrants, and on what grounds this distinction is made.

Approaches to migration which have treated population movements as aggregates of individual, rational decisions have been heavily criticised (Cohen 1987: 35; Castles 1993: 19; Zolberg 1983b: 3), but still continue to be used within a neo-liberal, laissez-faire economic paradigm. According to this voluntaristic view, individuals respond to the pull of a free labour market, economic opportunity and better living conditions and push factors such as unemployment, poverty and demographic growth. The individual and voluntaristic explanations for population movements have shaped the current refugee regime, so that while asylum seekers and refugees are referred to collectively as ‘streams’, ‘floods’ and ‘flows’, the decision to flee is treated as an individual response to persecution (a push factor). The decision on whether to admit is based on examination of each individual’s claim to have been persecuted (this is the principle – derogations are examined in Chapters Four and Five) and the persecution must have been directed at the individual applicants themselves. Economic factors are not considered relevant in the determination of an asylum application, since it is only the persecution of the individual that counts. Within this paradigm the decision to flee is presumed to be a response to push, rather than pull factors – ‘the main factor that determines their flight is the “push-pressure” aspect, thus distinguishing them from most migrants who are pulled’ (Joly and Cohen 1989: 7). This schism between ‘migrants’ and ‘refugees’ is perpetuated in the human rights and international law approaches and in the implementation of international law by states that recognise only individual claims for refugee status.

Refugees, and those claiming to be refugees (asylum seekers), present theorists and policy makers in liberal democracies with a particular problem because of the way they have been constituted by such polities, as people to whom, by virtue of their pressing needs, liberal democracies have certain obligations. The simultaneous opening and closing of borders has both sensitised and problematised the granting of asylum. In particular during the twentieth century, the European states have increased their control of entry of immigration. Until quite recently it was accepted that refugees constituted a special case, that there were obligations to refugees, which were not owed to migrants. The asylum procedures, which states use to decide who is, or is not entitled to asylum, are a mechanism that gives states control over a group to whom they appear to concede a right of entry.

However, as Stephen Castles (1993: 20-1) points out, a model which relies on computing push and pull factors cannot explain why the poorest do not move, or why people pushed by demographic pressures are attracted to densely populated areas, or why everyone, faced with the same broad range of economic and political push factors, does not leave<sup>2</sup>. Nor does it explain how certain groups, such as refugees and asylum seekers, choose their destinations (Castles 1993; Portes and Fernández Kelly 1989: 18). An alternative to this micro-analytical approach is one that examines the structural factors that influence migratory movements understood as collective phenomena. Alejandro Portes and Patricia Fernández Kelly focus on 'the structural arrangements of the productive system of which migration is but a single manifestation' (1989: 19). These structural arrangements include the flow of capital investments and the movement of labour 'from less-developed countries to areas from which capital investments have originally stemmed' (1989: 19). This approach, which has much in common with that of Saskia Sassen (1988), explains movement, and the choice of destination, in terms of colonisation, political influence, trade investment and cultural ties.

A different but related explanation is Immanuel Wallerstein's world systems theory, which also stresses the economic factors driving population movements (1974). The strength of Wallerstein's approach, that it sees the world economy as a system rather

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<sup>2</sup> Among the reasons people do not leave are poverty – they cannot afford the fares and/or visas necessary, but the pull of the familiar also acts as a disincentive to leave.

than as a group of independent, isolated national economies, is also its weakness, in that it overlooks the continuing power of states within that system. Robin Cohen warns that the 'spread of world capitalism is not so global, or so flattening, or so unproblematic as some world systems theorists [such as Wallerstein and Portes and his collaborators] seem to believe' (1987: 40). Zolberg (1981: 258) and Cohen (1987: 40) have criticised Wallerstein and Portes for relying solely on economic determinants and neglecting the political. Perhaps in response to this criticism, Portes and Fernández (1989: 20) subsequently refer critically to theories of labour recruitment, but as a process in which firms engage, ignoring, for example, Britain and Germany's state recruitment programmes. They do speak of 'the importance of political factors and of the state in particular, in shaping the nature of migration' (1989: 20), but only in relation to the criminalisation of certain types of labour migration. There is no mention of refugees or asylum seekers, and having mentioned the importance of political factors, they then proceed to ignore them.

Neither Wallerstein nor Portes have much to tell us about the movements of asylum seekers and refugees, which would not necessarily be a problem if the state did not regulate the entry of the migrants it attracts to fill labour needs. The motivations of individual migrants would be unimportant because they would not be subject to investigation at the border and used to select those who may enter. Portes, in particular, neglects the role of the state in sending and receiving migrants. In contrast, Castles, acknowledging the role played by the governments of the countries of origin, stresses that 'it is particularly the governments of potential immigration areas which permit, restrict or prohibit movements...State policies on refugees and asylum seekers are major determinants of contemporary population movements' (1993: 21-22). Economic factors are important, and states may act in the interest of a particular economic class, but state policy in relation to migration generally, and refugees and asylum seekers in particular, is constructed in response to political as well as economic factors, and the two are most frequently intimately interwoven:

It is important to realise that the distinctions between the various types of migrations, however important for the people concerned, are only relative...fundamental societal changes lead both to economically motivated migration and to politically motivated flight. Sometimes it is difficult to distinguish between the two (Castles 1993: 25-6).

Castles has emphasised the variety and complexity of the factors affecting migration, including the role of the political economy of the world market, of inter-state relationships and the laws and practices of states. He has also pointed out that this is a two-way process. Even those who come for primarily political reasons affect the economies and markets of sending and receiving countries 'and the effect on both sending and receiving countries is always more than just economic: immigration changes demographic and social structures, affects political institutions and helps to reshape cultures' (1993: 96). Castles' account is the most comprehensive, acknowledging the interrelatedness of the different factors that account for population movement and stressing the role of the state in creating and steering population movements.

The best known and most comprehensive attempt to fill the acknowledged theoretical gap (Escalona and Black 1993) that exists particularly in relation to refugees is that provided by Zolberg, Suhrke and Aguayo (1989). Redressing the bias towards overly deterministic economic explanations of migration, Aristide Zolberg stressed the importance of 'approaching migration from a political perspective' (1983b: 4) which entails a macroanalytic, historical approach. Central to this perspective is the recognition of a norm which is characteristic of the contemporary world, but not of previous epochs. This is that the organisation of the world into mutually exclusive states has been accompanied 'by the transformation of whatever social entities these states initially contained into new formations approximating single societies' (1983b: 5). Given his emphasis on the political perspective, it is perhaps inevitable that this leads him to focus on those whose primary motivation for movement is apparently political - refugees. Having outlined the problems with the standard dichotomy 'voluntary-economic-migrant' vs. 'involuntary-political-refugee', he defines refugees as 'persons whose presence abroad is attributable to a well-founded fear of violence, as might be established by impartial experts with adequate information' (Zolberg 1989: 33)<sup>3</sup>. The advantages of this definition, according to Zolberg is that it distinguishes those who need assistance abroad from states not their own, and those, such as the victims of famine or drought who can best be helped *in situ*.

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<sup>3</sup>Zolberg discusses three different kinds of refugees: targets - 'those who are being persecuted merely for belonging to certain categories - "race, religion, nationality, membership of a particular social group" - more or less the as the consequence of accidents of birth' (1983a: 27); activists - those engaged in political activities which the state seeks to extinguish; and victims - those displaced by violence which is

Having specified the objects of his study, Zolberg takes as his point of departure Hannah Arendt's reflections on minorities and stateless persons, who constituted such a large proportion of the refugees created after World War I. Arendt (1967: 267) highlights the impotence and vulnerability of individuals forced to rely, in the absence of protection by a state, on their humanity alone. These people become the flotsam and jetsam of the international order of sovereign nation states, to be expelled because they were not of the 'people'. This then becomes the basis for Zolberg's argument, neatly captured by the title of his essay 'The Formation of New States as a Refugee-Generating Process' (1983a). In this essay and the later book *Escape from Violence* (1989), Zolberg *et al* take Arendt's reflections on what she sees as a twentieth century phenomenon and trace its roots back to the formation of the modern state system in the fifteenth century. Using historical examples Zolberg argues that 'refugee flows are most prominently a concomitant of the secular transformation of a world of empires and of small self-sufficient communities or tribes into a world of national states' (1983a: 30). Zolberg identifies the state of origin as the creator of most of the world's refugees, but fails to acknowledge the role of the receiving states and industrial states in this process (for example, US policies in Central and Latin America, Germany's role in Turkey and the former Yugoslavia). What is more, he ignores his own warnings - of the difficulty of disentangling economic from political factors, and in compensating for those who have placed too much emphasis on economic factors, Zolberg concentrates almost exclusively on the political. This renders his omission of any discussion of the political reasons why states grant asylum all the more surprising. Implicit, though not articulated in Zolberg's work must be the following question: if, as Zolberg suggests, refugees are the result of state formation, of mass expulsions by states, or of the violence caused by states, shouldn't states, especially nation-states, and the current international system of states be regarded as the problem of which refugees are merely the symptom?

### **Security Threats and Human Rights**

Since the end of the Cold War, migration and asylum seekers have appeared for the first time on a number of different agendas. Turning, for example, to a state-centric approach that treats migration and asylum as issues of foreign policy, political and

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not necessarily directed at them but which makes their lives intolerable.

economic reasons for granting asylum become apparent. Examples of foreign policy as both a stimulus and a response to population movements since the Second World War abound and include bilateral recruitment treaties between the US and Mexico, and West Germany and southern European states. During the Cold War, there were a number of studies of migration and asylum as tools of foreign policy used to promote national economic, ideological and humanitarian interests (Teitelbaum 1984; and *post hoc* Teitelbaum & Weiner 1994). Foreign policy considerations dictate that those fleeing countries with which the receiving country has hostile relations will be granted asylum (the classical illustration is the granting of asylum by the US to persons fleeing Communist controlled areas or states, to which Castro responded by allowing the outmigration of more than 100,000 Cubans). These Soviet and Cuban defectors were used in the West's propaganda wars with the Soviet Union. On the other hand, asylum seekers from friendly states and allies are far less likely to be granted refugee status. For example, 98% of Guatemalan, Haitian and Salvadoran applicants to the US were rejected, while the British Conservative government's good trade relations with Pinochet meant the rejection of Chilean applicants (Joly 1996: 30).

With the end of the Cold War this approach gained rather than lost salience as a result not so much of mass movements of people across the globe as of the fear of such movements. The emerging new world order was an unfamiliar place, and the fall of borders revealed the surprising extent to which the West had relied on the Iron Curtain as a bulwark against population movements which, it was assumed, would be destabilising. The West was only prepared to encourage mass defections from the Soviet Bloc, so long as the Soviets could be relied on to prevent this happening. The end of superpower rivalry and the perceived retreat of the nuclear threat (however temporarily) created space on the 'old security agenda' which has now been filled by the issue of migration (Loescher 1989, 1990, 1992; Weiner 1992, 1995; Weiner & Münz 1997; Widgren 1993). In the traditional security approach the concern was usually with external military threats to the state or with the internal threat from terrorists (such as the IRA in Britain or the Red Army Faction in Germany). The traditional agenda has now expanded to include the 'security threat' (Widgren 1993) presented by migrants and refugees as well as the 'political and strategic factors that both cause refugee problems and determine the policy responses of states to refugee crises' (Loescher 1992:12).

Jonas Widgren<sup>4</sup> (1993) argues that mass movement is already a threat, one demanding immediate attention. Widgren stresses the urgency of the problems facing, not just individual states, but the European and North American areas. Similarly, Gil Loescher (1992) analyses refugee movements from a strategic security perspective, considering the political determinants of refugee flows, the effects of migration on foreign policy, and how refugees affect and are affected by international politics. The danger of the approach taken in this study, is that much of the analysis is given over to 'warrior' refugees, such as the Afghani Mujaheddin, Palestinians, or Khmer guerrillas, thereby feeding the fears of the traditional, and traditionally paranoid, security studies approach<sup>5</sup>. Elsewhere (1993, 1992), Loescher adopts a more balanced and integrated perspective, more suited to the new security agenda which focuses on the (in)security of the individual, including his or her ontological security.

The Copenhagen School<sup>6</sup> in particular has contributed to the development of the 'new' security agenda, including the environment and economic issues. Part of this new security agenda is concerned with issues of identity (Buzan 1991; Waever *et al* 1993; Weiner 1997) especially national and ethnic identity – 'identity became a security question, it became high politics' (Waever 1996: 111). The identity of the community is endangered by the arrival of large numbers of 'others', with alien customs, habits and languages. The indigenous culture will be diluted or changed by the newcomers in ways that the indigenous population will not be able to control. This threat of 'Überfremdung', of 'overforeignization' is not, or at least not only, a product of increased migration. It is also a result of the process of fragmentation and disintegration in a world, which, during the Cold War, had seemed fixed. As Habermas argued:

In the iron grip of systemic constraints, all possibilities seemed to have been exhausted, all alternatives frozen dead, and all the avenues still open to have become meaningless (Habermas 1992: 1).

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<sup>4</sup>Co-ordinator for the Intergovernmental Consultations on Asylum, Refugee and Immigration Policies in Europe, North America and Australia.

<sup>5</sup>Colloquially known as the 'bombs and bullets' approach.

<sup>6</sup>The term 'Copenhagen School' refers to the work of a number of scholars, especially Barry Buzan, Ole Waever and others connected with the Copenhagen Peace Research Institute, who take a constructivist approach to the securitization of certain issues, which, to an extent under their influence, are now part of the security agenda (Buzan 1991; Waever *et al* 1993; Waever 1996).

Within three years, all this had changed, the borders to the East had opened, one of the Superpowers had disintegrated and, inconceivably, war had broken out in Europe. Inevitably the dramatic changes led to confusion, and the search for certainty led to a retreat into the national, which was led from above<sup>7</sup>. The abrupt shift from *Wir sind das Volk* to *Wir sind ein Volk* was steered by the German Union parties, in particular, and is part of a continuum which extends to the calculated espousal of virulent nationalism by Milosevic, Tudjman, and Izetbegovic, in their battle for control following the break-up of Yugoslavia. However, though the rise of nationalist politics is neither spontaneous nor a purely grass-roots phenomenon, Buzan is right to warn against dismissing too quickly the fear 'of being swamped by foreigners' (1991: 94), since such fears can be, and have been, mobilised by the political right, and on occasion, the left (see Chapters Four and Five).

In response Jef Huysmans (1995) warns against the dangers of 'securitising' societal issues, suggesting that researchers such as Loescher and those from the Copenhagen School reinforce the interpretation of refugees as a security problem by accepting refugees as a security threat, and then researching this threat. Perhaps as a result of this warning, the Copenhagen School now avoids treating migration as a threat to security, so as to avoid validating the threat<sup>8</sup>. Waever (1996) later focuses on the threat to national identities that the 'populations' of the European Union member states see in the European integration process and refuses to acknowledge the perceived threat to that identity presented by the arrival of 'others'. However laudable such an approach might be, national identity has become an issue in the migration and asylum debates and it would be foolish to ignore the importance of this issue to people in the receiving states<sup>9</sup>. It should not be left uncontested, which it seems to be in the literature on refugee policy, though less so in the work on migration (Cohen 1994; Parekh 1994). The perception that migrants constitute a threat to an indefinable national identity is not 'natural'; it arises in a particular historical, economic and political context. Accepting that people feel threatened need not mean accepting that this perception is justified. Instead it implies a challenge, not just to understand, but also to correct, the

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<sup>7</sup>That this happened doesn't mean it was inevitable. At the time, anything seemed possible, including a brave new world order, rather than the same old *ordure*.

<sup>8</sup>Remark by Pertti Joenniemi from COPRI at 'Conquest of Distance' Conference to mark 350<sup>th</sup> Anniversary of the Peace of Westphalia, University of Twente, Enschede, 16-19 July 1998

<sup>9</sup> Especially since it is, however regrettably, a regular item on election agendas (see Chapters Four and Five).

belief that 'we' are threatened by 'them' – 'we' being members of a mythical, homogenous 'nation', 'they', non-members who by their presence would change, destroy what 'we' are. In the second section of this chapter, the discussion of identity and the putative threat from outsiders will be treated in greater depth.

Within an international perspective, the state is becoming less powerful for some theorists. Globalisation theorists see the power of the national state as increasingly undermined by the power of global forces against which it can only react:

the internationalisation of production, finance and exchange in unquestionably eroding the capacity of the individual liberal democratic state to control its own economic future. At the very least, there appears to be a diminution of state autonomy, and a disjunction between notions of a sovereign state directing its own future and the dynamics of the contemporary world economy (Held & McGrew, cited in Evans, 1998)

It could be argued that the mobility of people, increasing as a result of the communication and transport revolutions, constitutes just such a force. Adherents of this school of thought posit a set of constraints on the power of liberal democratic states to control the movement of people across its borders - international law and human rights norms. Even if it were physically possible for states to re-erect an impermeable Iron Curtain, it would not be politically feasible. This partly due to the strengthening of the rights of those who move, but also because it seems unlikely that such a move would be tolerated by the citizens of liberal democracies.

David Jacobson (1996) argues that there have been significant institutional changes that have made people into transnational actors no longer dependent on citizenship for the protection of their rights. These changes are in part a result of the impact of transnational migration. Jacobson, James Hollifield (1992) and Sassen (1998) reintroduce the individual into migration theory, but this time as a rights bearing individual, whose rights insulate her from the arbitrary power of states, 'the primacy of rights leads states to exercise caution and restraint in dealing with migrants' (Hollifield 1992: 28). Cornelius *et al* suggest that economic factors provide necessary but not sufficient conditions for immigration, that one must look 'to trends in the political development of the receiving countries' to 'explain the "crisis of immigration control"' (1994: 12). The political development to which they refer is the 'rise of rights-based politics', or what Hollifield calls 'embedded liberalism'. He cites the case of Britain's

unsuccessful attempt in 1990 to expel large numbers of Vietnamese refugees from Hong Kong as an example of the power of 'embedded liberalism' (Hollifield 1992: 28)<sup>10</sup>. Sassen chooses the example of administrative and constitutional courts which have used international and European law to block attempts by governments to restrict or stop asylum seekers from entering the country (1998: 58)<sup>11</sup>. Hollifield (1992), Jacobson (1996) and Sassen all recognise the continuing sovereignty and power of the state, and would probably agree with Jacobson, who argues that an adherence to human rights norms is compatible with strong nation-states: 'Human rights transcend, adapt, and transform the nation-state' (1996: 3), they have also 'become an essential means to international legitimacy' (1996: 141n).

There is a broad school of those writing on asylum in Europe that emphasises that 'at its root and in its evolution the refugee question is fundamentally a human rights issue' (Rudge, 1992: 102; Collinson, 1993a: 85-87; Lavenex, 1997: 17; Layton Henry, 1994; Joly and Cohen, 1989). Those who make this argument are concerned to hold on to a means of protecting vulnerable people who are forced to leave their states of origin and seek asylum elsewhere. The argument is that this can only be done by stressing that asylum seekers are not migrants, and that they have a special claim on entry. To accept that the two are intimately connected would be to give governments an excuse for further restrictions:

By positing asylum in terms of immigration, governments implicitly play down the humanitarian aspect of the refugee problem, and may therefore defuse the public's sensitivity to the potential humanitarian consequences of any restrictive measures introduced (Collinson, 1993a: 86).

This concern is justified when one examines the attempts of European governments and European intergovernmental bodies to turn 'asylum seeker' into a code for 'economic migrant', so as to be able to deprive them of rights, deport and refoule them. But by insisting that migrants and refugees are different, and that the former have rights not possessed by the latter, human rights defenders are arguing for a ranking of need. It is inevitable that some form of selection will have to be carried out in order to assess degrees of need. The defendants of human rights based approach must argue that the selection should be based on the violation of the individual's rights, and that

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<sup>10</sup> The case of Al Masa'ari in the last section of this chapter is another example.

<sup>11</sup> Sassen doesn't give any examples of such decisions, though there have been a few. However, of the numbers refused asylum, only a minority are allowed to appeal to the European Court, and of those, only a handful each year have their appeals upheld.

this has to be an improvement on selection made solely on the basis of state interest. However, only violation of certain rights count in the selection process. By accepting the distinction between migrant and refugee, a distinction based on the political/economic divide, human rights defenders are privileging the violation of political and civil rights, and ignoring the violation of other social and economic rights. Liberal democratic states are generally prepared to accept such a distinction, because the number of people whose political and civil rights are disregarded are far fewer than those who have no work, no income, no food, no health care and no education. In addition, the legitimacy of liberal democracies is based on respect for political and civil rights. As will be shown in Chapter Three, this emphasis is very much a product of the tensions that emerged between the Allied powers after the Second World War.

Already in the post-Second World War period, faith in the power of universal human rights to protect individuals had come under attack. Arendt argued that the plight of the Jews demonstrated just how vulnerable human beings were, who had nothing to rely on but their humanity, concurring with Edmund Burke's assessment of human rights as naked abstractions. Without a state prepared to guarantee those rights, refugees (here understood as all who flee their states of origin) are effectively rightless<sup>12</sup>. While the 'notion of human rights, as a codification of abstract concepts of personhood, has become a pervasive element of world culture' (Soysal 1994: 7) and without wishing to deny the work that human rights norms do in protecting some people and in persuading some states to behave in a particular way towards their own citizens, the claims of those who hold this view seem just so much wishful thinking<sup>13</sup>. This approach appears

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<sup>12</sup> This is the danger of linking human rights to nationality, a link that dates back to the French Revolution, which 'combined the declaration of the Rights of Man with national sovereignty' (Arendt 1967: 272). Arendt draws attention to the link between the birth of the nation-state and the creation of groups who are to be excluded from the polity, who do not enjoy the rights of the citizen - 'Since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state' (1967: 290)

<sup>13</sup> Leaving aside his dubious claims about the United States, Jacobson is simply wrong when he argues that aliens in Western European countries have not felt any compelling need to naturalise (1996: 9), as evidenced by the continuing struggle over citizenship rights in both France and Germany. When Soysal argues that a 'Turkish guestworker need not have a "primordial" attachment to Berlin to participate in Berlin's public institutions and make claims on its authority structures' (1994: 3) she is being disingenuous. She is right when she says that a *primordial* attachment is not necessary, but citizenship is, if that guestworker wants to participate in the political life of the Federal State. However, Berlin has a far more liberal attitude to naturalisation than other German Länder, and is not representative of Germany as a whole, since many of the rights a Turkish guestworker enjoys in Berlin are unique to Berlin. Soysal extrapolates from low naturalisation rates, the absence of a pressing need to naturalise. Turkish citizens, born and resident all of their lives in Germany, lobby for easier naturalisation processes and the possibility of acquiring dual citizenship because its acquisition matters very much politically and

blind to those at the border, who do not have the protection of their state of habitual residence, and those who have crossed the border requesting asylum, who are put into prison or a detention camp, without charge, without trial, without a definite release date and without the possibility of judicial review of their detention. This approach then tends to overestimate the power of international human rights codes to modify state behaviour, especially in relation to non-citizens, even those who, like asylum seekers, have a legal status in the host country.

The state continues to play a leading role, especially in relation to population movements. Individual states cannot prevent large-scale movements, as events in Europe and Africa have demonstrated in the past decade, but the industrial states wage a continuing war against these movements, and though they may not win, they do succeed in making migration very difficult. It is inconceivable that states would give up this struggle, since control of entry is fundamental to statehood (Arendt 1967; Morgenstern 1946; Walzer 1983). The paradox that Arendt identifies in *The Human Condition* - that as human knowledge and powers increase, so our capacity to control our world diminishes - finds a parallel in the *condition d'état*. As the state expands its arsenal of control – passports, visas, electronic surveillance equipment and computerised databases, the capacity to control is constantly undermined by more sophisticated and innovative smugglers, trading in the continuing demand for labour and relying on the continued desperation of the world's poor. These modern day slave traffickers too, have access to state of the art equipment producing more refined forgeries of identity documents, better hiding places and more tortuous routes. This labour of Sisyphus in which states are obliged to engage is further hampered by a rising tide of escalating conflict throughout the world, by growing inequality between rich and poor states and by the continuing demand in industrial states for cheap flexible labour.

Each of the positions outlined above contributes to an understanding of the phenomenon of human migrations. Individuals move, though not always in

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socially. In France, strong objections were raised when laws were introduced which made it necessary for the children of migrants to affirm their wish to remain French citizens at eighteen years of age. In Britain, citizenship is unimportant for Irish citizens who enjoy almost identical rights with British citizens, but legislation introduced in 1996 makes it much more convenient for employers to employ British citizens. Furthermore, for those currently held in detention in British prisons and detention camps awaiting deportation, citizenship would make a fundamental difference.

circumstances of their own choosing. The aggregation of these individual movements has an impact on the politics, economies and societies of sending and receiving states. States are themselves the cause of mass movements, through repression, economic mismanagement and exploitation, which they then attempt to steer and control. Their power to do so is limited by 'embedded liberalism' - an attachment to liberal values and norms, such as human rights. However, respect for those norms is contingent on a coincidence between those norms and *raison d'état*. All of these factors contribute to the movement of people that states realise cannot be halted, but which they must attempt to control. These factors maintain pressure on borders which must be continually strengthened if they are not to be swept away. However, this drive to strengthen national borders conflicts with the global drive to open borders to capital, goods and services, and with the spread of universalist liberal norms.

### **Asylum as a Moral and Political Philosophy Issue**

Within moral and political philosophy, most theorists (including some referred to above) can be grouped into two oppositional paradigms – the universalist and the particularist. The particularists include realists, nationalists and communitarians, while the universalists are equally diverse, including Stoics, Christians, global utilitarians, and deontologists, as well as global liberals, though in this chapter the focus is on representatives of the last three positions who expressly address the issue of refugees. The debate between the two major groupings centres on the limits of the state's moral obligations. It is a debate between those who argue that the state's border defines the limits of its obligations, and those who argue for universal moral obligations, owed to all of humanity<sup>14</sup>. The argument about whether it is possible, or desirable, to distinguish between refugees and immigrants is important in what follows. In some of the approaches outlined below, it is argued that there are special duties to assist refugees, but not migrants, in which case the difference between the two is important, both for those who would enter and for those who will decide if they may enter. Others argue that there is an obligation to assist all who, for whatever reason, are less well off

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<sup>14</sup> These two positions are evident and are in constant tension at the international, European and national levels, in policy, practice and the law. So that, while the ideals and goals expressed in international legal instruments, such as the Universal Declaration of Human Rights are intended to be universally valid, they are undermined by the concept of state sovereignty, which, together with the principle of non-intervention, ensures that states can violate human rights norms with impunity. The formulation and implementation of international law and domestic law and practice is governed, not by universalism, but by national interest or *raison d'état*. The chapters that follow discuss the impact of these tensions.

than us, the citizens of wealthy European liberal democracies, in which case the distinction between refugees and migrants is rendered less significant.

### *Special Duties*

The privileging of the particular, that is, state, national or communal interests is an imperative for realists and communitarians. The realist position sees the state as the decisive actor in politics, and argues that the primary goal of the state is survival (Machiavelli, Morgenthau, Carr, Waltz). States are seen as essentially and justifiably egotistical, placing their own interests first. This need not mean, as is often assumed, that in the realist accounts the state is a- or immoral. Instead actions are to be judged good or bad depending on whether they contribute to a desired good, such as the preservation of the state. Since it is the state that protects its citizens and promotes their interests, this can be described as a consequentialist morality, but as will be discussed below, consequentialist morality itself need not be limited by the borders of the state. The moral argument for preserving the state is that, aside from protecting the citizenry, it is also a means of protecting non-citizens, since it is states, rather than individuals that grant asylum. While states may acknowledge the force of moral arguments, and tolerate liberal policies, they are and should always be subject to *raison d'état* (Hendrickson 1992)<sup>15</sup>. Migrants should be admitted when there are labour shortages, or when there is an ageing population. While this might mean a higher standard of living for the migrants, the goal of this policy is to improve conditions for the natives, therefore *raison d'état*, or the needs of the indigenous population must always trump the needs of others. Such a position does not preclude acts of generosity. The citizens of a state may decide to offer sanctuary to certain people who promise no obvious benefits, but this is a matter of choice, not obligation, and should only be done when this does not endanger the host state. Of course, this ignores the reality that such altruism brings less tangible benefits, such as moral kudos, which serve to legitimate the state.

David Hendrickson argues that a characterisation of 'realism' which denies the force of moral arguments within the state, amounts to little more than taking aim at a straw man. He suggests than even cold-hearted realists accept that 'humanitarian concerns ought to form an exception to the absolute discretion of the state' (1992: 220).

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<sup>15</sup> For a discussion of the evolution of the doctrine of *raison d'état*, see Kosselleck (1988).

Similarly O.T. Scanlan and John Kent (1988) argue that their Hobbesian view of the state does not necessarily involve a rejection of moral duties beyond boundaries in favour of national interests, since national interests are given normative force by 'the normative content of the interests held by citizens' (1988: 78). Assistance may be offered to non-citizens, but it will differ according to whether they are considered refugees or migrants. There are two reasons for this – the humanitarian concern of the citizens for individuals who are persecuted, and expediency. It is necessary to separate refugees from migrants in order to separate and control the different benefits each has to offer – the latter cheap labour or skills that are in short supply, the former, the moral legitimacy that comes from responding to the needs of strangers, from being generous, that is, liberal.

For communitarians, the moral system of the political community both shapes and is shaped by its members. We learn the difference between moral and immoral actions from our community, to whom we owe loyalty. David Miller (1994) stresses a generational dimension to this loyalty, that benefits derived from past generations impose on present generations duties to future generations, which include the preservation of material and social goods. For Miller, the significant community is the nation, and national identity a valuable social good. For communitarians, among whom I would number nationalists, the sense of identity that derives from our political community is more significant than any other, and the preservation of this identity and the community depends on control of entry - presumably at the border - which must mean state borders, since few, I would imagine, would advocate erecting borders and checkpoints around substate communities<sup>16</sup>. Given that we live in a world of distinct political communities -nation states- we develop distinct identities. A national identity is what distinguishes an Englishman from a Frenchman, from a German or an Irishman, although there may be identities which encompass one or more of the above - it's possible to be both Irish and British, German and European. Miller (1994:138-41), using Renan, specifies five criteria for the existence of a nationality: first, belief -a nationality exists when its members believe that it does; second - historical continuity, which ties the members to past and future by a sense of obligation which may not be

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<sup>16</sup> Though there are state borders in the US, movement across them is not controlled (an occasional problem for law enforcement). Nonetheless, recent concerns with multinational states, may mean that such borders will be introduced within states, for example, to protect the rights of indigenous peoples. Whether such measures will actually advance the interests of these people remains to be seen.

renounced by the present generation; third, that it is an active identity, that the members do things together; fourth, connection with a geographical space; and five, ‘it is essential that the people who compose the nation are believed to share certain traits that mark them off from other people’. The argument then is that people who live in nation-states, and it is presumed that that is the norm, have or develop a national identity, that this is something distinctive and valuable and it would be threatened if the members of that community could not choose among prospective entrants, therefore we are justified in restricting entry. Walzer specifies that this discrimination is necessary even in relation to those seeking asylum (1983: 51).

The critique of the communitarian attachment to national identity made by cosmopolitans (Bader 1995; Beitz 1989; Carens 1992) is particularly strong, so I will just sketch a brief response to Miller’s five criteria. Miller, quoting Renan, suggests that the first of these criteria -belief- leads one to the conclusion that the nation is a ‘daily plebiscite’, which would tend to undermine his second criterion – that of historical continuity. National identity, or the belief in it, is constructed by the state, or by a would-be state, which defines and creates a national identity through the educational system which seeks to standardise the national historical myths and the language, and through the media which daily flags the signs of nationhood. The Czech Republic and Slovakia are examples of nation-states created from above by political elites (Croatia, Bosnia-Herzegovina and the Serbian Republic of Yugoslavia less happy examples). Furthermore, beliefs may change. Until the late thirties, Jews, and many Germans, believed that they were German. Nazism disabused them brutally of this belief. This is not to say that just because the beliefs in the nation are constructed, they do not exist – clearly there are many for whom the nation is an important source of identity

If historical continuity is necessary to national identity, then how many generations back must one be able to trace one’s lineage, in order to belong to the nation? In today’s world, it is difficult to find many, especially in Britain, who can claim to be wholly British. And those whose grandparents came to Britain from India or Czechoslovakia, at it was, cannot be said to be Indian or Czech or Slovak, since they have no historical continuity with the Czech, Slovak or Indian community or territories. So what would be their national identity? A response to this criticism might

be that individual lineages are not essential to the historical continuity of the nation: the nation exists through time, though individuals may leave or enter. But how then did nations start?<sup>17</sup> If Miller accepts that the national identity is based on myths (which by definition are untrue), this takes us back to the question of belief in something that is not natural, but artificial and constructed. If people choose to believe, choose to construct the history of the nation in one way, this means that they could choose to construct in a different way one that accommodates others<sup>18</sup>.

The third criterion, that nationality is an active identity, seems particularly weak. Miller suggests that 'nations are communities that do things together, take decisions, achieve results and so on' (1994:139). Surely he is confusing the state with the nation, and it is government which acts, rather than the people. Though Miller might regard the government as the political representative of the nation, most nations contain groups that feel that the government does not represent them<sup>19</sup>. Either way, there is little that all Britons undertake as Britons. The fourth criterion, that there is a particular geographical homeland, ignores the existence of nations without territories and states. Though they may desire both, seeing in the state the only means of achieving security, their sense of identity is not dependent on it. The problem for nations without states is not lack of territory; it is lack of power, the result of which is often inadequate access to resources. If they had access to resources and did not suffer discrimination, would they continue to desire such a space or state? There are groups of people for whom a particular geographical landscape is significant, even if most of them have never visited it and may have a completely false notion of what that land is actually like. For these people, if they are discriminated against, excluded or persecuted, the creation of a territorial state in that particular mythical homeland becomes an ideal, one to which they are prepared to sacrifice those who currently, and often for centuries, have inhabited that land. This can be seen in Isreal and Yugoslavia, and may yet be seen in Kurdistan. The creation of territorial nation-states, as Zolberg (1983, 1989) has shown leads almost inevitably to the violent expulsion of some Other.

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<sup>17</sup> Benedict Anderson (1994), Robin Cohen (1994), and Linda Colley (1994) have all explored the making of the nation, its traditions and myths. R. Just (1989) writes of the deconstruction and subsequent reconstruction of Greek identity in the 19<sup>th</sup> and 20<sup>th</sup> centuries.

<sup>18</sup> Mark Duffield (1991) in his work on conflict in sub-Saharan Africa, tells of nomadic groups who, on coming into conflict with sedentary groups, would reconstruct their histories in order to normatively validate the outcome of conflicts over routes and access to water.

<sup>19</sup>For example, there was a clear feeling among different groups in Britain (Scots, Welsh, single mothers, etc) that they were disenfranchised, rather than represented in parliament.

Finally, Miller's notion, shared, I believe, by most communitarians that there are distinctive national traits which are natural and real, and that can be pointed to, is a particularly dangerous and invidious one. Miller insists that this need not imply racism, national identity 'may be cultural in character: [consisting of] shared values, shared tastes or sensibilities' (1994:141). However, our values, tastes and sensibilities are learnt, not natural, and they change over time. Why should we consider that newcomers or their children are incapable of learning new ways? Or assume that 'we' too would not want to learn new ways, to change – there are many examples of the way in which, for example, those from the Caribbean and Asia have contributed to the evolution of a fluid, dynamic and contested British identity.

In 'Justice and Boundaries', Onora O'Neill points out that within the borders communitarians such as Walzer see as necessary to the protection of an identity, 'membership is usually neither inclusive nor exclusive' (1994:73). The contribution a controllable border makes to the preservation of a national identity must be questionable, especially where state borders cut across nations, as for example, in Ireland, or Rwanda, Burundi and Tanzania, or where, as in the case of Britain, they enclose more than one nationality. While it may be argued that the conflicts in Northern Ireland and the Great Lakes region of Africa are the result of a mismatch between national communities and state borders, the consequences of attempting to force such a coincidence of nation and state are to be clearly seen in South Eastern Europe. It may be argued that it is unfair to focus so much on ethnic nationalism, to the exclusion of civic nationalism. I find Philip Spencer and Howard Wollman's (1997) arguments against the idea that there can be a 'good' nationalism persuasive. They argue that there is a pattern common to all nationalism, whether political or cultural, civic or ethnic, or liberal or illiberal, and that that pattern is the problem of the Other.

The war in Yugoslavia seems to demonstrate quite brutally that a national identity is formed in relation to an 'other'. It might be argued that the daily and public invocation of 'we' and 'our' which creates a belief in the 'we', contributes to forging a shared identity, and therefore to strengthening the bonds of trust within the community. However, this identity is counterpoised, either implicitly or explicitly to the Other, and rarely in a benign way, even when it is a political, civic or liberal national identity. As

Spencer argues ‘Whether English or British, this identity has been premised on the existence of a *dangerous other*, to be suppressed, fought or excluded’ (emphasis added 1997:12). This ‘other’ may be internal or external. Foucault has pointed out the ways in which the prison or the asylum has been used to contain the other, as have ghettos. The state border is used to contain ‘us’ and to define ‘them’. And yet Britain has already had an open border for a very long time. Citizens of the Republic of Ireland and the United Kingdom have been able to travel freely between their respective countries, without, apparently, threatening the national identity of either country, in spite of attempts throughout the centuries to constitute the Irish as both differing and threatening. Given the difficulty of specifying what these identities are perhaps this is difficult to judge. Immigrants from the colonies and commonwealth overtook the Irish as ‘dangerous’ others, only to be joined in turn by asylum seekers. This raises a question- if the identity of the Other changes, doesn’t this logically entail/implies changes in the identity of those defined in opposition to those others?

While Walzer would probably reject the ‘nationalist’ label, in stressing the importance of identity derived from one’s community, he recognises the power of the nationalists’ case<sup>20</sup>. Membership of a community, and the identity that that membership confers is a primary social good, one that depends on a border where entry is regulated. Since a border is necessary for Walzer, it is to be assumed that the community he is thinking of is the political state. There can be no right to enter the state; control of entry is both the right and the duty of the state:

the right to choose an admissions policy is more basic than any.... At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. Without them there could not be *communities of character* (Walzer 1983: 31)<sup>21</sup>.

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<sup>20</sup> I am aware that this grouping together communitarians and nationalists is contentious, but since the nation is conceived of as a community, there is a marked overlap in the arguments used to defend against indiscriminate entry. Moreover, communitarian arguments almost inevitably become nationalist arguments, especially in relation to borders and entry policy.

<sup>21</sup> Walzer’s distinct and valuable ‘communities of character’ in need of protection behind closed borders are fictions, but dangerous fictions, because by privileging these phantoms, outsiders are seen as a threat which must be kept outside the border. Jonas Widgren, when questioned about the desirability of admitting that controllable borders were a fiction, responded that they were a fiction necessary for the maintenance of sovereignty (Foundations of Social Mobility, Conference in Berlin 1994). One fiction used to shore up another - hardly a stable edifice! The fact that borders cannot be controlled heightens the fear, leading to demands for more control. A more damaging criticism of the global state, as suggested by Cicero (Gibbon, 1896: 2), is that it may constitute a prison. If persecuted by such a state, there would be nowhere left to flee, where one might be beyond the reach of such a state. But in a world of states, flight is still impossible if those states refuse to allow entry. For Arendt, the danger is ‘that a global, universally interrelated civilisation may produce barbarians from its own midst’ (1967: 302)

For Miller, these communities of character are nation-states. The right to decide an entrance policy is a fundamental right of all states, not just of liberal democracies --it is an attribute of sovereignty

Theoretically, in the sphere of international law, it has always been true that sovereignty is nowhere more absolute than in matters of emigration, naturalisation, nationality and expulsion' (Arendt 1967: 278).

Having an admissions policy means choosing who may and may not enter the community. Membership in this community is itself a good, 'conceivably the most important good', but it only has value in a world of communities - there must be communities to which I do not belong, and as importantly, those who do not belong to my community. To imagine a single inclusive global community, we would, according to Walzer, have to imagine a world that does not exist. If it did, if the walls of the state were torn down, a thousand petty fortresses would take its place. If a global state were powerful enough to tear down fortresses too, Walzer claims that the result would be 'a world of radically deracinated men and women' (Walzer 1983: 39)<sup>22</sup>.

Still, Walzer does not suggest that states close their borders completely. There are obligations to admit some, but he is not very clear on the nature of this obligation, since fulfilling it by granting asylum is, for him, an *ex gratia* act<sup>23</sup>. Nonetheless, having accepted there are obligations to those Walzer refers to as necessitous strangers, the question of the limits and nature of such obligations arises. Walzer doesn't pretend it is an easy choice, he recognises that every one has a right to somewhere to live, but insists that this right can't be enforced against particular host states – refugees cannot make a claim against a particular state (other than their own) for protection. He suggests that asylum is the answer to this dilemma, if only because to deny it, would mean using force against helpless and desperate people. But there are limits to our liability:

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<sup>22</sup> This is a strange choice of words. What does deracinated (or racinated) mean? Since there are no 'races', how can one speak of being deracinated? If it means to be without an awareness of race – surely that would be positive, and yet Walzer makes it sound negative. To be fair, in the context of his writing, it would seem that what Walzer actually fears is the loss of a cultural, rather than 'racial' identity. If, however, there were a State whose population was wholly 'black' or 'white', it would appear that, for Walzer, such a State would be justified in maintaining that 'racial' purity by discriminating among applicants. He only rejects discrimination after entry. Even if 'race' is not an issue, the preservation of a distinct culture is still a curious concern, given the diversity, fluidity and 'indistinctiveness' of cultural identities *within* actually existing states.

<sup>23</sup>Rescher (uniquely as far as I know) stresses the obligations of the refugee to the host state, since the refugee is a person to whom the sheltering country has extended benefits 'above and beyond the call of

...if we offered a refuge to everyone in the world who could plausibly say that he needed it, we might be overwhelmed...the right to restrain the flow remains a feature of communal self-determination (1983: 51).

Those whom states have helped turn into refugees have a particular claim (the Vietnamese on the US), as do those who share an ideological affinity, but not everyone can be helped<sup>24</sup> and so Walzer defines the limits of a state's obligations using the principle of mutual aid, that is, that we should help others when the cost to ourselves is low, but:

...when the number [of refugees] increases and we are forced to choose among the victims we will look, rightfully, for some more direct connection with our own way of life (1983: 49)

The basis on which Walzer chooses between competing applicants – 'a sense of mutuality and relatedness' – is deeply troubling. To discriminate between applicants, choosing those to whom we have an affinity, suggests firstly that we have no obligations to those with whom we have nothing in common but our humanity (that whether we assist is only ever a matter of choice), and secondly, unrealistic assumptions about the degree of homogeneity within modern states.<sup>25</sup> Walzer is concerned primarily with the implications for the receiving state, and while he might feel sympathy with refugees, state interest supersedes the interest of individuals who do not belong:

...the principle of mutual aid can only modify and not transform admissions policies rooted in a particular community's understanding of itself (1983: 51).

While communitarians and realists might agree that all human beings are equal, and wish that everyone had a community to which they could belong, they insist on the necessity of a world of multiple communities, which privilege the interests of members over obligations to non-members.

Each of these positions rejects universalism, and though this is for different reasons, the conclusion is ultimately the same: while a state, community or nation might choose

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ordinary duty' 1992: 29).

<sup>24</sup> Does this mean that one does not have obligations to all of the refugees one may have caused to flee, if one has created too many of them? It is difficult to gauge what Walzer believes would have the correct US response to the Vietnamese refugees, for example.

<sup>25</sup> As an American, Walzer knows that states are not culturally, linguistically or ethnically homogenous. Within states there are many different communities – with which of these sub-state communities should asylum seekers share a sense of relatedness – is the state entitled to introduce quotas (as the US and Australia did) in order to preserve a particular mix of cultures and 'ethnicities'?

to assist those who are not citizens, members, or nationals, there is no binding obligation to do so. Where there is a conflict between the interests of outsiders and those of citizens, that is, where the costs to the citizens outweigh the benefits to *the citizens*, the citizens must and should be given priority, even when the outsider is seeking asylum. This is current orthodoxy among states, and is shared by many, if not most citizens of European democracies, and their representatives (if one is to judge by election results (see Part Two)), elected after all to promote the interests of their constituents. And yet, the actions of states are judged by their correspondence to universalism. States which discriminate internally, such as Nazi Germany or South Africa in the years of apartheid, are treated with opprobrium, but so too are states that favour the immigration of particular ethnic groups, such as Australia, which until the 1970s had a White Australia immigration policy, and the United States when it operated immigration quotas that disadvantaged Asian migrants<sup>26</sup>.

### *Universal Duties*

What divides the universalists from the particularists is their rejection of a morality that ends at the border, of the idea that there is something ‘special about our fellow countrymen’ (Goodin 1998). Turning to one of the most radical of the universalists first, Singer (1993) applies the logic of utilitarianism to the issue of refugees and asylum seekers. Unlike the realists, for Singer, the guiding principles of utilitarianism are the best consequences for *all* affected, not just members of the community, and equal consideration of all interests. He argues that it is difficult to justify the distinction made between someone fleeing drought and poverty and someone fleeing persecution when both are equally in need of refuge, that is, between economic and political considerations. However, given that others (see above) do justify this distinction, it is a pity Singer didn’t elaborate. Curiously though, he inverts the usual definition of refugees and asylum seekers. For Singer, asylum seekers are simply those refugees ‘who have reached the shores of another country [where they] can claim asylum’ (1993: 254). He is correct in one sense – that we are happy to call people we see in refugee camps in Asia or Africa refugees. Once they arrive at the border, they become applicants requesting asylum and recognition as refugees, which only a minority will receive (Singer ignores this step).

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<sup>26</sup>Britain has escaped such censure, even though its Nationality and Immigration Acts operate on the basis of colour and ethnicity (see chapter four)

Singer doesn't call into question the system of a world divided into states, though the State's insistence on the right to control entry and admission, its preference for those at our borders requesting asylum (rather than those far away in camps), and the interpretation of granting asylum as an *ex gratia* act, as articulated and defended by Walzer, do come in for heavy criticism. Instead, he asks what are our obligations to those beyond our borders and attacks the principle of mutual aid, advocated by Walzer, arguing that the privileging of 'our' interests and the granting of asylum as a matter of generosity, when the costs to ourselves are low, is not ethically defensible (1993: 254)<sup>27</sup>. Weighing up the benefits to those who wish to enter Western states against the costs to the host populations, Singer finds, contra Walzer, that the right of closure must be subordinate to the rights of refugees to enter. While opening borders to all who would wish to enter *might* result in increased competition for jobs or housing or heightened 'racial' tensions, closing the borders *would* mean far graver consequences for the refugees. In other words, the drop in our living standards, for example, which might result from taking in far more refugees is not of comparable moral significance. Singer considers one apparently logical conclusion of his argument, that if we do not privilege fellow citizens, and if all countries were to continue to accept refugees they might be reduced to the same standard of poverty and overcrowding as the third world countries from which the refugees are seeking to flee. However, he finds instead that we are only obliged to continue increasing the number of refugees to whom we grant asylum, until the consequences do achieve moral significance, such that, for example the peace and security of all, including already accepted refugees were seriously threatened, and argues that we are a long way from such a situation.

Normally presented in opposition to consequentialists like Singer, deontologists share the same commitment to a universalizable system of ethics and a conception of humans as free rational beings, so that there is no justification for privileging one's compatriots. Kant's assertion that a stranger has a right only to a temporary sojourn and a negative right not to be treated with hostility (nicht feindselig behandelt zu werden (1984: 21)) could be understood to support an argument for the right to control entry, and that migrants have no right to permanent residence. When Kant says that

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<sup>27</sup> From this, it is clear that Singer does not feel that the preservation of the distinctiveness of communities has the same moral significance that Walzer does.

one may refuse to receive the stranger, *unless* this would cause his destruction, then this seems to acknowledge that those whose 'life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion' enjoy a right not enjoyed by those who do not fear destruction. In other words, Kant appears to distinguish between citizen (permanent inhabitant) and non-citizen, and between migrants and refugees. On this reading, there is not much to choose between Kant and Walzer, but this interpretation is erroneous for two reasons. Firstly it ignores Kant's three necessary and universal principles, and secondly it overlooks the targets of Kant's injunctions. Kant insists that we are rational, autonomous beings; that for an action to be moral, it must be possible to will that it become a universal law; and that we must treat others only as ends in themselves and not as means. In which case, what grounds can there be for refusing entry to migrants? Any attempt to develop a migration policy, which privileged the permanent inhabitants over strangers would ignore the autonomy of the migrant, who shares 'common possession of the surface of the earth' (1984). Furthermore, it would be impossible to will a selective migration policy as a universal law, and any attempt to do so, would be to treat migrants as means rather than ends<sup>28</sup>.

The second error is to ignore the historical context in which Kant was writing. Kant was not writing at a time of large scale migrations, but instead when Europeans were travelling around the world, abusing their right to hospitality by conquering and plundering their hosts:

...compare the inhospitable actions of the civilised and especially of the commercial states of our part of the world. The injustice, which they show to lands and peoples they visit (which is equivalent to conquering them), is carried by them to terrifying lengths. America, the lands inhabited by the Negro, the Spice Islands, the Cape, etc., were at the time of their discovery considered by these civilized intruders as lands without owners, for they counted the inhabitants as nothing. In East India (Hindustan), under the pretence of establishing economic undertakings, they brought in foreign soldiers and used them to oppress the natives, excited widespread wars among the various states, spread famine, rebellion, perfidy, and the whole litany of evils which afflict mankind (1984).

He is arguing that the colonisers have no right to settle permanently, and that all they may expect is hospitality. Applying Kant's own principals today, there is nothing to

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<sup>28</sup> Since Kant also insisted that politics was compatible with morality, for a Kantian, discussing policy in this way is not as ridiculous as it might sound to a realist.

justify excluding anyone, except deceitful and warmongering colonisers. What of liberal universalists such as Jürgen Habermas or Andrew Linklater?

Habermas has addressed the issue of asylum directly on a number of occasions (1992, 1993, 1994), formulating the problem as one of ‘whether special citizenship-related duties are to be privileged above those universal, transnational duties which transcend state boundaries’ (1992: 14). He approaches a solution to the ‘special duties’ problem via five steps, and constructs his arguments in opposition to nationalists and communitarians (Walzer in particular)<sup>29</sup>. In the first of his five steps, he rejects the ‘ethnocentric instrumentalism of utilitarianism’<sup>30</sup> because it cannot determine what duties are owed to those who involve more costs than benefits to the community (the old, the handicapped or asylum seekers)<sup>31</sup>. In the second step, he argues that special duties do not result from membership of a concrete community, but instead ‘from the abstract co-ordinating tendencies of *judicial* institutions’ (emphasis in the original 1992: 15). Boundaries are simply administrative conceits, necessary for allocating certain ‘positive social and factual obligations...that does not mean that our responsibility ends at this boundary’ (1992: 15)<sup>32</sup>. Trying to work out what those responsibilities are in his third step, Habermas insists on the importance of impartiality, and uses Rawls’ metaphor of the veil of ignorance. He argues, with Joseph Carens, that a right to migrate would logically follow, but that there would be ‘legitimate restrictions’. We will return to this below. The fourth step is an acknowledgement that the modern state is not only an abstract institutionalisation of legal principles, but also a political-cultural context for the implementation of basic universalistic constitutional provisions. In his final step, he considers two conclusions that can be drawn from this: either one concludes, like Walzer, that liberal immigration policies are subject to

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<sup>29</sup> Like Habermas, Linklater frames much of his discussion in opposition to the communitarians. Since our political community is imaginary, what is to prevent us from imagining a different, more inclusive community? If, as Linklater says, we learn the specific rituals of inclusion and exclusion, so we can unlearn them - there is “a sensitivity to unjust modes of exclusion which reveal the potency of modern ethical conceptions of the freedom and equality of all individuals” (1998: 118).

<sup>30</sup> He is somewhat unfair here, since he ignores universal utilitarianism, such as Singer’s, which is emphatically not ethnocentric.

<sup>31</sup> However, a realist or communitarian utilitarian might reply that on this cost-benefit analysis, it is family members, rather than the community, who have ‘special duties’ to the old and the needy. The state only has a duty to provide when not to do so would lead to unrest, or when the citizens want it to provide. Otherwise, those who do not have family (including asylum seekers) must depend on good will and charity, since there are no ‘special duties’. Habermas cannot argue that it does not offer a solution to the problem that he outlines, only that he rejects it because that solution is objectionable.

<sup>32</sup> O’Neill (1994) questions whether it is necessary for functional boundaries to coincide with each other, or with moral boundaries.

further normative restrictions in order to preserve ‘the ethnic-cultural substance of a way of life’ (1992: 17); or, Habermas’s preference, one concludes that all that may be required of newcomers is that they will readily engage in the political culture of their new home, ‘the *political acculturation* demanded of them does not include the entirety of their socialisation’ (1992: 17).

What are the implications of this argument? Habermas supports a liberal immigration policy. However, this is not the same as an open immigration policy. Unlike Walzer or Miller, he does not accept that ethnic-cultural relatedness should be a requirement for entry, and he rejects the instrumentalism of those such as the realists, who decide policy according to the needs of the state alone. Throughout the discussion outlined above, he switches between refugees, asylum seekers and immigrants, without making any distinctions. Elsewhere (1993: 128; 1994: 143-148) he argues that the roots of the German asylum problem lie in the failure to recognise and accept that Germany is a country of immigration. This makes it difficult to judge whether he accepts that there is a difference between refugees and migrants. As with Kant, the context in which Habermas is writing is important in this respect. The period 1992 to 1993 in Germany witnessed dramatic increase in the numbers of people applying for asylum and the arrival of hundreds of thousands of refugees from Yugoslavia. This occurred at a time of massive upheaval in Germany as a result of unification, and a ‘disingenuous’ debate was started in which every citizen was forced to take sides, and in which one of the cornerstones of the liberal polity was called into question – the constitutional provision for ‘political persecutees’ (politisch Verfolgte).

While Germany had a - relatively - very liberal asylum practice, it had, and has, no immigration policy, in spite of the number of non-Germans who enter and settle in Germany each year. So while Habermas was keen to support the original constitutional provision for asylum seekers, he (together with many other German intellectuals) was also anxious to broaden the debate, to introduce an acceptance of migrants and of Germany as a country of immigration. He does refer to the 1951 definition, and say that it should be extended to ‘include the protection of women from mass rapes...[and] refugees from civil war regions’ (1994: 140), before saying that most of those who move are people looking for work and fleeing poverty. And yet, frustratingly, in none of these essays does he come out clearly for or against distinctions between migrants

and refugees. Nonetheless, like Kant, Habermas looks forward to a world citizenship, in which free movement is the norm, and which is only possible in a world of liberal, democratic republics (1993: 141). But he stops short, at least in the short term, of advocating open borders.

Carens is an Idealist who has written extensively on the moral challenge presented to liberal states by refugees. His concern is to outline what states should do, rather than to analyze what they actually do. Since he clearly argues that 'borders should generally be open and that people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind current citizens in their new country' (1994: 229), there would appear to be no need for him to make a distinction between migrants and refugees – his arguments for free movement should hold for all migrants regardless of the reasons they leave their states of origin. However, he does introduce a hierarchy of those who should be admitted, using need (see Dummett in section 1 above) as a means of ranking individuals:

Certainly need should be one important criterion for admission, and refugees seeking permanent resettlement rank very high on this score since they literally need a place to live (1992: 44)

The urgency of the refugee's need is a reason for admitting her, but often this moral concern actually turns into a justification for admitting those who have actually reached the border. Peter Singer (1993: 247-63) suggests a number of explanations for the preference for asylum seekers at the border over refugees in camps, which is accepted as legitimate by Walzer. The principle of proximity is certainly a factor, in that those on our borders are physically closer than refugees elsewhere, and so their needs seem easier to address. Singer argues that the different treatment may be due to the difference between acts and omissions, between actually deporting a refugee and not aiding a refugee in a distant camp (Singer 1993: 254). Finally, Singer suggests that the obligation to grant asylum to asylum seekers, rather than refuge to refugees is actually accepted because of the much smaller number who arrive at our borders compared with the millions living in camps or on the roadside around the world. Although Carens claims to be 'closer to Singer and Singer on the question of overall limits to obligation and closer to Walzer on the important sub-question of asylum' (1992b: 31) – his position is actually much closer to that of Walzer than Singer, as will be seen in the next section. Carens (1992b) argues that Walzer gives too much weight

to the principle of communal self-determination and that the qualification of low cost should be adjusted more in favour of refugees. He supports the implementation of the principle of equal consideration of all interests advocated by Singer but only in the design of institutions, not as binding on individuals, since, he argues, this would be too onerous a demand. Carens also differs from Walzer, in that he doesn't accept the need for mutuality or relatedness.

Carens agrees with the reasons Walzer suggests for granting asylum (causal responsibility for the plight of refugees and humanitarian concern) and offers a third - the legitimacy of the state system, but his reasoning is different. He takes Walzer's analogy of the political community as a family, and suggests that refugees are the orphans who have no family to care for them, or who are abused by their families/states. He suggests that, since it is plausible to argue that the source of their harm is the family/state, one can argue that an alternative arrangement would be better for them.

Their plight reflects a failure, not only of the particular state from which they are fleeing, but also of the system of dividing the world into independent sovereign states and assigning people at birth to one of them (1991: 22-3).

This problem must be solved by the system as a whole if it is to retain its legitimacy (see also Shacknove 1993). The strength of Carens argument is that unlike mutual aid or the humanitarian argument, where assistance can only be rendered if the cost is low, here the imperative to assist grows with the numbers of victims. This places the burden on the whole system, which then must be shared by the states who wish to preserve that system. Carens offers no guidance for this process, but he does offer a compelling moral reason for States to continue granting asylum. The flaw in his argument is one he identified in Walzer's. In an article published a year after the one just discussed, he points out that the moral claims identified by Walzer -mutual aid, responsibility for the causes of flight - cannot be enforced against a State that refuses to recognize them (Carens 1992: 34). It seems unlikely that states, in particular those constrained by the short-termism inherent in states with regularly and democratically elected governments, will prioritize the legitimacy of the international state system – it is simply not on the domestic political agenda. And yet, this may be the best hope for strengthening the practice of asylum<sup>33</sup>.

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<sup>33</sup> See Shacknove's argument along the same lines in chapter three.

## **The Practical Limits of Moral Obligations & Legitimate Restrictions on Migration**

It would seem then, that those who privilege the interests of fellow nationals still concede certain humanitarian duties to non-citizens – but only to those defined as refugees, not to migrants, and only when the risk to the state or the nation is low. However, those who insist on universal moral codes, faced with large numbers of people claiming a right to enter, accept that there are limits to the numbers of people, even if they are refugees, who can be admitted under certain circumstances. While liberal cosmopolitans engage in debates with communitarians and realists about the extent and nature of moral obligations, many seem to share, however regretfully, some of the communitarian and realist assumptions regarding necessary restrictions on entry. The question is then a matter of how to restrict the granting of asylum, while still remaining liberal? States are currently pursuing two strategies.

The first is the deconstruction of the category ‘asylum seekers’ into two sub-groups, ‘genuine’ asylum seekers, who are few in number, and ‘bogus’ asylum seekers or ‘economic refugees’, to whom no duties are owed, and who should be prevented from entering or deported as quickly as possible. Public discourse insists that the latter constitute the majority of all asylum seekers. The second strategy is to insist, regretfully, that there is a limit even to the numbers of ‘genuine’ asylum seekers that one can accept. Liberal states have agreed an obligation to protect those who are persecuted by illiberal states – ‘genuine’ refugees. This serves to demonstrate that there is a difference between the two, and that liberal states are superior (this may explain the bewilderment greeting refugees who reject the liberal values of their host states). ‘Bogus’ asylum seekers, aka ‘economic’ migrants, bestow no such legitimisation on the political system. Leaving aside the difficulties in making distinctions between ‘genuine’ and ‘bogus’ asylum seekers, it is recognised that there are nevertheless potentially millions of ‘genuine’ asylum seekers who do not make it to ‘our’ borders. What if they could? This is the true test of liberal democracies, and is not just a problem for liberal cosmopolitans.

Communitarian theorists like Walzer come overwhelmingly from liberal democracies and are in turn shaped and defined by their own - liberal - political communities,

whose 'liberalness' they wish to preserve. Yet at the heart of liberalism is the notion of human beings as morally equal, 'Perhaps every victim of authoritarianism and bigotry is the moral comrade of a liberal citizen: that is a claim I would like to make...', says Walzer (1983: 49), '...at the extreme, the claim of asylum is virtually undeniable' (1983: 51). However, Walzer confronts his dilemma and abandons his liberal principles:

...if we offered a refuge to everyone in the world who could plausibly say that he needed it, we might be overwhelmed...the right to restrain the flow remains a feature of communal self-determination. (1983: 51).

Having done so, it then becomes acceptable to discriminate even among 'genuine' asylum seekers. Communitarians will discriminate on the basis of 'mutuality' or a sense of 'relatedness', and justify it terms of the 'community' and accept that their community's 'liberalness' is bounded by its borders.

It seems that while universalists either dispute the inherent value of a national identity<sup>34</sup>, or insist that it is not endangered by migration, most seem to concede that

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<sup>34</sup> Communitarians, unlike cosmopolitans, link national identity and welfare to provide a further rationale for limiting entry, even to asylum seekers. Miller argues that 'much state activity involves the furthering of goals which cannot be achieved without the voluntary cooperation of citizens' (1994: 143). Yet the welfare state is not funded voluntarily, and one is penalised if one refuses to pay. Nonetheless, it could be argued that, while few are happy about the amount of tax deducted, most see the logic of paying tax, so that in sickness or old age, all members of the community will benefit. And it does seem that a degree of trust is necessary. In countries where tax evasion is endemic, it seems ridiculous to play by the rules when no one else does. And yet the creation of a common identity is supposed to further trust and reciprocity. Were 'too many' strangers to entry this common identity would be attenuated - the bonds of trust that have been strengthened by familiarity and time would be stretched to breaking point. There is the assumption that while 'we' might be prepared to make sacrifices for 'our' compatriots, with whom 'we' share an identity, we would be less prepared to do so for 'strangers', especially strangers that we do not trust to have a genuine claim on our generosity, such as 'bogus' asylum seekers. This argument that the provision of, for example, welfare payments, depends on a shared national identity, is undermined both by the contributions non-nationals make to the host country, especially in Germany, and by the sacrifices many Britons and Germans do make for complete strangers. Here in Britain, since the withdrawal of benefits from asylum seekers, many charitable organisations, staffed by volunteers and funded by donations from the public, are caring for thousands of strangers. In Germany, when asylum seekers began arriving from the states of the former Yugoslavia, many volunteered their Laube - summerhouses - as accommodation for them. It might be argued that such gestures of solidarity are voluntary, and have only marginal effects on the wealth of the individuals involved - certainly far less than the removal of 25 - 40% in tax. Yet since tax is deducted at source and taxpayers have little say in how it is spent, the voluntary nature of the sacrifices made for the sake of strangers serves only to undermine the use of communal solidarity, or a common identity, as the basis for welfare provision. And the sacrifices made, while they may be smaller in monetary terms, often involve long hours, arduous labour and little or no recognition. And, unlike state welfare, there is usually little expectation of reciprocity. This is emphatically not an argument for the replacement of the welfare state by private charity, nor is it an attempt to denigrate the positive affects of communal solidarity. It is instead evidence that the borders of the community frequently do not coincide with those of the state or the nation; that people are prepared to go beyond that which is currently expected or demanded of them, even for non-citizens.

there are limits to our obligations to our fellow humans, though these limits are determined by practical rather than ethical considerations. Most cosmopolitans seem to accept the logic of protectionism for welfare systems and for liberal polities. Concern to preserve the protection offered the weakest in our society means that the ‘threat’ to the welfare state, that it would be overwhelmed if demand outstripped the state’s capacity to supply social welfare benefits, must be taken seriously.

All European states have some form of social welfare system to ameliorate the most damaging affects of the market. Belonging to these polities means contributing, and having access to that system. Granting asylum means permitting access to benefits to those who have not -yet- contributed to their provision. In both Britain and Germany, at a time when the welfare state is in crisis, this has provided arguments for those who would restrict asylum. What are the grounds for arguing that entry must be limited in order to protect the welfare state? This is an empirical question – and one which it is difficult to resolve, since, while the welfare state is under siege, nowhere has it actually collapsed. Freeman has pointed to tension between welfare systems, which are, must be, closed and open economies. He argues that the ‘welfare state requires boundaries because it establishes a principle of distributive justice that departs from the distributive principles of the free market’ (1986: 52) and that the advantages of such a system necessarily entail limited access or as Brown puts it ‘no effective welfare state could exist which did not restrict its benefits to members/citizens’ (Brown 1997: 7).

Brown has pointed out that in practice, most cosmopolitans, other than libertarians, want to retain a welfare state, and that this leads them to accept, if not to defend borders. The basis of this argument appears to be feasibility. While the British, or German government can, and does, raise sufficient revenue from its citizens to fund a welfare system, which is barely responsive to the needs of its citizens, it seems that it would not be reasonable to expect it to be able to provide for all who might wish to enter<sup>35</sup>. Since neither Brown nor Freeman are universalists, their conclusions are unsurprising, and given greater force since they are shared by cosmopolitans like Carens

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<sup>35</sup> This was one of the arguments used to justify the 1993 Asylum and Immigration Appeals Act and the changes in the rules governing benefits to asylum in 1996/1997 in Britain and the 1993 change to Art.16 of the German constitution. It was this economic argument which formed the basis of the push to distinguish ‘genuine’ from ‘bogus’ refugees.

We are clearly not obliged to admit an overwhelming number, assuming that “overwhelming” means something substantive like destroying the capacity of the society to provide basic services to its members (Carens 1992: 33).

There are two problems with using the welfare state as a rationale for closing borders. Freeman acknowledges the first, that these benefits are at least in part dependent on global inequalities. Justifying the benefits then becomes a matter of justifying those inequalities, and of justifying restricting access to them. There are those who suggest ways of redressing this injustice, through the introduction of a ‘global income’ (Barry) or welfare internationalism (Suganami), but rather hypothesising about these alternatives, I would stress the second problem with this speculation in relation to welfare - that it is just that - speculation. We do not know that welfare systems would collapse if ‘too many’ were to enter the state. Such a statement will appear counter-intuitive to many, but there is no incidence of such a collapse. When the Labour government in Britain carried out its Comprehensive Spending Review (July 1998), it was able to find an extra £3 billion for education and welfare from the transport budget, and more from defence cuts.

The increase in 1990 to the population of Germany by 16-18 million East Germans, who had not previously contributed to the Republic’s welfare budget to the Federal Republic, many of whom became unemployed, as well as more than a million ethnic Germans from the Soviet Union and one and a half million asylum seekers within six years did not lead to the collapse of the German welfare state. Having argued that the country could not accommodate any more refugees, as Räthzel points out, ‘suddenly there was money to fund housing programmes and provide German-learning programmes: as much as...DM202m in 1989’ (1990:40)<sup>36</sup>.

Finally, the argument that liberal regimes are vulnerable to large numbers of others is considered.

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<sup>36</sup> Though apparently, according to Mr Jacques Arnold, the then Honourable member for Gravesend ([Hansard](#) 2.11.92), the arrival of 26 Bosnians in Dover ‘put immediate stress on health, education, social services and voluntary agencies in the town’. More seriously, Peter Lilley considered the small number of asylum seekers arriving in Britain such a threat to his social security budget, he introduced a bill specifically designed to deprive most of them of access to any kind of state assistance, and 800 Czech and Slovak gypsies arriving at Dover (nearly all of whom were rejected and have since left Britain) were sufficiently problematic for Jack Straw (Home Secretary) to cut the appeal time for ‘third country’ cases from 28 to 5 days.

Liberal regimes must...avoid being 'swamped' by immigrants in such numbers or at such a rate that the new residents cannot be assimilated into the liberal system, with the consequence that it is undermined from within (Whelan 1988: 22).

For many liberals (Ackerman 1980; Barry 1992; Carens 1992; Dummett 1992; Habermas 1992), where the liberal regime itself is at stake, this kind of protectionism seems to be justified. Habermas speaks of legitimate restrictions in order to 'avoid the enormity of claims, social conflicts, and burdens that might seriously endanger the public order or the economic reproduction of society' (1992: 16). Carens also refers to the threat to public order as a legitimate ground for restriction, though “public order” is not equivalent to the welfare state or whatever public policies are currently in place. It is a minimalist standard referring only to the maintenance of law and order' (1992 FM: 30). However, the question of why law and order should be endangered is left unanswered. Were all borders to be opened tomorrow there would be serious disorder, but this is due to the current political climate in which migrants and refugees are constructed as threatening (see Chapter Three and Five). However, since in the past migrants have been constructed as beneficial (see Chapter Four), it seems possible that they could be again, in which case many fears, which might lead to a violent reaction, could be allayed.

Carens (1996) is not alone in arguing that moral obligations must be feasible. Even Singer, as discussed above, accepts that there are limits to what one *can* expect. Applying arguments that he makes in his consideration of overseas aid, his response in the case of refugees would be that when others are suffering much more than us, we can accept many more refugees than we do, and so come closer to the impartial standard he proposes. Not being able to help everyone is not an excuse for not helping as many as we can. Nonetheless, the course of action Singer actually proposes for governments (he rarely refers to states), is not really that radical, 'Presidents and Prime Ministers...could just as easily gradually increase their refugee intakes, monitoring the effects of the increase through careful research' (1993:262).

Though there are deep and significant theoretical differences between the positions just discussed, there is a consensus that the state and a system of states is inevitable<sup>37</sup> and

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<sup>37</sup> Some, such as Linklater (1998) and O'Neill (1994) can conceive of a post-state world, but also believe that current states can be reformed.

that the state should impose restrictions on entry in order to protect certain social goods, such as welfare provision and the stability of the liberal polity itself. This presents the universalists with a problem. Particularists have a basis on which to choose – Walzer’s ‘mutuality and relatedness’ or ethno-cultural belonging – but given that universalists stress that mutuality and relatedness is shared with all humanity, how will they choose, if they must, among all of those to whom they have an obligation, if they accept, as many do, the threats posed by weight of numbers to the welfare state and the liberal polity? Is it possible to do so and still remain liberal? Just how many refugees, and of what type, do we have to accept in order to be able to call ourselves liberal?

### **The Question of Legitimacy**

In most, if not all, of the approaches outlined above there is an acceptance that we live in a particular kind of world, a world divided into states, to which most of us are assigned at birth. Those of us who live in Europe, especially Western Europe, live within polities, of which we have certain expectations, that they will protect the interests of the citizenry and that they will uphold liberal values. The opening of borders, which until the collapse of the Soviet states had prevented the exit of their populations, presents a challenge to Western European states. In the expectation that the numbers who could do so would be small, these states had insisted on the right of those populations to freely leave their states of nationality and claim asylum, which was granted without close examination of individual claims. Now that the borders are open - or at least more open - the burden of control has passed to west European states. Since liberal democracies had insisted for decades on the right of East Europeans to leave their states, and linked free movement to the legitimacy of states, rationalisation for closing borders is now sought and political and international theorists, universalist as well as particular, are jumping into the breach.

Quentin Skinner (1978) has explained how a normative vocabulary can both advance and limit the actions available to a political actor: Such an actor wishing to legitimate her behaviour will try to ensure that it can ‘plausibly be described in terms of a vocabulary already normative within his society, a vocabulary which is capable of legitimating at the same time as describing what he has done’ (Skinner 1978: II xii). If a liberal democratic nation state wants to restrict or to liberalise its asylum policy, then

it must justify these changes of policy in terms that are normative within those societies. In Britain (see Chapter Four), during the debates on the introduction of restrictions on asylum, members of parliament felt constrained to ritualistically invoke Britain's long and honorable liberal tradition of granting asylum, asserting that the much tougher line on the admittance of asylum seekers was in no way a departure from that liberal tradition, and that in fact, it protected that tradition by excluding from the asylum process those who would abuse it<sup>38</sup>.

There is a limit to what can *plausibly* be described as either liberal or democratic action, and this does limit the options available to liberal democratic states. The action must:

...plausibly meet the pre-existing criteria for the application of the term. Thus the problem facing an agent who wishes to legitimate what he is doing at the same time as gaining what he wants cannot simply be the instrumental problem of tailoring his normative language in order to fit his projects. It must in part be the problem of tailoring his projects in order to fit the available normative language (Skinner 1978: II xii).

It would therefore be very difficult for any state to decide, for example, to abolish asylum, and still plausibly claim to be to be a *liberal* or *democratic* state. Even the most outspoken opponents of Germany's relatively liberal asylum regime, while advocating draconian restrictions, do not demand that asylum cease to be granted at all<sup>39</sup>. Not only was there no popular mandate for such an action, but the idea of abolishing it would have been outside their own normative vocabulary. In Britain, the decision to remove Al-Ma'saari<sup>40</sup>, though clearly in the interest of Britain as a capitalist state, could in no way be described as liberal. In the face of opposition, the British government could not pursue its preferred course of action and still claim to uphold liberal values.

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<sup>38</sup> It was argued that the presence of 'bogus' asylum seekers was delaying the processing of 'genuine' claims, and therefore that stricter admittance procedures would improve conditions for 'genuine' asylum seekers' (see chapter four).

<sup>39</sup> A leaflet from the Deutsche Volks Union (a far right party) explained that, 'In the interests of respectable foreigners in Germany, criminal foreigners, *bogus* asylum seekers, and civil war refugees from countries *in which the civil is long since over*, and foreign illegal workers, who take jobs from the natives, must be expelled (emphasis added).

<sup>40</sup> Al-Ma'saari is an outspoken critic of the Saudi regime, which asked Britain, in the interest of good trade relation to reject his claim for asylum and remove him from Britain (see chapter four).

Today asylum is under attack because, as its practical usefulness for the state has declined (as a source of cheap labour and as visible confirmation of the superiority of liberal democracies to 'Communist' states [see Chapters Four and Five]), its retention now depends on its value as a validating tool (evidence that the state is in fact liberal democratic). It has gained some security from its identification with human rights - respect for which is deemed a necessary, though not sufficient, indicator of liberal democracy; from the legal obligations which the state has undertaken (in international and domestic law); and from the perception that states have moral obligations which asylum enables them to fulfil. These are the grounds on which most would argue for a liberal asylum practice. Those who would argue for its restriction are forced to fight on this ground too. For example, ways to restrict legal obligations (safe third countries, safe countries of origin, the creation of extraterritorial areas at points of entry) without contravening them are sought, as are means of restricting moral obligations by separating 'genuine' and 'bogus' applicants (there being no moral obligation to someone who has made a fraudulent claim). In a liberal polity, it would be counterproductive to argue for the restriction (not to speak of the abolition) of asylum on solely practical grounds, as to do so would expose the restrictionists to attack as immoral or worse, illiberal<sup>11</sup>.

## Conclusion

The different and various approaches that have so far been outlined all contribute to an understanding of the challenge that asylum seekers present to the nation state, even though there are difficulties with all of them. While rejecting the individualistic model of migration as failing to take account of the structural pressures which impel people to leave, one should nonetheless remember that it is individuals who stuff clothes and a few photographs into a bag, tie children to backs and put one foot in front of the other. The decision to go and the choice of destination are usually constrained by economic and political factors, and structures and events over which the individual has little control. Reception in the host state is effected by the perception of the impact that the newcomers will have economically, politically and socially, as well as of the needs of the newcomers. One small, ill Bosnian child is made welcome, cared for and funded through newspaper campaigns, while the Government rejects any responsibility to take

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<sup>11</sup>Of course, this is only a problem for states whose legitimacy is dependent on their claims to be liberal and democratic.

larger numbers of adults. In spite of increasing mobility and the power of aliens to exercise rights, liberal democratic states still control entry into their territories, though their ability to do so is far from absolute, and subject to both internal and external constraints.

As we shall see in Part Two in particular, there are two possible explanations why states grant asylum - reasons of state and moral obligation. These explanations are not necessarily mutually exclusive - it possible that in fulfilling a moral obligation, the state may be acting in its own best interests. The two states examined in this thesis, Britain and Germany, are states of a particular kind. They are liberal democratic nation states. Reasons of state in liberal democracies may be assumed to be different to reasons of state for totalitarian or absolute states and to have a stronger normative content. After all, it is not merely that the consent of citizens of liberal democratic states is necessary, but that they expect to be governed in a particular way - they expect their state to embody and to protect certain ideals, such as freedom, autonomy, self-determination, and the moral equality of every individual. If the State in question purports to be not only democratic, but liberal, then the State derives its legitimacy by behaving in accordance with the liberal values of its *demos*. The rhetoric of moral and legal obligations used by certain states, while it may guarantee a safety net for a small number of asylum seekers, should be also be understood primarily as serving the interests of those states, in that it legitimates their claims to be liberal and democratic. If the people recognise obligations to certain outsiders, then it is incumbent on the State meet those obligations. This the State appears to do by granting asylum, though it has been careful to maintain control of the definition of the refugee and of access to the State, so that the costs of this legitimisation do not outweigh the benefits.

Asylum has always been a practical tool, as well as an expression of the values, of a particular polity. This is not to deny that there are those within states who take seriously the liberal commitment to universal rights, only to assert that the fulfillment of this commitment by modern European liberal democracies is dependent on a coincidence of liberal norms and the interests of those states. In the absence of such interests, liberal values will continue to protect some, but the numbers will be limited and the protection contingent on, and vulnerable to, the interest of states. There are economic and political motives for granting, and withholding asylum, though states

usually make some attempt to disguise the former. Most often, economic and political interests are both served by admitting a number of – carefully selected – refugees<sup>42</sup>.

In this discussion asylum seekers have been treated as part of larger migratory movements. This may be interpreted as support for those, like Widgren, who argue that most of those who apply for asylum are economic refugees, *and so not entitled* to asylum. That is not the argument I wish to make. On the contrary, the argument is that accepting the distinction between ‘political refugees’ and ‘economic migrants’ supports the exploitation of both groups by states, and serves the interests of states, for refugees and migrants serve two distinct purposes<sup>43</sup>. The usefulness of refugees for states disappears when they cannot be distinguished from migrants. They may, do, contribute to the economic life of the host state, and some would recommend that economic factors be taken into account when deciding how many and which refugees to admit, but their primary purpose is political - the legitimization of the host state, and by extension, of the system of states.

What unites all of the different approaches outlined above is the acceptance that entry into the state must be restricted, though some might argue that, ideally, it should not be. The insistence of states on their right or duty to control their borders and territory is based on practical, as well as theoretical, arguments, neither of which should be left uncontested. Some of the most potent critiques of the current exclusionary and communitarian orthodoxy are undermined by their acceptance of some of the assumptions of the communitarians, when confronted by a particular version of reality. Reality is constructed in a particular way to justify limiting our obligations to ‘necessitous strangers’ without abandoning what are held to be the defining features of liberal democracies. The challenge to Western states is not simply one of refining the theoretical justification of the state or particular forms of the state. There are serious practical challenges raised by the numbers of asylum seekers, but the response to these

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<sup>42</sup> However, these interests sometimes conflict. There is a battle raging between business interests and conservative or nationalist interests. While in Europe the latter seem to be winning the arguments, in the US, a bill requiring that records be kept of all foreigners entering the US from Canada and Mexico was defeated on the grounds that it would seriously affect cross-border trade (Associated Press Report, 23.7.1998). In Thailand, mill owners have gone on strike to protest the deportation of foreign labourers (Bangkok Post, 8.7.98).

<sup>43</sup> This is not to deny that individuals have different reasons for relocating, only that it is not possible to identify people according neat categories such as refugees or migrants, and to warn that attempts to do so may be counterproductive, not to say, extremely expensive.

challenges is shaped and constrained by particular views of the world in which we live, views that are shared by cosmopolitans and communitarians alike.

The asylum issue brings to light the equivalent of Arendt's *Condition Humaine*, the *Condition d'État* - the daily struggle for control in which states must engage. In order to survive economically states have needed migration. Chapter Two, in tracing the history of asylum, shows the economic benefits that have accrued to states as a result of the admission of migrants - whatever their motivation. In order to survive politically states need legitimization. The next Chapter will highlight the adaptation of asylum for this purpose by liberal states. Perhaps most importantly states need control. The legislation that is introduced by European liberal democracies is part of an ongoing attempt to control migration, including migration for political reasons. This legislation is one manifestation of the struggle for control which is fought at the border, a struggle the state cannot win, but which it must continue to fight if it is to survive. In the next chapter, the evolution of the state, and the way in which it co-opted asylum into its armoury as part of that struggle, is outlined.

## CHAPTER TWO

### WHY DID ASYLUM COME INTO BEING?

*En effet, la première utilité de l'histoire est de servir à la politique* - Jean Bodin

In this chapter the main objective is to explore the emergence of asylum, how it adapted in response to different needs over time, in particular the needs of states, and the way in which the different forms of asylum, described below, receded or came to dominate, depending on historical and political necessity. It begins with an outline of the origins of asylum, which includes a brief discussion of diplomatic asylum, the chapter then moves chronologically through European history, chronicling the development of the state and its use of asylum<sup>1</sup>. As a result of this retelling of asylum's history, certain features emerge, conditions that are necessary for the granting of asylum: separate jurisdictions; parity of power; and an advantage to the asylum granting body. This advantage can take varying forms - political, economic or demographic, depending on the demands of changing circumstances. Granting asylum can be a means of undermining one's enemies, gaining skills and labour, augmenting a declining population or legitimating one regime over another. Where no such advantage is evident, or where the costs of granting asylum outweigh the benefits, asylum has fallen into disuse. This has happened only occasionally as we show, and only to specific types of asylum at particular times - territorial asylum during the Roman Empire, and church asylum more recently in Europe (though it is now being revived again).

There are essentially three different types of asylum: *temple/church asylum*, *diplomatic asylum*, and *territorial or cross border asylum*<sup>2</sup>. Each developed in response to different, but connected needs. In each case the need was originally that of the society as a whole, but as the state itself developed, asylum became a support for, or a tool of, the state. The history of asylum is examined in order to substantiate the claim that the primary function of asylum, whether 'temple', 'diplomatic' or 'territorial', as a support for, and tool of those in power, has not changed, and is therefore unlikely to change.

<sup>1</sup> Although Europe only grants asylum to a small minority of the world's refugees, this geographical limitation is necessary because the focus of the thesis is two European states - Britain and Germany.

<sup>2</sup> 'Temple' and 'diplomatic' asylum are both internal forms of asylum, in that the protection is offered within the territory of the 'persecuting' state. 'Diplomatic' and 'external' asylum are, however, both 'international' forms of asylum, since two states, at least, are involved.

Each of the different forms of asylum developed separately over many centuries<sup>3</sup>, providing different solutions to different problems. However, the problems and the solutions do have certain common features. Where a form of asylum threatened the sovereignty or competence of the state, then that form of asylum fell into disuse, as in the cases of 'diplomatic' and church asylum in Europe<sup>4</sup>. For many commentators this demise has not been seen as unjust or problematic. The dominant view of the state has always been that its primary purpose is to promote and to protect the interests of society and its members: 'the State, through the system of laws, is the sole legitimate guardian of its subjects'<sup>5</sup> (Bulmerincq 1853: 6)<sup>6</sup>, so naturally it would not tolerate any usurpation of this role.

### **The Origins of Asylum**

Territorial and church asylum were originally used by the asylum granting body to declare its absolute power not just over a particular geographical area, but over everyone within that jurisdiction. In other words, both these forms of asylum were declarations of autonomy. In each case, it will become clear that certain prerequisites were and remain necessary for the granting of asylum in all its forms - distinct jurisdictions, parity of power between different states or powers, and, most importantly, an advantage to the wider society, later the state. Taking this very long-term perspective on asylum allows us to place developments in the twentieth century into a wider context. The shift in asylum practice between the Greek city states and the Roman Empire, for example, has parallels with certain recent developments in the European Union. The changing functions that asylum has served for the ruling powers, states in general, and liberal democratic states in particular, reveals both the flexibility of asylum as a tool of states and its endurance. Taking a long view also shows the different benefits - material and ideal that asylum has conferred on the different asylum granting bodies. With a pedigree stretching back over four thousand years, it may still outlast the much younger modern state system.

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<sup>3</sup>The earliest records stem from the 14th century BC, among the Hittites, the Egyptians and the Israelites - all Middle Eastern peoples.

<sup>4</sup>...though recent years have seen a resurgence in the latter for reasons which will be discussed in later chapters

<sup>5</sup>[D]er Staat ist durch die Rechtsordnung der allein berechtigte Schutzpatron seiner Untertanen.

<sup>6</sup>On this account, *legally* the government of Alain Juppé acted within its rights when it entered a church to remove the 300 'illegals' seeking sanctuary there. Neither France nor any other Western democracy will countenance the Church attempting to limit or undermine state sovereignty.

The word ‘asylum’, comes from the Greek ‘asyllos’, that which may not be seized or violated, usually a place that was sacred or magical, i.e. a temple<sup>7</sup>. One who broke the taboo surrounding such a sacred, magical place had stepped out of the realm of the profane and into the realm of the Gods, to whom alone the fugitive must justify herself, and in whose realm secular powers no longer had any jurisdiction<sup>8</sup>. One was safe because one had reached a place not under the jurisdiction of earthly powers<sup>9</sup>. However, this could only be the case where there was a division between spiritual and earthly powers<sup>10</sup> - separate jurisdictions, and where each recognised and respected the power and jurisdiction of the other - where there was parity of power. But why should the sanctuary be respected? What possible purposes did it serve for the temporal powers? Certainly, fear of the Gods played a role, but it was not always sufficient to protect the fugitive<sup>11</sup>. One of the most important functions of ‘temple’ asylum was in limiting the damage of blood feuds. Until the development of legal systems, with courts, judges and sentencing, blood feuds and the *vendetta* meant a never-ending cycle of vengeance and lives that were nasty, brutish and short. A sanctuary, or temple, where one was safe from violence, provided the means to step out of this cycle:

In a time of unrestrained blood vengeance, when revenge was a right, asylum diminished the effects of this practice. Only non-contentious perpetrators may be handed over to the avengers (Bulmerincq 1853: 29)<sup>12</sup>.

The alternative may have been the decimation of whole populations. This then provided a practical reason for respecting sanctuaries. Where the system of laws or ‘Rechtsordnung’ was weak - asylum developed as a means of breaking out of the cycle of escalating violence and of supporting the development of such a system<sup>13</sup>. It allowed

<sup>7</sup> However, scholars, most notably Grotius, have traced ‘temple’ asylum back to the Israelites in the 13th century BC.

<sup>8</sup> Weltliche Macht kann ihn unter keinem Vorwand und mit keinem Rechtstitel mehr erreichen (Kimminich 1983: 1)

<sup>9</sup> With time ‘asylum’ came to mean not simply the *place*, but the *protection* afforded the fugitive.

<sup>10</sup> According to Otto Kimminich, i.a., the absence of such a division explains why asylum was unknown within Islam for a long period (Kimminich 1983: 8).

<sup>11</sup> This is not to say that the sanctity of the altar would always be respected! Cassandra was slain by Ajax before the statue of Pallas Athena - certain statues of the Gods were also dedicated as sanctuaries. The follower’s of Cylon in the seventh century BC were dragged from the altar to which they had fled and killed, and in 403BC Theramenes too, was taken at the altar and killed. But such acts were regarded with horror, as sacrilegious. Temple asylum too, was only respected so long as it was convenient!

<sup>12</sup> ‘In einer Zeit ungezügelter Blutrache, wo die Rache ein Recht war, mindert [das Asylrecht] möglichst die Ausübungen desselben. Nur den freiwilligen Thäter dem Bluträcher überlassend!’

<sup>13</sup> Moses specified that only those who had *inadvertently* killed were to be granted asylum - those who

time for the crime to be investigated and a judgement to be handed down - but this worked only so long as asylum was used to protect the victims of wrongdoers, and those unjustly accused. If temples became sanctuaries for wrongdoers themselves, it would undermine the power of the developing order (Grotius 1990: Bk.II, Ch.XXI, § V-VI). Thus, temple asylum had a political role to play<sup>14</sup>, until the state itself had developed a monopoly of the role of protector. At that point, the sacred would become a competitor for the central *raison d'être* of the state.

When these feuds escalated into war, a mechanism was needed whereby an end to that war could be negotiated if no clear victor emerged. It was essential therefore that the ambassadors and negotiators of the feuding parties could come and go in safety. They became diplomatically immune and their residences inviolate. This was the origin of 'diplomatic' asylum. The host government could only enter the embassy to recover a fugitive with the permission of the ambassador, (though this was not codified until the fifteenth century)<sup>15</sup>. One reason for the failure of diplomatic asylum to become a permanent feature of European state relations is the challenge it presented to the state within its own territory. For this reason, even in earliest times, its force was not particularly strong. As Grotius put it in the seventeenth century:

As to [the ambassador's] authority over his household, and the asylum, which he may afford in his house to fugitives, these depend on the agreement made with the power, to whom he is sent, and do not come within the decision of the law of nations. (1990: Bk II, Ch. XVIII, § VIII).

If the legation's power to grant asylum derives from the state, from which the fugitive is fleeing, there is no real separation of jurisdiction. Furthermore, diplomatic asylum runs counter to the interests of the host state, and may serve to embarrass the diplomatic legation. For this reason, a fugitive cannot be certain that she will be granted asylum in the embassy, and not be handed over to the authorities. Diplomatic *immunity*, granted to diplomats and codified by the Vienna Convention, remains because it serves the states' purpose, whereas diplomatic asylum, granted by diplomats

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had killed with intent were to be dragged from the sanctuary and themselves put to death.

<sup>14</sup> Bulmerincq suggests that temple asylum fulfilled another function for the Israelites - it meant that the children of Israel would not have to flee to a foreign land, where they might be tempted to worship false gods and abandon their faith (1853: 29).

<sup>15</sup> The Spanish theologian Francisco de Vitoria declared that '...in the gravest matter, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the whole world' (Vitoria *De Potestate Civilis*, cited by Remec 1960: 27).

and codified in the 1954 Caracas Convention on Diplomatic Asylum, seems to have become an anachronism, at least in Europe<sup>16</sup>.

Like temple asylum, territorial asylum is the protection afforded a fugitive fleeing from one jurisdiction to another, but in this case, both jurisdictions are political. It is dependent on the mutual recognition of distinct jurisdictions and on parity of power between the countries involved, as can be seen in one of the earliest examples of treaties regulating the treatment of refugees between the Hittites and other leaders in Asia Minor in the 14<sup>th</sup> century BC<sup>17</sup>. The Hittite King Muttawalis and the King of Vilusa signed an agreement, which stated:

In relation to refugees, I have sworn the following oath: if a refugee from your country enters the land of Hatti, he will not be returned; the return of a refugee from the land of Hatti would not be just (quoted in Kimminich 1983: 10)<sup>18</sup>.

This is, in effect, a guarantee of asylum<sup>19</sup>. Although it sounds like concern for the protection of the individual, it could equally be interpreted as insistence on the right of the ruler to control all who enter or are present within his or her territory<sup>20</sup>.

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<sup>16</sup> Diplomatic asylum is the protection granted by the representatives of one power to a fugitive, using the immunity granted to them while in the territory of a foreign power. It is a direct challenge to the sovereignty of the host state. Within Europe, its use is very rare, 'many states do not accept the institution of diplomatic asylum, or do so only in very limited cases' (Goodwin-Gill 1983: 102f). Diplomatic asylum has its strongest tradition in Latin America. Examples of asylum being granted by US embassies in Soviet states to fugitives from those states in the 1950s and 1960s served a distinct purpose, providing propaganda for Western states, in that such incidences were used to demonstrate the moral superiority of the West and the lack of legitimacy of the Soviet regimes. The political calculations involved in the decisions to grant asylum can be seen by comparing the frequency of such grants and the state of political relations between East and West during the Cold War. The re-emergence of diplomatic asylum in 1989 in Hungary and Czechoslovakia (when thousands of East German citizens sought asylum in the West German embassies of neighbouring Warsaw Pact states) was exceptional. For this reason it is not discussed any further in the thesis.

<sup>17</sup> Elsewhere in the Middle East, the Old Testament, in the book of Psalms and Deuteronomy, directs that refugees and strangers be afforded special protection (Psalm 146,9 and Deut. 14, 29; 26,13). Moses (4: 35) named six cities which were entitled to grant asylum, to which Jerusalem was later added.

<sup>18</sup> Betrefts eines Flüchtlings aber habe ich folgendes unter Eid gelegt: wenn ein Flüchtlings aus deinem Lande ins Land Hatti kommt, so gibt man ihn dir nicht zurück; aus dem Lande Hatti einen Flüchtlings zurückzugeben ist nicht rechtens.

<sup>19</sup> The Egyptian Pharaoh Ramases II and Hattusilis III, King of the Hittites, concluded an extradition treaty, agreeing to arrest and return refugees from one country to the other. Although these treaties were extradition treaties, and did not include a right to asylum, they did include certain protections for refugees (Kimminich 1983: 9). The disparity in power may explain why, in this case, the Hittites could not refuse to return a fugitive. To do so would be to incur the risk that the Egyptians would enter their territory to reclaim him/her. Parity, or superiority, of strength or power enables the host country to refuse to return a fugitive, or to refuse to permit agents of the pursuing power to enter the territory to capture her/him, whereas a weaker power cannot refuse such permission, and so salvages at least the appearance of sovereignty by signing an extradition treaty. Later, when the state had developed a system of laws, extradition would become a necessary defence of a state's 'Rechtsordnung' and of its sovereignty.

<sup>20</sup> More than three millennia later, just this attitude formed the basis of Britain's refusal to extradite

In contrast, an *extradition* treaty between two powers serves as mutual recognition of the sovereignty of that power within its own territory and over all its subjects. In none of the above mentioned treaties is there mention of *political* asylum. Otto Kimminich argues that during the time of the Greek city states, a thousand years after the signing of those treaties, the granting of asylum was constructed for the first time as the *right of the asylum granting state* (Kimminich 1983: 12)<sup>21</sup>. This is something that has remained the same through out the history of asylum<sup>22</sup>. At this time, for a limited period, the tender shoots of political asylum in the modern sense appeared in ancient Greece, before being severely pruned by the Roman Empire<sup>23</sup>.

As early as the 11-12<sup>th</sup> century BC, Athens had become a haven for those refugees displaced by the Doric Greeks<sup>24</sup>. From the seventh to the fourth century BC, the Greeks especially were busy with political activity and the ‘formulation, discussion, revision and at times overthrow, of legal and constitutional codes’ (Lloyd 1979: 241). The best constitution for a state, the best type of state, the best laws for a state were subjects that demanded debate and discussion, and the Greeks were accustomed to a high standard of both. They were also (a limited number of them) accustomed to extensive and intensive political involvement - to active citizenship. Unlike in the neighbouring autocracies, where dissenters, or those who fell out of favour could expect to be killed, political disagreements in Greece were expected, part of the cut and thrust of everyday political life amongst the citizenry. Citizenship was not guarded ‘very jealously...If you did not like what the strongest party was doing in your own city, you could always try another city likely to grant citizenship to foreigners’

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anyone from her territory for crimes committed outside her territory, much to the disgust of German jurists who saw in this a refusal to support and affirm the sovereignty of other states (see below).

<sup>21</sup> die völkerrechtliche Konstruktion des Asylrechts als Recht des Schützgewährenden Staates.

<sup>22</sup> Germany is the exception that proves the rule. As will be shown in section two, since Germany introduced a ‘right to asylum’ in 1949, it has been under attack, and in 1993 was severely curtailed.

<sup>23</sup> It is possible that the economic dimensions of asylum predates the political. The Old Testament refers to asylum cities (Kimminich 1983: 10), including Rome, which guaranteed the security of foreign visitors. While Kimminich suggests that such cities benefited from increased trade as a result of their reputations as peaceful and welcoming venues, he also points out that the international trade promoted the development of asylum. This may also have been the reason why the notion of ‘asylum cities’ was revived in the twelfth century when the Holy Roman Emperor decreed that certain cities were entitled to afford asylum to fugitives: Vienna, Berne, Geneva, and Nürnberg. This is not to say that the situation of ‘strangers’ was ever anything but precarious!

<sup>24</sup> Bulmerincq (1853: 32) traces the founding of sanctuaries or asylums to the ‘erwachten Humanität’ of the Greeks.

(McClelland 1996: 74). If the views expressed were intolerable, then banishment from the city-state was usually the worst punishment inflicted<sup>25</sup>, and the exile might hope to return when the political climate changed. Athens prided herself that none would dare to raise a hand against the refugees under her protection<sup>26</sup>. This applied equally to slaves and foreigners<sup>27</sup>, though they were only allowed to claim asylum in public temples<sup>28</sup>.

During this period in Greece, when the ‘sacred-magical’ phase was giving way to the legal, Kimminich argues that asylum, unlike other branches of the law, remained, if not wholly, then at least partially, outside the ‘juridification process’ (Jurifizierungsprozeß). This is the process whereby the law became impersonal and abstract, independent of personal or divine authority<sup>29</sup>, and above *politics*. Nonetheless, the law was personal in the city-states. Unlike Roman Law, which was a code to which all were subject, Greek law was passed for a specific purpose or in relation to a particular person<sup>30</sup>. It is unsurprising then that the decision by a city-state to grant asylum was governed by practical, political, rather than legal, or religious considerations:

The reason for granting asylum had more to do with the independence (sovereignty) of the city-state, and less to do with religion. In this way, asylum became a means for achieving political ends (Kimminich 1983: 11)<sup>31</sup>.

Political refugees or exiles from Greek city-states, more than mere criminals, could expect sanctuary or protection in other Greek city-states, sure that they would not be extradited. Both temple and political asylum flourished in Greece until its conquest by the Romans. Not because (or not merely because) the Greeks were particularly enlightened, but because the necessary conditions for asylum existed. Within Greece, there was a separation between the sacred and the profane, and between the various

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<sup>25</sup>The harshness of this sentence should not be underestimated. Banishment was worse than death for some.

<sup>26</sup>See Sinclair (1988: 28).

<sup>27</sup>For the distinctions between foreigners and citizens, see Sinclair (1988), or Manville (1990: Chapter 1).

<sup>28</sup>Asylum was already being used as a device to legitimise one regime over another, just as it was during the twentieth century’s Cold War.

<sup>29</sup>Divine vengeance may still be mentioned; but the gods tend increasingly to become depersonalised as mere personifications of the rule of law itself (Lloyd 1979: 247).

<sup>30</sup>My thanks to Professor Brown for this point.

<sup>31</sup>[D]er Grund der Asylgewährung [wurde] weniger im Religiösen als in der Unabhängigkeit (Souveränität) des Stadtstaates gesehen. So wurde das Asyl für politische Flüchtlinge zum Mittel der Politik.

city-states. Asylum also served a purpose. It attenuated the worse effects of blood feuds and enabled political dialogue and differences to continue and develop.

This is in direct contrast with the Roman Empire<sup>32</sup>, which pursued those who challenged the imperial authority in particular to the outermost reaches of the Empire's jurisdiction<sup>33</sup>. Bulmerincq (1853: 64) suggests that the lack of a strong tradition of asylum in Rome can be attributed to the speed and thoroughness with which Rome developed a legal system, that is, the state and its laws became the best guarantor of its citizens' safety, and therefore asylum was unnecessary. It served no purpose for the state, and would only undermine its authority. There was also no recognition of separate jurisdictions. Greece was a collection of autonomous city-states with distinct (though disputed) jurisdictions, but Rome was a single entity. The different *polies* did not bow to any superior power, whereas Rome accepted no challenge to its power. As a result, no authority under Rome had the power to refuse to extradite a fugitive, that is, to grant them asylum, should Rome demand their return. Should a city, or a chieftain, refuse to hand over a traitor, they could count with the full force of Rome's wrath. Only those who challenged Rome's authority were pursued so relentlessly. Asylum, as an expression of territorial sovereignty – 'territorial' asylum- was suspended during the lifetime of the Roman Empire (within the Roman Empire), because it served no purpose for the state, because there were no separate jurisdictions recognised, because the Emperor provided an overarching authority within his domain<sup>34</sup>, and because asylum served no purpose within the Empire. 'Wherever you are' said Cicero to the exiled Marcellus, 'remember that you are equally within the power of the conqueror' (Gibbon 1896: 82). This sense that Rome was the universe, coupled with the universal validity of Roman Law throughout the Empire and the Stoic idea of an *invisible city of the wise* (McClelland 1996: 88) which was universal, all influenced the emerging Christian Church which aspired to the same universality.

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<sup>32</sup> Before Rome had an empire, indeed before Rome was a city, Romulus is said to have used the offer of asylum as a means of increasing the population of the newly founded city, which in turn led to the accusation that the population of Rome was to a large extent descended from knaves and scoundrels - *εθνη βαρβαρα και ανεστια* (Schwegler, quoted in Bulmerincq 1853: 54).

<sup>33</sup> Whereas, the exile of political opponents was commonplace in Greece.

<sup>34</sup> However, there were instances of refuge being granted to Romans in the Kingdom of Parthia and to Parthians in Rome. This was possible because at the time, the Kingdom of Parthia was the 'only neighbour fit to be regarded as a rival' to the Roman Empire, and because a political end was furthered by granting asylum. See Turton, *The Syrian Princesses*, 1974.

### Asylum in early Christian times - Church Asylum in Ascendance

While territorial asylum ceased to exist as a distinct institution on the European mainland until the French Revolution irreparably damaged the power of the absolute monarchs, temple, now church, asylum continued, but only by the authority of the Emperor<sup>35</sup>, and its exercise waxed and waned in tandem with the influence of the Church vis à vis first the Roman Emperor, and then the Holy Roman Emperor. In 347AD at the Concilium Sardicense, following his conversion, Constantine decreed that, since many who suffered hardship or who had committed an offence, and as a result were liable to deportation or exile, sought the protection of the church, the church was entitled to grant them refuge. This was the first legal recognition of the right to *grant* asylum. Although the Church had been following the lessons of the Bible before the council, as far as the Emperor was concerned, the authority to do so had to be seen to come from him<sup>36</sup>. The Church was to provide refuge only to the righteous. As with its predecessor 'temple' asylum, 'church' asylum was possible because the temporal powers *chose* to recognise the separate jurisdiction of the sacred. This rendered church asylum vulnerable. Nonetheless the Church, with the support of Constantine, increased its power, especially in the areas of law and politics. Christianity was recognised as the official religion of the Empire in the fourth century AD, and as such was given the rights of sanctuary which temples had enjoyed.

The early Middle Ages in Europe were a period of war, plague and a political vacuum left by the collapse of the Roman Empire. Clovis (481-511), the Merovingian King, formed a valuable alliance with the Church<sup>37</sup>, extending the rights which it had enjoyed under Roman government and granting them jurisdiction over the clergy, and in some cases, over the laity: 'the great prelates did not want wild Frankish counts wandering over their lands and pleaded for 'immunity' This privilege meant that no royal officer could enter the lands of the church' (Painter 1968: 65). While the absence of a rigorous

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<sup>35</sup>Perhaps there are parallels between Rome and modern states, few of which tolerate this challenge to their sovereignty within their territory, although in both Britain and Germany, there have been an increasing number of cases of 'Church asylum' since the seventies. See Steve Cohen, 1988. The conscious challenge this presents to state sovereignty is discussed in another chapter.

<sup>36</sup>The Emperor could therefore, and did, introduce exceptions to this rule, e.g., those who were in debt to the state, Jews who were attempting to evade financial commitments and finally, in 397, those who were attempting to shirk public or private commitments of any kind.

<sup>37</sup>Clovis sealed his alliance by having himself baptised. Some years later (506), he announced that he could not rest while Arian heretics (the Visigoths) ruled southern Gaul, and so he invaded and conquered it.

legal system and the frequency of conflict at this time should have meant a need, from the state's point of view, for asylum, the separate spheres of jurisdiction essential for asylum were incomplete. They did not correspond exactly to those of the sacred and the secular. Merovingian Kings kept the Church under their control within their territory<sup>38</sup>, while the Pope, following the invasion of central Italy by the Lombards, became the secular ruler of Rome and its environs. Asylum by now had become very restricted.

Justinian (482-565AD) had blurred the distinctions between Church<sup>39</sup> and temporal powers still further. He added to the catalogue of those could not be granted asylum by the church: murderers, adulterers, rapists (of virgins) and desecrators of churches. Bulmerincq (1853: 85) asserts that the necessity for such rulings demonstrated the widespread abuse of asylum at that time. One could equally argue that asylum was being used by the church in a manner which threatened to undermine the legal system which Justinian was founding, and so was curtailed by the temporal powers. However, asylum still continued to be granted to 'common criminals'. It was at this time (end of the sixth century) that sanctuary was introduced into England as the Anglo-Saxons converted to Christianity. In addition to churches, the cities of Westminster, Wells, Norwich and York, as well as Whitefriars and the Savoy in London were all declared sanctuaries, to which any person accused of any crime *except treason or sacrilege* might flee and remain for forty days. The fugitive had to confess, take the oath of abjuration of the realm and then move to a foreign country. It is interesting that the two crimes exempted from this rule concern the rejection of, or lack of respect for, temporal and sacred authority. This privilege survived in England until it was abolished by the statute of 1624, 21 Jac, c.8 (Jowitt 1959: 1585)<sup>40</sup>.

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<sup>38</sup> ...by maintaining a veto over episcopal elections and the sole power to summon church councils and to issue the decrees of the council.

<sup>39</sup> The Church itself at this time was not a single, unified body, and the adherents of the various sects, sought and found asylum in the jurisdictions of different bishops. There were also dissident Christian sects outside Europe, such as the Nestorians, who emphasised Christ's humanity over his divinity and the Monophysites, who disputed Christ's humanity. These sects moved through western Asia in the fifth and sixth centuries, the Nestorians seeking refuge in Nisibus, across the Persian border, where they were granted asylum by the local bishop (Lindberg 1992: 164). The Arians, in particular, had suffered religious persecution at the hands of Clovis and others in the fifth century, but this eventually faded away following the Council of Toledo in 589, which united the Catholic and Arian Churches (Moore 1987: 13). Heresy too, seemed to fade away for the next four centuries.

<sup>40</sup> Except for the Savoy, which remained a sanctuary for those involved in civil cases until the 17/18th

The *Investiturstreit*, which dates from 1075, was very much a struggle about power relations between Church and Empire<sup>41</sup>. This period is particularly interesting in that, at one and the same time, the Church was both primary protector and persecutor<sup>42</sup>. It was attempting to assert its authority vis à vis the Emperor, and within the body of Church itself. Although the persecuted and the protected were not the same, the purposes they served were simply two sides of the same coin. The Church protected in order to demonstrate its authority (or demarcate its spiritual territory), and in turn was prepared to persecute those who challenged this authority. The Church could grant protection to fugitives, because on the one hand they were leaving temporal jurisdiction for sacred, but on the other hand, and perhaps more to the point, because it was permitted to do so by the Holy Roman Emperor and the English (and French) monarchs. And yet, as far as the Church was concerned, secular powers had no jurisdiction within the realm of the sacred, were, in fact, subordinate to the sacred. ‘Until the thirteenth century, the beginning of a king’s [or emperor’s] reign was dated not from his accession but from his coronation, at which he received this sacred authority’ (Ullman, quoted in Dummett 1990: 23). The Church insisted that the source of its authority was divine and came, not from the emperor, but from Christ<sup>43</sup>. In the Church’s view, it was therefore a ‘universal’ body, with ‘universal’ jurisdiction, and the sole possessor of divine authority. This provoked a certain amount of tension between the two. The state had developed its own legal systems, and now perceived the clerical courts and the granting of asylum as a threat to its authority. Legal jurisdiction, the right to decide guilt or innocence, was a political struggle and asylum merely one of the battlegrounds.

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centuries.

<sup>41</sup> Gregory VII, while accepting that the Emperor’s authority was divine in origin, insisted on the moral supremacy of the Papacy, and, thus, on his right to depose the Emperor. Gregory VII also asserted as peculiar to papal dignity the right to appoint and invest all bishops. In so doing, Gregory threatened a significant source of power and revenue of secular lords in general and of royalty and the Holy Roman Emperor in particular, and asserted a central, reforming role for the papacy. The then Emperor, Henry IV disputed this and, following a dispute about the appointment of an archbishop in 1075, declared Gregory deposed. He in turn responded by excommunicating and deposing Henry. Neither accepted the decision of the other. The differences between the two were not resolved until 1122.

<sup>42</sup> The Church at this time was still afflicted with internal divisions. Variations in practice and belief presented challenges to the dominant orthodoxy and were labelled heresy, as were complaints about the corruption of the government of the Church and its moral laxity. R. Moore (1987: 69) argues that heresy had died out between the seventh and eleventh centuries because the Church, until the papal reforms of the eleventh century, was a heterogeneous body, which could accommodate variety. He (1987: 68) explains that: ‘Heresy (unlike Judaism or leprosy) can only arise in the context of the assertion of authority, which the heretic resists, and is therefore by definition a political matter’. Moore examines persecution itself, and asserts that around 1100 Europe became a persecuting society.

<sup>43</sup> According to which Christ himself protected the adulteress, and granted her forgiveness.

In 1215 the Fourth Lateran Council extended the ‘stigma of heresy...to those who sheltered or defended its adherents, and to magistrates who failed who act against them’ (Moore 1987: 7)<sup>44</sup>. The Church would not countenance the challenge to its authority that the granting of asylum to a heretic presented<sup>45</sup>. The Lateran Council also introduced new measures directed against Jews<sup>46</sup>, and this was followed by the expulsion of the Jews from England (and France)<sup>47</sup>. Many went to Spain, while others dispersed throughout Europe. They left hostile territories for others less hostile, but since no one was likely to demand their return, or follow them abroad, they cannot be said to have found, or to have enjoyed, asylum anywhere.

The struggle to define the relationship between the church and the state preoccupied Thomas Aquinas<sup>48</sup>, who argued that although ‘ecclesiastical and secular authority occupy the same social space, ecclesiastical authority is superior’ (McClelland 1996: 118), while Marsilius of Padua and William of Ockham both disputed the authority of the papacy and argued against interference by the papacy in matters of state. Marsilius insisted in his treatise, *The Defender of Peace*, that no member of the Church was ‘entitled to wield any “coercive jurisdiction” in virtue of his office’. This was only to be exercised by the highest secular power within each kingdom (Skinner 1978: Vol.I,21)<sup>49</sup>. As a result, both William and Marsilius spent time under the protection of

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<sup>44</sup>In the same year, the Magna Carta guaranteed freedom to enter England to all but those who had previously been forbidden to enter (Plender, 1988: 62).

<sup>45</sup>Those whom the Church itself persecuted, such as heretics and Jews, were exempt from asylum. These were the two most persecuted groups in Western Europe. Moore (1987: 67) defines three groups in particular who were vulnerable: heretics, Jews, and lepers, but points out that other groups such as homosexuals were also subject to persecution. He suggests that the distinctiveness of heresy, leprosy and Judaism was the result, and not the cause, of persecution. The Jews had never been particularly secure, but with the beginning of the crusades, which may be seen as yet another attempt to resolve the conflict between temporal and sacred authority, they endured killings and massacres of unprecedented savagery.

<sup>46</sup>For the first time, the Lateran decrees required Jews to distinguish themselves from Christians in their dress, prohibited them from holding public office, and forbade those who converted to Christianity from continuing to observe any of their former rituals, to prevent them from avoiding the penalties of infidelity by means of false conversion. Following the death of King John, the regents did not enforce the decrees, charging instead a fee for permission to dispense with the yellow badge (Moore 1987: 7).

<sup>47</sup>This motivated by fiscal considerations, rather than anti-Semitism, or a drive towards homogenisation within the state. Unable to own land, or join guilds, the Jews had been forced to turn to money-lending, and, in turn, forced to lend to the monarch. Rather than repay their debts, Henry III and Edward I simply expelled the Jews from Gascony in 1288 and England in 1291.

<sup>48</sup>Augustine, before him, had stressed the superiority of the ecclesiastical over the secular.

<sup>49</sup>For a detailed discussion of the debates surrounding ecclesiastical and secular authority, see Skinner (1978).

the Holy Roman Emperor Louis<sup>50</sup>, who was also contesting the authority of the pope, and so unsurprisingly granted them asylum. The battle for power waged by the different contenders for the papacy and the imperial crown culminated in the Great Schism<sup>51</sup>, which began in the second half of the fourteenth century and lasted until the beginning of the fifteenth. As a result of the Schism, the papacy lost much of its authority, only to regain it again temporarily under Sixtus IV, who restored temporal authority in the Papal States (Skinner 1978:114)<sup>52</sup>. The successors to Sixtus, Alexander VI and Julius II provided models for Machiavelli, whose political theory and view of the State could be said to provide a rationale for the state's 'justifiable' exploitation of asylum for *raison d'état*. For Machiavelli, the primary goal of a Prince, or a ruler, must be the maintenance and security of his state<sup>53</sup>, no matter how repugnant or immoral that action might be. Machiavelli's analysis of the best way to maintain one's state, laid out clearly what to become the central precepts of the realist position, outlined in the previous chapter. In Machiavellian (or realist) terms, if asylum serves the state, it should be maintained, and if not, then its use abandoned. Against Machiavelli, Erasmus, writing at the same time, argued that 'if you cannot defend your realm without violating justice', then justice must triumph, no matter the risk to the state. While the State might employ the latter's ideals in its rhetoric, the practice of states up to and including the present is much closer to that advocated by the realist Machiavelli. As will be seen at the end of this chapter, modern states have learnt another important lesson from Machiavelli, the importance of maintaining the *appearance* of virtue.

During the period of the Holy Roman Empire, Church asylum was granted either by the authority of the Emperor (which meant he could always refuse to authorise the protection of certain individuals, so that asylum would not be granted to those who

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<sup>50</sup> Skinner insists that Marsilius was not primarily concerned with a defence of the Emperor's authority, but was instead upholding the autonomy of the Italian City Republics (1978, Vol.I, 61).

<sup>51</sup> This occurred when the cardinals, displeased with their first choice Urban VI, who would not remove his court to Avignon, as many the cardinals wished him to do, rebelled against him and deposed him. They elected in his Robert of Geneva, who called himself Clement VII, but since Urban VI, refused to recognise their actions, for a time, the Church had two rival Popes.

<sup>52</sup> Not every one thinks so highly of the Pope, who commissioned the Sistine Chapel 'his pontificate must be considered a dismal failure. At a time when the Church needed reform and rightly expected vigorous leadership in that direction, Sixtus IV caused the moral tone of Roman ecclesiastical life to dive sharply' ('Popes Through the Ages' by Joseph Brusher, S.J. Electronic version copyright © 1996).

<sup>53</sup> Skinner argues that this is true only of *The Prince*, and that in *The Discourses*, 'the basic value...is that of liberty...not that of security' (157).

defied the Emperor) or as a means of asserting the independence and/or the higher authority of the Church (in which case, especially those who supported the Church against the secular powers would be given refuge). Within the Empire, the conditions for granting 'territorial' asylum as granted by the modern state did not exist, and could not until the development of territorial states<sup>54</sup>. Asylum throughout this period was subject to the individual decisions of princes and lords, who took personal responsibility for the fugitive. The regulation of this practice by laws or principles would have been inconceivable.

### **From the Reformation to Westphalia – 'Church' Asylum Gives Way to 'Territorial' Asylum**

The claims of the Church to special jurisdiction, to a separate legal system, were violently attacked by Luther (whose name was linked to that of Machiavelli<sup>55</sup>), leading finally to the Reformation<sup>56</sup>, which split the Christian Church. Luther did not so much advocate a separation of Church and State, which would appear to be one of the conditions necessary for the granting of 'church' asylum, as argue that the spiritual realm was within each person, and therefore 'cannot properly be said to possess any separate jurisdiction at all' (Skinner 1978: II, 14). Only the secular powers were to have a right to exercise coercive powers. As a result, the visible Church should be placed under the control of the secular powers<sup>57</sup>. Furthermore, Luther insisted, following St Paul, that 'the powers that be are ordained of God', and that tyranny must be endured, that resistance would be blasphemous. Little comfort here for those that flee. However, as Skinner (1978: II, 199-200) is careful to point out, from 1530 onwards, Luther and his followers developed a doctrine of resistance to unjust rule.

It has been argued that Luther's political theory paved the way for the legitimization of unified and absolutist monarchies<sup>58</sup> and absolutist ideologies (Skinner 1978: II,113),

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<sup>54</sup> The situation may be have been different in Italy, given the rivalries between the cities, but such a discussion lies outside the scope of this work.

<sup>55</sup> For the Jesuits, Machiavelli and Luther were both heretics, the former because *raison d'état* seemed to excuse immoral behaviour, and Luther because he did not concede the power of the Church in temporal matters.

<sup>56</sup> Martin Luther himself had to seek asylum following his challenge to the Church. Frederick IH of Saxony offered him protection, refused to extradite him to Rome, obtained safe conduct for him to Worms and hid him in Wartburg.

<sup>57</sup> Something which Henry VIII of England was quick to exploit.

<sup>58</sup> One of the consequences of this process of -absolute- state formation was mass expulsions. Others

which Bodin and Hobbes were later to develop. The reaction to Luther and Machiavelli's impious and heretical views generated a wealth of literature by the counter-reformation theorists, in particular the Jesuits, on the genesis of political society and on political morality. Two reasons are given for opposing Machiavelli's argument that *ragione di stato* justifies a Prince taking whatever action is necessary. Suarez argues against Machiavelli, that the civil law must be limited by the dictates of natural justice and never by political expediency alone (Skinner 1978: II, 171). However, Ribadeneyra's argument, as outlined by Skinner is particularly interesting. He rejects Machiavelli's advice to Princes on pragmatic grounds, since the 'most prudent way to maintain one's state will always be to keep God "pleased and propitious" by "keeping His holy law"' (Skinner 1978: II, 173). These three different positions foreshadow some of the modern approaches outlined in the previous chapter, that of the realists, of universalists like Kant who rejected the privileging of political expediency, and of universalists like Carens. Hathaway and Shacknove, whose arguments that the best way to persuade states to continue to grant asylum, that is to behave morally, is to demonstrate the practical benefits of doing so are considered in the next chapter.

There were various sources of refugees at this time, mostly religious, and their reception in different countries varied. The Jews (some of whose ancestors may have been expelled from England or France in the twelfth century) had already been expelled from Spain, in 1492. They did what refugees continue to do - they crossed the nearest border into a neighbouring territory, Portugal. However, instead of asylum, these refugees were ousted once again. Having already lived fairly peacefully under the Moors, many moved to North Africa, to be followed some time later by the Moslems who were ejected from Spain between 1492 and the 1630s. Others moved further round the Mediterranean into Eastern Europe. Once again, the Jews were tolerated, but not granted asylum. None would be pursuing them with the intention of bringing them back. They needed protection from the indigenous population rather than a foreign power. Such protection would only be extended if the Jews proved useful or profitable. Some became moneylenders to kings, a precarious way of surviving, given the

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(Zolberg 1983, 1989 see previous chapter) have offered explanations as to why states expelled sections of their populations, but here the focus is on where these people went, and how and why, they were received. Zolberg attributes these refugee flows to the process of new state formation occurring in the late fifteenth century. State formation may have caused the refugee flows, but it does not explain why

tendency of royalty to default or unilaterally renegotiate the terms of the loans (see ftn. 50, this chapter).

Protestants came from the Low Countries (Belgium), Huguenots from France in the sixteenth century, Puritans and Quakers fled Britain for the New World, and there were many others who fled the religious turmoil unleashed by the reformation and then the counter-reformation. The Huguenots from France in the late sixteenth century, and the Protestants expelled from Belgium<sup>59</sup> (by Philip III of Spain) were lucky enough to be seen as a source of skills and capital<sup>60</sup> in Britain, and had the added good fortune of being co-religionists. The benefits derived from granting asylum to the Huguenots have proved lasting, since this event is still cited as proof of Britain liberal asylum tradition. Under Henry VIII, England became for the first time a truly independent *sovereign* state, following the break with the Church. Henry was an absolute Monarch<sup>61</sup>, intolerant of any challenge to his authority, and not simply from the Church. As a result, the church was not in a position to insist on its right to offer sanctuary to fugitives. The privilege of sanctuary in various cities and churches, which had remained unchanged, if not unchallenged for 500 years, was severely restricted under Henry<sup>62</sup>. Nonetheless, relatively free movement continued to be permitted into England.

Fortunately for the Huguenots, while Church asylum was dying out, the conditions necessary for ‘territorial’ asylum were in place. They found refuge in England because England and France were two separate jurisdictions, and most importantly because, as far as the English state was concerned they brought valuable skills and trades with them<sup>63</sup>. Practically speaking, there was also little to be done to keep them out, England’s coast providing many small harbours where people could be landed. The shift from ‘Church’ to ‘Territorial’ occurred later on the mainland, where the feudal

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some states granted asylum to refugees from other states.

<sup>59</sup> Approximately 115,000 of them between 1577 and the 1630s.

<sup>60</sup> Elizabeth of England too, expelled a number of different groups, including ‘negars and blackamoors’ and ‘Anabaptists’ (Dummett 1990: 42 & 57).

<sup>61</sup> Although at this time, Parliament had a real existence, Henry’s powers were very close to absolute.

<sup>62</sup> 1534, 26 Henry 8, c.13; 1535, 27 Henry 8, c.19; 1541, 33 Henry 8, c.15. However, it was not abolished until 1624 by which time Whitefriars and the Savoy in London had become notorious for the criminal fraternity which exploited the special status of these areas. Macauley reports, however, that until 1685 the Carmelite in London were still offering sanctuary to debtors. This form of asylum survived further attempts to repress it in 1696, and 1722, before being finally stopped in 1724.

<sup>63</sup> According to Cooper, although they were greeted in England with some hostility: *any restrictions upon the refugees were unpopular with the mass of the people, however desirable they were with the*

system remained in place - in principle until the Peace of Westphalia, but in practice until the nineteenth century. The Holy Roman Emperor as Christ's Lieutenant, was seen, and saw himself as the guardian of Christendom. Together with its spiritual head, the Pope, he remained a symbol of the unified Christian West and of the universality of the Church (even when this was no longer the case). As Kimminich (1983: 17) makes clear, under such circumstances the development of a system of international law, regulating the relations between what were fiefdoms and kingdoms was impossible.

The Peace of Augsburg, which had formulated the principal of *cuius regio, eius religio*, [in a prince's country, a prince's religion]<sup>64</sup>, did not ensure peace and conflict continued, culminating Thirty Years War, which once again was a political struggle in which the Catholic and Protestant Churches, as well as the Kings, Princes and Dukes fought for influence and territory. In 1648, the Peace of Westphalia put an end to the war, creating (in theory, if not actually in practice) a system of sovereign and juridically equal states, within whose realm the ruler was absolute recognising no superior. Naturally, the series of treaties that made up the Peace of Westphalia did not suddenly transform the political system and its social relations overnight. It did, however, pave the way for certain developments, such as territoriality and the creation of a state's people, which would in turn lead to the development of the nation-state system. What emerged, more slowly than is sometimes imagined, was a system of absolutist states, and the acceptance of the doctrine of *raison d'état*. Spinoza elevated the preservation of the state to a moral imperative, arguing that even 'sins became pious works if they served the common weal' (Koselleck 1988: 20). Hobbes, on the other hand rejects the authority of individual morality, since conflicting Christian consciences in his time were the greatest danger to the peace and stability of the state, 'the sovereign's moral qualification consists in his political function: to make and maintain order' (Koselleck 1988: 32).

These were the conditions necessary for the development of international relations between states, and hence for the granting of asylum by states to fugitives from other

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*chartered companies* (quoted in Dummett 1990: 41).

<sup>64</sup>In the various territories influenced by the Calvinist Reformed Church, toleration was sometimes subsequently extended to Calvinists, but the sects of the so-called 'radical' Reformation - Anabaptists and Hutterites - and, later, the Socinians and Unitarians continued to be persecuted, whilst atheists were not to be tolerated at all according to theories of toleration advanced even by enlightened philosophers such as John Locke.

states. Westphalia also curtailed the power of the Church. Its influence remained strong, but not so much as universal body, as within states, and it would never again be able to challenge the secular powers, meaning that Church asylum would never again be able to protect refugees from the state (though it could offer sanctuary to those pursued by individuals). After Westphalia, once it was accepted that there was no higher power than the state, it was inevitable that decisions on asylum would become the prerogative of states. Kimminich (1983: 18) has identified the intensifying of two particular influences on the practice of asylum in the period following Westphalia: the notion of asylum as a right of states (which he traces back to Greek city law), rather than the Church or individuals; and the perception of political criminals as particularly dangerous (a Roman idea). As we have seen, asylum had been granted by the Church as a means of asserting its separateness from the state, and its power in relation to the state.

Grotius and Pufendorf recognised that asylum had important implications for the sovereignty of states. Both agreed that sovereignty endowed the ruler with the right to decide who could enter the territory of the state. For Grotius, while a sovereign had the right to exclude foreigners, the granting of asylum was the mark of a civilized polity - only barbarians would expel those who sought refuge in their territories (Bk.II, Ch.II, §XV). Pufendorf makes a similar point:

...every State may reach a decision according to its own usage on admission of foreigners who come to it for reasons other than are necessary and deserving of sympathy; only no-one can question the barbarity of showing indiscriminate hostility to those who come on peaceful missions (quoted in Plender 1988: 64).

Grotius and Pufendorf (and Vattel) understood the challenge that those requesting protection from one state in another presented. The justifications for much of the body of laws governing asylum and extradition, the struggle between the principle of territoriality and universality, can be traced back to the writings of these men (Plender 1988:63-4), as can the concern with who is entitled to claim asylum. Since sovereigns control entry, they alone have the *right* to control entry. Refuge is to be offered to those in need and those who deserve it. Since the decision on who is deserving rests with the sovereign, the sovereign is naturally in a position to take account of the interests of his state when making this decision.

The various German princes, as usual throughout Europe, saw incomers as beneficial. 'Frederick William, the Great Elector, encouraged the Protestants fleeing France after the revocation of the Edict of Nantes in 1685, to settle in Prussia' (Marrus 1985: 6-7). Brandenburg had been laid waste following the Peace of Prague and needed their expertise, mercantile skills and manpower. Here the benefit to the state was apparent, though the borders between the separate jurisdictions were not so clear. In the turbulent years that followed, there were few extradition treaties signed between the warring factions, but this did not mean that the German states were prepared, or able, to grant asylum. Political criminals, that is those guilty of treason, were hunted down, and states which granted asylum threatened with war, for granting asylum was regarded as a hostile act, in which the asylum granting state undermined the sovereignty of the prosecuting state, while at the same time, granting asylum was seen as a way of asserting sovereignty. By the eighteenth century, Britain's *vielgerühmte Asylpflicht* was a source of irritation to other states<sup>65</sup>. While it was of little concern that England seemed prepared to allow any foreigner to enter her territory, her reluctance to cooperate with foreign states seeking to extradite criminals, especially if they were accused of 'political' crimes, and to concern herself solely with what occurred on her territory, was seen as undermining the authority of those states, *within* their territories<sup>66</sup>. The guiding principle of English law was, and remains, territoriality. Since 1724, the legal system had not recognised a separate 'sacred' jurisdiction, to which fugitives could flee, so 'Church' asylum had been effectively suppressed. However, 'territorial' asylum continued to bring in new and valuable additions, in particular to the merchant and artisan classes. There was no authority which could force England to extradite a fugitive (against her will), and her island status rendered her separate physically as well as politically from other states. She had nothing to gain by expending time, effort or money hunting down foreigners for crimes they had not committed against English subjects, or the Crown. It was of no concern what those persons had done in other territories.

Westphalia put in place most the elements which characterise the modern practice of asylum. The territorial integrity of states, that no state had the right to enter another

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<sup>65</sup> When Voltaire was expelled from France in 1726, he sought and found refuge in England.

<sup>66</sup> Weder (1887: 5) suggests how a more responsible state might see its duty: 'ich halte mich nach rechtlichen und sittlichen Grundsätzen und durchaus im Interesse aller Staaten für verpflichtet dem verletzten Staate Beihilfe zu leisten zur Verfolgung seiner auf mein Gebiet geflüchteten Verbrecher'.

state in pursuit of a fugitive, was accepted as a norm, as was the right to control entry to one's territory (regardless of whether a sovereign actually had the capacity to control the borders). The granting of asylum was acknowledged as within the gift of the sovereign, who alone had the right to decide to whom it should be granted, and that decision would be taken in the light of *raison d'état*, that is, in the interests first of all, of the state. One element that was missing - the idea that liberal states owe a special duty to refugees, in particular political refugees, persecuted for their political ideology, especially when that ideology is liberalism - would be provided by the French Revolution. This would broaden the idea of state interests to include not only material interests but ideal interests, in other words asylum from now on would be more explicitly linked to the legitimacy of the state – or at least its appearance of legitimacy.

### **The Revolutions of 1789 and 1848 and the Emergence of the Political Refugee**

The French Revolution, which overthrew the absolutist monarchy of the *Ancien Régime*, and introduced a *Déclaration des droits de l'homme et de citoyen*, in which the state appeared as a potential danger to those rights, represented a significant threat to the prevailing order in the neighbouring kingdoms of England, Austria and Prussia. In 1789, liberalism, democracy and nationalism were unleashed on a world, which, one might be forgiven for thinking, they have conquered, while at the same time sowing the seeds of contradictions that continue to plague liberal, democratic nation-states. The title of the *Déclaration* already indicates the source of the paradox - how to reconcile the rights of people *qua* human beings, which are universal, and *qua* citizens, which are particular.

Britain, in response to the changing situation on the mainland, initially took a universalist (or indiscriminate, depending on one's point of view) approach to the refugees from France. It sheltered those who, like Barruel, clung to the old order and fled the Republic, as well as those against whom the revolution had turned. This lack of discrimination may have been because 'this policy of asylum was maintained, not by law, but by the absence of laws' (Porter 1979: 3). However, 'the deterioration in relations between Britain and France, and...fears that Jacobin emissaries had infiltrated the ranks of the refugees' (Plender 1988: 64) led to an abandonment of the *laissez-faire, laissez-passer* entrance policy. Fearful for its own security, the state now sought to protect itself against dangerous French subversives and introduced the Aliens Bill

1793, which remained in force until 1826. In the absence of passports or similar documentation control was exercised by obliging ships' masters to give details of any foreigners carried by them, or face a fine<sup>67</sup>. In addition, customs officers could question any foreigner, and all foreigners newly arrived had to register. Originally, these measures of control, which severely restricted the possibility of seeking asylum, were only to last as long as the war, which England, together with most of the other European states, was now fighting against France. The possibility that a deserting Frenchman might be in need of protection did not outweigh the danger that England, Prussia or Austria might become infected by this dangerous revolutionary fervour<sup>68</sup>.

England's repudiation of asylum as being, potentially, too dangerous to the state coincided with demands for the extradition of those who challenged the authority of the crown - for example, Blackwell and Napper Tandy, two Irish rebels. The two had sought refuge in Hamburg, which after much consideration, since Blackwell was a naturalised Frenchman, eventually surrendered the two fugitives in 1799. Napoleon called the extradition of the two a 'gross abuse of hospitality'<sup>69</sup>. Yet the decision to extradite was perfectly consistent with German legal opinion of the time. According to the German jurists, granting asylum to a fugitive from the 'Rechtsverfolgung' of another state, undermines that state's sovereignty:

A right to refuge creates demands on one state by another, as a refugee from one is protected in another, thereby restricting that power of state's to prosecute (Bulmerincq 1853: 7-8)<sup>70</sup>

This view was also shared by Britain, but only when demanding extradition, not necessarily when granting asylum. From 1826 Britain played host once again to different groups of refugees, depending on different events in Europe, including Italians, Poles, Spaniards, Frenchmen and Germans. Asylum was connected in the

<sup>67</sup> In the absence of identity cards or a legal obligation to register with the police, Michael Howard plans to introduce requirements which will oblige employers to screen their workforce for 'illegal' immigrants.

<sup>68</sup> France's liberal asylum regime also came to an end with the war. In 1795, it was decreed that: 'Tout étranger, à son arrivé dans un port de mer ou dans une commune frontière de la République, se présentera à la municipalité; il déposera son passeport, qui sera renvoyé de suite au comité de sûreté générale pour y être visé'. And this was followed in 1797 by the Passports Law (Plender 1988: 65).

<sup>69</sup> 'Vous avez violé l'hospitalité. Cela ne fut pas arrivé parmi les hordes le plus barbares du désert. Vos concitoyens vous le reprochement à jamais. Les infortunés que vous avez livrés meurent illustres, mais leur sang fera plus de mal à leur persécuteurs que n'aurait pu le faire une armée'. Quoted in Weder 1887: 24.

<sup>70</sup> 'Ein...Zufluchtsrecht beanspruchte aber auch der Staat gegen den Staat, der Flüchtling des einen

public imagination with the obligations of humanism, the rights of man<sup>71</sup>, and the espousal of free trade as an economic doctrine. Porter cites a Select Committee Report from 1843, which summarised the orthodoxy of the time:

...it is desirable for every people to encourage the settlement of foreigners among them, since by such means they will be practically instructed in what it most concerns them to know, and enabled to avail themselves of whatever sagacity, ingenuity, or experience may have produced in art and science which is most perfect (Porter 1979: 5)

The example of the Huguenots was quoted at the time as an illustration of the benefits refugees could bring. It was further helped by the English press, which complained loudly at being told by European governments (and the French Emperor in particular) how Britain should treat those within its territory, especially when Britons viewed themselves as citizens of the most liberal, progressive state in the world, and considered most European states as despotic and illiberal.

The situation changed again in 1848. In February, Lord Palmerston wrote a letter to the Hungarian and Russian ambassadors, who had in vain demanded the extradition of Hungarian insurgents from Turkey. This is often cited as the definitive defence of a state's right to refuse to extradite (Lammasch 1884, Weder 1887)<sup>72</sup> and yet two months later, an Aliens Act, providing for the expulsion of any alien who threatened the preservation of the peace and tranquillity of the realm was passed by large majorities in both houses. However, the Act was only in force for two years, and was never used to expel anyone. In fact, between 1824 and 1906, no one was expelled from Britain. Again, this can only be explained by the confidence of a state with the largest empire in world, protected by her island status from the situation on the mainland, and proud of its liberal institutions and reputations. Kimminich argues that in Palmerston's letter for the first time the granting of asylum was tied to the demands of humanity, not simply the sovereignty of states. Although we have shown that such a connection is

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wurde geschützt in dem anderen und dieser Schutz beeinträchtigte die Rechtsverfolgung der Staaten'.

<sup>71</sup> As Arendt was later to point out, these could, however, only be guaranteed by membership of a state, the state.

<sup>72</sup> If there is one rule, which more than another has been observed in modern times by all independent States, both great and small, of the civilized world, it is the rule, not to deliver up refugees, unless the State is bound to do so by the positive obligations of a treaty; and Her Majesty's government believe that such treaty engagements are few - if indeed any such exist. The laws of hospitality, the dictates of humanity, the general feelings of mankind, forbid such surrenders; and any independent government, which of its own free will were to make such a surrender, would be universally and deservedly stigmatised as degraded and dishonoured (Correspondence respecting refugees from Hungary within the

much older, the letter both expressed public feeling at the time and served to put a humanitarian gloss on what was a self-interested policy. It was written at a time when material and ideal interests coincided. Such humanitarian arguments, however, carried little weight when political expediency would be served by extraditing. Two years after Lord Palmerston's letter, Britain was insisting that those who engaged in subversive machinations against his Majesty's government should not be granted asylum, and threatened foreign governments who refused to comply with demands for compensation and accusations of complicity (von Mohl 1853: 25).

Little wonder then, that Europeans, especially those whose states were threatened by the short-lived revolutions of 1848, became impatient with Britain's stance. It seemed to observers that the only principle embodied in Britain's asylum/extradition policy was self-interest. This accusation came especially from German commentators (Bulmerincq 1853; Lammash 1884; von Mohl 1853; Weder 1887), outraged that Britain refused to 'play the game' by allowing German political 'criminals' to settle in Britain, safe in the knowledge that they would not be extradited<sup>73</sup>.

It is unjust that an individual state, by allowing unrestricted freedom of residence and action to dangerous revolutionaries, endangers many other states. It involves a double injustice. Firstly, because the effected state is forced to take steps of which its own people would not approve, and the mere attempt of which would be detrimental to the state; secondly because, while an unrestricted right to asylum might be useful to all parties, this state insists that it alone has the right to grant it<sup>74</sup> (von Mohl 1853: 10-11).

Asylum was regarded as a tool, to be used by an individual state to protect its own interests. There was (is) no obligation on states to extradite criminals, political or otherwise, except as a result of bilateral treaties (Goodwin-Gill 1983: 35).

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Turkish dominions presented to Parliament February 28th 1851, No.19 and 20. Lammash 1884: 41-2)

<sup>73</sup> These 'criminals', many of whom had spent years in Britain, returned to the mainland to take part in the revolutions, only to have to return, when within eighteen months, the old status quo had been re-established.

<sup>74</sup> Es ist für unbillig erklärt worden, dass ein einzelner Staat durch die unbeschränkte Freiheit des Aufenthaltes und des Gebahrens, welche er gefährlichen Umwälzungsmännern gewähre, viele andere Staaten in beständiger Gefahr erhalte ... es sei in dieser Annahme eine doppelte eigene Unbilligkeit enthalten. Einmal, indem man der beanspruchten Regierung zumutet, Schritte zu tun, welche dem Geiste ihres Volkes zuwider, und deren bloßer Versuch schon für ihren eigenen Bestand bedenklich wäre; zweitens aber, weil man das für alle Parteien nützliche und von allen der Reihe nach dankbarst in Anspruch genommene unbeschränkte Asyl nur für sich selbst gelten wolle.

At the same time as the granting of asylum *seemed* to be becoming less and less a prerogative of the state, the number of those who might appeal to a common humanity, or rights was severely limited, and tended to exclude all but 'political refugees'. In his letter, Lord Palmerston had referred for the first time to 'political refugees', instead of 'political criminals'. Bulmerincq in his introduction warns against the idealisation of these individuals, among whom there may indeed be martyrs prepared to sacrifice their lives for the communal good, but who are more likely to be dangerous fanatics. Although the 1870 Extradition Act in Britain provided for the non-extradition of fugitives who had committed an offence of 'a political character', from the point of view of other states, political crimes were the most heinous:

Just as life is the most important right of the individual, so its sovereignty, its existence, is the foremost right of the state, the political criminal is, from the perspective of states, *a priori* unforgivable (Weder 1887: 16)<sup>75</sup>.

Until the last decades of the nineteenth century, entry and settlement into Britain was relatively unrestricted, and for good reason. Hundreds of thousands of Britons were leaving every year, seeking opportunity and wealth in the Colonies, as well as in the United States. As a result of this large-scale emigration and the demands of the industrial revolution, there was a constant need for the population, and the labour force, to be replenished. In such circumstances, there was little resistance to the idea of granting asylum, which fitted the dominant ideology of political and economic liberalism in Victorian Britain, and fulfilled practical needs. The former stressed the freedom of the individual and the latter free trade. The industrial revolution and the economic booms which followed it created an insatiable need for labour, which could be:

cloaked in the woolly idealism of Victorian liberalism. British politicians of both parties, particularly the Liberals, regarded themselves as champions of the right of political asylum (Foot 1965: 84)

Thus asylum fulfilled a dual function, serving the interests of the capitalist class while legitimating it. It was also a show of strength, indicating to the states from which these people fled that they had no claims on their citizens, once those people had entered Britain. Aside from political and economic considerations, practically it would have proved more costly to track down the fugitives than to tolerate their presence, given the

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<sup>75</sup> Wie dem Individuum das Leben das vorzüglichste Rechtsgut ist, so dem Staate die Existenz, die Souveränität...In ihren Augen ist [der politische Verbrecher] *a priori* unentschuldbar

absence of fingerprinting, passports with photographs and all the paraphernalia of twentieth century surveillance. Furthermore asylum at that time was very different to today, there was no legal definition of a 'refugee' or of asylum (there is still no definition of asylum in law). Since granting asylum meant merely refusing to extradite, that is, doing nothing, it was a cheap way of asserting moral superiority. This sense of superiority received further confirmation from the new racial theories (Dummett & Nicol 1990: 96)<sup>76</sup> which became current at the time, placing North Europeans at the pinnacle of a hierarchy of 'races'. This reinforced a paternalistic *laissez-faire* entrance policy from which a number of refugees from less benevolent and liberal regimes could benefit, though these benefits were incidental.

A combination of domestic and foreign developments eventually led to a change in the *laissez-faire* entry regime from 1880 onwards. In Russia and Eastern Europe, the persecution and targeting of Jewish populations were causing increasing numbers to flee westwards, some of whom settled in Britain, but most of whom were headed onwards to America. These *Ostjuden*<sup>77</sup> were different to, and not always welcomed by, the well-assimilated Anglo-Jewry. Overwhelmingly, they were impoverished, and clung tenaciously to orthodox Judaism. Victorian liberalism<sup>78</sup> had not put an end to anti-Semitism or intolerance. The newcomers were treated as carriers of disease, pollutants. At the same time, news of assassination attempts and bombings by anarchists and nihilists from Poland and Russia, which by their very nature, robbed people of their sense of security, eroded liberal attitudes towards political exiles from Eastern Europe (Marrus: 1985). The contingent nature of the commitment to refugees was revealed and the way was paved for the introduction of controls. This intolerance towards aliens, expressed in the slogan 'England for the English' (Brown, R. 1995; Dummett 1990; Solomos 1993) was heightened as British capitalism entered a period

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<sup>76</sup> Ann Dummett and Andrew Nicol further suggest the importance of distorted Hegelian notions of the State, in underlining the superiority of the British state.

<sup>77</sup> The literature on this exodus, and the British response to it is extensive, and so this period is not covered in any great depth here.

<sup>78</sup> The *laissez-faire* entrance policy, the defence of immigrants (which was often based on their imputed capacity for hard-work and diligence - capitalist virtues), and the removal of the legal disabilities which had afflicted the Jewish population (Holmes: 1991), as well as the presence of Jewish cabinet ministers and a Jewish Prime Minister are frequently cited as evidence of this Victorian liberalism. For an alternative view, see Bill Williams, 'The Anti-Semitism of Tolerance: Middle-Class Manchester and the Jews 1870-1900', in Alan J. Kidd and K. W. Roberts, eds., *City, Class and Culture: Studies of Cultural Production and Social Policy in Victorian Manchester*, 1985, Manchester University Press, Manchester

of decline, and economic crisis and high unemployment diminished the demand for labour.

These economic, political, and social factors overcame the demand for unrestricted entry, and led to the 1905 Aliens' Act<sup>79</sup>. This was the first attempt to regulate the flow of entrants into Britain and was 'passed for the purpose of checking the immigration of undesirable aliens'<sup>80</sup>. The provisions of the Act only applied to steerage passengers on 'immigrant ships', that is, to those who could not support themselves, might become a charge on the rates, or were mentally ill and to those ships carrying more than twenty aliens. Such people would either not be allowed to disembark or would be kept at the port until a decision had been made, after which time those who were refused entry were removed at the expense of the ships' master<sup>81</sup>. The Act is significant because it provided, for the first time since the reign of Elizabeth, a mechanism for control, and as such, was condemned at the time as an attack on personal liberty, and because it managed to target a particular group without actually mentioning them - those coming from Russia and Poland, in particular those without means. In addition, it made a distinction between immigrants and refugees. Although there was no mention of refugees or asylum in the Act, it did specify that leave to land should not be refused to those who were seeking entry:

to this country solely to avoid persecution or punishment on religious or political grounds or for an offence of a political character or persecution involving a danger of imprisonment or danger to life or limb, on account of religious belief (Aliens' Act (1905) 1(2)).

Why was this distinction made? Although the Liberals had opposed the Act while in opposition, once in power (January 1906), the new Home Secretary, Herbert Gladstone decided not to repeal it, but to soften its impact, by instructing immigration officers, that in all cases where doubt about persecution existed (Cohen, S. 1988: 12), the benefit of such doubt should be given to the immigrant and leave to land granted<sup>82</sup>. In spite of Gladstone's instruction, those who successfully appealed against refusal to land on the grounds of persecution were very few-505 in 1906, 43 in 1907, 20 in 1908,

<sup>79</sup> See P. Foot (1965: 84-100) for an analysis of the campaign which led to the passing of the Act.

<sup>80</sup> From a letter from the Secretary of State for the Home Department to members of immigration boards, 9 March 1906, cited in Landa, 1911: 315.

<sup>81</sup> No doubt, this provided a model for the 1987 Carriers' Liability Act (Cohen, S. 1988)

<sup>82</sup> Gladstone's liberal concern sparked furious attacks from the right, who argued that the 'benefit of the doubt' rule fatally undermined the Act. As the numbers quoted above demonstrate, those fears were unfounded.

30 in 1909, and 5 in 1910 (Landa 1911: 225). Perhaps the greatest significance of Gladstone's instruction, which reinforced the discretionary power available to immigration officers, was that it confirmed the granting of asylum as an act of benevolence. Since asylum in Britain has always been an *ex gratia* act, that is, granted at the discretion of the Home Office, it is susceptible to the whims of the holder of that office, and the government of the day. Shifts in public opinion towards refugees can quickly result in new legislation and influence the implementation of asylum policy.

The advantage of granting asylum as an *ex gratia* act is that, without surrendering control over entry, it reinforces the image of the British state as liberal - it doesn't have to grant asylum but it does - and implies that Britain is prepared to underwrite certain costs for the sake of certain liberal values<sup>83</sup>. Mostly importantly, however, it grants the government of the day enormous flexibility, allowing it to admit those whom it chooses - those who serve the national interest, and allows it to reject those it does not want or need. While the upholding of values such as liberty, decency and fairness (terms which are conveniently vague) may be argued to form part of the national interest, historically it can be seen that it is far more likely to entail concrete advantages to Britain in terms of domestic and foreign policy:

It has been the traditional policy of successive British governments to give shelter to persons who are compelled to leave their own countries by reason of persecution for their political or religious belief or of their racial origin, but His Majesty's Government are bound to have regard to their domestic situation and to the fact that for economic and demographic reasons this policy can only be applied within narrow limits (Home Office Memorandum 1938, cited in Dummett 1990:158).

The danger inherent in presenting asylum as an act of charity is that it contributes to the image of the refugee as a burden, someone to be tolerated for the sake of those liberal values rather than as someone with a positive contribution to make to the host society. Nonetheless, the Aliens Act (1905) was not a particularly effective control mechanism, and for the next few years, aliens could enter Britain almost at will<sup>84</sup>.

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<sup>83</sup> Britons must bear in mind that the national attributes of which we are justly proud - liberty, decency and fairness - are not free goods. One of the costs they impose is that we may not return people - even inconvenient people - to dangerous places for subjection to unspeakable acts (Ann Winterton, *Hansard*, 15 July 1996 Col.816).

<sup>84</sup> Nonetheless, according to a report in the Times, a ship was fined shortly after the Act came into force, when two of its passengers, political refugees fleeing death or imprisonment, escaped (Dummett 1990: 161).

The nineteenth century introduced asylum as we now know it - the protection given by a state to those persecuted by another. The benefits that asylum could offer were also clear. In addition to the economic benefits asylum had always provided to the state, it was now clear that asylum could serve as proof of the liberal credentials of the state. It is not coincidental that throughout this period, asylum was not common practice among the German states, which had little to gain from granting it. Geopolitically, the recognition of, and support for their sovereignty that extradition offered outweighed any benefits that could be derived from granting asylum.

### **The Two World Wars**

The twentieth century has justifiably been called the century of the refugee. There were major population displacements in Europe from the beginning of the century starting with the 1905 and 1917 Revolutions in Russia, followed by the Civil War and pogroms against Jews, both of which sent refugees westwards to Germany, France, Britain and the US. Invariably, the Jews refugees met with the more hostile reception. In the meantime, the Balkan conflicts of 1912-1915 almost turned Serbia into a nation of refugees, but most of the great powers could see little reason for getting involved on their own. Instead, the problem was contained geographically and dealt with by the League of Nations:

Armenian, Bulgarian, Greek, Middle Eastern, and other refugees could also benefit from League assistance because their fate engaged the interest of no member state to any appreciable way (Marrus 185: 110)

However, World War I was to provide 'the most devastating refugee experience yet' (Marrus 1985: 48):

The days before and the days after the first World War are separated not like the end of an old and the beginning of a new period, but like the day before and the day after an explosion (Arendt 1967: 267).

The draconian measures introduced especially in Britain were to shape the future of asylum practice in that country until the present. As a result of the anti-alien hysteria that the war generated, the right to appeal against refusal of leave to land, contained in the 1905 Act, was suspended by the Aliens' Restriction Act (1914)<sup>85</sup>, passed in a single day. The end of the war did not bring a return to peace or to liberal laissez-passez entry policies. Massacres in Turkey between 1915 and 1918 caused hundreds of

thousands of Armenians to flee, and the Russian Revolution in 1917, and the threat of revolution in Germany in 1918 led to further restrictions. Leave to appeal was finally abolished by the Aliens' Restriction Act (1919)<sup>86</sup> along with any provision permitting refugees to land. The 1914 and 1919 Acts were attempts to control entry, and this control was facilitated by the introduction of passports<sup>87</sup> (which also served to control exit since the warring states had no desire to lose soldiers or skills). This document, introduced in spite of resistance in Britain and other European countries, as a wartime necessity, became an important part of the state's armoury in the battle to control its borders and reaffirm the *nation-state*

the coupling of direct and indirect surveillance (customs officials and frontier guards, plus the central co-ordination of passport information) is one of the distinctive features of the nation-state (Giddens 1985: 120).

In 1920, the newly formed League of Nations convened a conference in Paris on the subject of passports, which recommended the easing of existing regulations. The lives of large numbers of East Europeans, in particular Russians, without identity papers, who were anxious to emigrate, preferably to the United States or Canada, were complicated by the need to possess an internationally recognised travel document. Eventually, the office of the High Commissioner for Refugees, founded the following year, managed to provide, first the Russians, later the Armenians, with 'Nansen passports'. These passports were not a guarantee of asylum - they were simply identity papers necessary for travel. This response to the plight of the Russian refugees was possible because they had a taker for their skills. France, who had lost 1.5 million young men during the Great War (7% of the entire male population) saw a way of solving her chronic labour shortages and so took in 400,000 Russian refugees and over a million others 'willing to do menial labour' (Marrus 1985: 96). The United States of America were not unhappy at the prospect of more European immigrants - thus there were obvious benefits to the asylum granting states. In addition, the Soviet Union from whence these people came was an international pariah and excluded from the League of nations until 1934 - so there were separate jurisdictions. These two preconditions

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<sup>85</sup>The 1914 Act was repealed by the 1971 Immigration Act.

<sup>86</sup>Parts of which were repealed by the 1971 Immigration Act. The 1919 Act was passed as a temporary measure, but was renewed every year until 1971.

<sup>87</sup>Passports were used before the war in South America and in Southern Africa for the purposes of transnational travel, and internally they were in use in Russia. In Britain and France the legislation which governed the issuance of passports, had passed into desuetude (Plender 1988: 77).

were still - usually - present when asylum was being granted. However, this large-scale granting of asylum could also be viewed as the mass import of labour.

Throughout the interwar years conflicts and the attendant mass movements of people continued. The defeat of the Greek army in Turkey caused the displacement of 750,000 refugees and culminated in population transfers of more than 1.5 million people in 1923 (Marrus 1985: 103). And yet in Britain, from 1919 to 1938 no distinction was made between aliens seeking asylum and other aliens (Dummett & Nicol 1990: 146), although most people seeking to enter Britain at that time were victims of political and religious persecution<sup>88</sup>. In the previous century, a representative of the British government had argued that the granting of asylum was subject to the demands of humanity and hospitality, rather than simply to the interests of states. Yet in the face of the large numbers of refugees generated by the war and subsequent conflicts asylum, whether cloaked in the rhetoric of humanitarianism, hospitality or rights, or naked in its instrumentalism, was felt to be an inappropriate response to the needs of these people.

WWI had ushered in the age of the passport and of greater control of movement across borders, but the pressure exerted by two million Russians and hundreds of thousands of Armenians tested the new national controls, and forced a reaction. For the first time states delegated responsibility to an international organisation, the League of Nations' High Commissioner for Refugees. The tasks of the Commission were essentially humanitarian. It was concerned to provide politically neutral assistance to groups of people who had been forced to leave their country of habitual residence. Under the guidance of the first Commissioner, Dr Fridtjof Nansen, the High Commission attempted to regularise the legal status of refugees, to protect them, to help them to settle. However, the humanitarian intentions of the High Commission were always subordinate to the interests and concerns of League's member states. As a result, the High Commission had no real power, and very little money, it 'was supposed to function in 1922 on a paltry 4,000 pounds sterling' (Marrus 1885: 111). Then, as now, assistance was to come from private charities or directly from governments. As with its

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<sup>88</sup>Paul Foot (1965: 113) has pointed out the irony of a Labour government in 1929 refusing asylum to the political refugee, Leon Trotsky, when Marx, Engels and Lenin had all been permitted to live in Britain by Conservative and Liberal governments. From 1919 until the 1970 Immigration Rules, there was no formal or separate status for refugees.

successors, the International Refugee Organisation during WWII and the United Nations High Commission for Refugees after WWII, it was assumed that the 'problems' which necessitated such an office were temporary and soluble, and therefore the organisation itself was temporary.

The primary consequence of WWI was that for the first time, European governments had to deal with mass movements of involuntary migrants, who could not be easily absorbed. The scale of movement and misery placed enormous demands on the humanitarian principles espoused by 'civilized' West European nations and created problems of control. A international response was deemed necessary. As a result an international agency was created - the High Commission for Refugees - with responsibilities, but no power, no money and dependent on private charity. Laws were introduced, whose goal was to regularise the status of the refugees. The core of these regulations was the 'definition' (applied to groups) - a form of selection. Once defined and recognised, the refugee was entitled to the enjoyment of certain rights, though not the full rights of citizens of host countries. Apart from the Russian and Armenian refugees, there was a preference for dealing with the refugees within their own geographical space, as far as possible. Finally, an enduring aspect of the 'refugee problem' this century is its treatment as temporary, exceptional and soluble. The International Nansen Office was created in 1930 and it was expected to have fulfilled its tasks by 1938<sup>89</sup>.

A further innovation was the body of law created by European states, governing the protection of *European* refugees<sup>90</sup>, embodying European political norms and values. This pattern was to remain largely unchanged in the decades that followed. One of the first tasks of the new High Commission was to define a refugee. A refugee was someone who left the territory of his/her state of origin and was without the protection

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<sup>89</sup> A development which might not seem of direct relevance to the institution of asylum, or to refugees, was the extension of the welfare state during the war. The provision of welfare by the state made membership of receiving communities a valuable commodity, with the result that naturalisation of refugees was not one of the preferred options. The welfare state, ideally a means of protecting and including different layers of society, has continued to be used to justify the exclusion of 'newcomers' in the last quarter of the twentieth century, especially in Britain and Germany, leading to the 'subjugation of humanitarian instincts to the attainment of national economic goals' (Hathaway 1990a: 136).

<sup>90</sup> Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees; July 5, 1922, Arrangement Relating to the Issue of Certificates of Identity to Russian and Armenian Refugees, May 12, 1926; Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, June 30, 1928.

of a state - but this definition was applied to groups or categories, and did not necessitate the examination of individuals. The crossing of an international border has always been a necessary, though not a sufficient condition of recognition as a refugee<sup>91</sup>, since states would not countenance interference in the domestic affairs of sovereign states. To do so would be to breach the norm of non-intervention. Nor were they prepared to allow the High Commission to decide quotas for individual states. The constraints under which international refugee agencies have since been forced to work date from the inception of the first such institution, the League of Nation's High Commissioner for Refugees.

The international refugee regime was created by the leading Western powers and was acceptable only in so far as the system served, or did not run counter to, their particular interests or needs (Loescher 1993: 9).

This did not change with the rise to power of fascists in Spain<sup>92</sup>, Italy and Germany in the 1930s. Hundreds of thousands were uprooted, and these were then joined by those forcibly expelled from the German Reich. In the year that Hitler came to power, the Nansen Office (successor to the High Commissioner) convened a conference in Geneva which led to the Convention relating to the International Status of Refugees (1933). For the first time (since the Hittites) the principle that refugees should not be returned to their country of origin or rejected at the frontier of their country of origin was articulated in an international agreement<sup>93</sup>. Kimminich (1983: 27) points out, though, that Art 3(2) of the Convention laid down a duty to grant asylum, without actually creating a right to asylum for individual refugees. The United Kingdom objected to the latter principle, as did many other states. It would have infringed on the rights of states to decide who should or should not be allowed to enter their territory. The document did not add significantly to the protection of refugees since only eight states ratified it<sup>94</sup>, most expressing reservations, which rendered it toothless and worthless.

Further limits to the humanitarian approach were exposed by Germany's systematic expulsion of Jews and other 'undesirables'. While Nazi Germany was creating

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<sup>91</sup>Humanitarianism is not confined by national boundaries, yet the attempt by the High Commission in 1927 to extend protection to Ruthenian, Jewish and Hungarian refugees in Central and Eastern Europe, on the grounds that their need was as pressing as those already covered by the mandate, was blocked.

<sup>92</sup>France granted asylum to 500,000 refugees from the Spanish Civil War.

<sup>93</sup>Though, as we have seen, the principle goes back to Grotius and Pufendorf.

refugees, liberal democracies were refusing to accept them. The Nansen Office had great difficulty persuading member states to extend hospitality or protection to this new wave of refugees<sup>95</sup>. A possible explanation for this reluctance might be found in the question discussed at the Evian Conference (1938) as to whether it might not be better to deal with the causes of refugee movement, instead of improving the conditions of refugees which would only serve as stimulus to flight (Kimminich 1983: 30). Although it was agreed at the time that it would be more politic to choose the latter solution and that member states would facilitate involuntary emigration from Germany (and later Austria) one by one each state rose to explain why they could not accept Jewish refugees (Dowty 1987: 94). As United States Vice-President Mondale recorded 'the civilized world hid in a cloak of legalism' (in Goodwin-Gill 1985: 3fn)<sup>96</sup>.

In Britain, Kushner (1990a, b,c) and others have recovered the illiberal tradition of intolerance and anti-Semitism<sup>97</sup>, which has done much to shape Britain's response to refugees, especially Jewish refugees. The electoral failure of political anti-Semitism and fascism belies both the support such views had within the population and the impact they had on Government policy. Rather than confront the anti-Semites, the government chose instead to appease them by restricting the numbers allowed into the country. Initially, only those whom the Anglo-Jewish community promised to support would be allowed to enter. This was due in part to economic considerations<sup>98</sup>, to prevent the refugees from becoming a financial burden on the British tax-payer, but also because it was claimed that an increase in the number of Jews coming to Britain would heighten anti-Semitism<sup>99</sup>. In March 1938, concerned that this was the intention of the Germans, the Home Secretary, Sir Samuel Hoare introduced visas which 'could be granted on the spot to 'distinguished persons' assured of hospitality in Britain, [and]

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<sup>94</sup> Belgium, Britain, Bulgaria, Denmark, France, Italy, Norway and Czechoslovakia

<sup>95</sup> In 1938, the Nansen Office was replaced by a High Commissioner for Refugees.

<sup>96</sup> Although Rubinstein (1998) disputes the accusations of complicity and indifference levelled at the liberal democracies, his arguments ignore or distort much of the evidence on their policies at this time, and contemporary testimony from, for example, Chaim Weizmann who told a British commission of inquiry on Palestine in 1936, for refugees the world 'is divided into places where they cannot live and places into which they cannot enter' (1936) (Dowty 1987: 91).

<sup>97</sup> See also Williams, *op cit.*

<sup>98</sup> Between 1933 and the outbreak of war, 20,000 Jewish women had come to Britain as domestic servants, but this was because of a shortage of labour in nursing and domestic service, and not the result of a generous asylum policy. See Kushner (1990b).

<sup>99</sup> This logic is still being used in the 1990s - see Chapters Four and Five.

*non-refugee* students “who are known *not* to have any Jewish or non-Aryan affiliations” (Dummett & Nicol 1990: 157 my emphasis).

It was only as a result of public revulsion following *Kristallnacht* in November 1938, that Chamberlain, in spite of his undisguised dislike of the Jews, eased admission policy, though even ‘then the refugees were allowed entry only on temporary visas’ (Kushner 1990c: 199). This may have been due, in part, to a need to distance Britain from ‘illiberal’ Germany, but it was also seen to serve material and ideal interests. It was an opportunity to reinforce Britain’s legitimacy at home and abroad, as well as a means to obtain knowledge and skills. In 1938 the British Cabinet agreed that it should:

try to secure for this country prominent Jews who were being expelled from Germany and who had achieved distinction whether in pure science, applied science, such as medical or technical industry, music or art. This would not only obtain for this country the advantage of their knowledge and experience, but would also create a favourable impression in the world particularly if our hospitality were offered with some warmth (cited in Marrus 1985: 153).

In spite of this cynical exploitation of the Jewish exodus for practical and propaganda purposes, the reaction to *Kristallnacht* shows that there are moments when governments could harness the concern of their populations to move policy in a more generous direction (Dummett 1990: 226-7)<sup>100</sup>. While the myth of Britain’s liberal and generous tradition of granting asylum is just that - a myth - nonetheless that myth has acquired a power of its own, rendering it impossible for the state to abolish asylum completely. It has also served to protect the few who make it to Britain and acts as a touchstone and inspiration for individual defenders of liberal values. These functions should not be underestimated - while illiberal Nazi Germany was creating refugees and importing slave labour, liberal Britain was receiving refugees (however few).

Two World Wars revealed the limits of asylum practice. While Britain in the nineteenth century offered an example of how humanitarian and state interest could happily coincide, the twentieth century revealed just how fragile and one-sided this alliance actually was. State’s were governed by Machiavellian self-interest, and liberalism only served to disguise this brutal reality.

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<sup>100</sup>Some forty years later, outrage about the treatment of refugees from the former Yugoslavia led groups of individual citizens to form aid convoys.

## Conclusion

In summary, I have shown that as the state has developed and evolved, it has made use of asylum. Its longevity alone allows one to hope that it will continue to serve those who flee, though one must assume this will only be the case if it also serves the interests of the powers that be, which for the foreseeable future will be nation-states. From this history of asylum practice, it can be seen that asylum exists only as an institution where there are competing jurisdictions - either between Church and State, or between states; where there is not one overwhelming power, but parity of power - so that one state is not obliged to hand over the fugitive for fear of repercussions; and where there is a distinct advantage to the asylum granting body, whether that advantage is practical (economic or demographic) or political (confirming the state's legitimacy). Under such circumstances, asylum is used to reinforce a state's right to control those within its territory, especially when that right is contested by a second state whose citizens have fled its jurisdiction. This has traditionally been the use made of asylum in Britain and is entirely commensurate with the principle of territoriality which is at the heart of British law (and policy). In Germany, whose history as a unitary state with a distinct territorial identity, is much shorter, asylum was also an instrument, but was valued much less than its counterpart extradition, which acted as mutual support among states for each other's sovereign rights to pursue those who had broken the laws of the state. Germany's geopolitical position at the heart of Europe and history as a revolutionary battleground affected the perception of asylum - which was protection offered to those who conspired to overthrow the state).

In addition, asylum, until very recently, did not usually involve much cost, at least to the asylum-granting state, being more the absence of extradition than an active protection of an individual. The impact of the changes in cost, brought about by the development of a welfare state, have been referred to in the previous chapter and will be dealt with in greater detail in Chapters Four and Five. The benefits to the legitimacy of asylum-granting state will be outlined in the following chapter. Before proceeding to an examination of contemporary asylum practice in Britain and Germany, the next chapter introduces the current international political and legal context in which these two states operate, and seeks to show that the construction of the refugee problem, with which liberal democracies were confronted following the Second World War, was the inevitable result of particular features of those states.

## CHAPTER THREE

### CONSTRUCTIONS OF THE REFUGEE PROBLEM SINCE WORLD WAR II

The scale of the problem presented to West European states by refugees and asylum seekers after the Second World War was new, even if the problem itself was not. Although there had been massive population movements since the beginning of the century (Marrus 1988; Zolberg 1989), never before had so many been displaced in such a short period of time. In addition, many could not or would not return to their original countries of nationality or residence. The problem was that there were large groups of people within the territories of states who did not belong to those states (Arendt 1967; Zolberg 1989). Throughout Europe, there was a shortage of housing, food, and perhaps most importantly work (though this would change very quickly). The governments of the day obviously had responsibilities to their own citizens, but who was to be responsible for these others, whose duty was it to provide for them and what was to be done with them? The needs of, and problems presented by 30 million displaced persons in mainland Europe (Loescher 1992: 9) - including refugees, those who had been shipped eastwards to labour camps and ethnic Germans now fleeing westwards - presented one of the greatest challenges of the immediate post-war period. That there was a problem – a crisis – none could doubt, but what kind of crisis was it, and how best to resolve it? These were the questions facing the victorious powers in 1945 and they remain important questions because the way the crisis was viewed then, the way it was constructed at that time, continues to constrain the formulation of responses to asylum seekers at the international, regional and national levels.

The main focus of this chapter will therefore be on the construction of the ‘refugee problem’ as it emerged after the Second World War. It will explore the processes and assumptions contributing to that construction, before turning to an analysis of the solutions chosen, including repatriation, asylum and non-refoulement. The discussion then turns to the European context and explores the responses of the Council of Europe and the institutions of what became the European Union to the ‘refugee problem’. Developments in European asylum policy accelerated at the end of the 1980s as a result of political and economic factors. The impact of the end of the Cold War and the simultaneous opening and closing of European borders in preparation for

a Single European Market are examined, and an attempt is made to put the new developments – greater numbers of different (economic) migrants - into a wider context. In the final section, the redefinition of the refugee problem as a security problem is used to demonstrate that while changing the definition seems to lead to different solutions (in this case temporary asylum and containment), in fact, this construction of the problem and its the solution are not that new – the issue remains one of control.

### **The Construction of a Problem**

The particular construction of the refugee problem that emerged after 1945 occurred within the framework of the international system of sovereign nation-states, and was constrained by political factors, which in turn restricted the range of responses to the problem. In the previous chapter, it was shown that three conditions were necessary for the granting of asylum. These conditions arise because of certain fictions - a world of equal, sovereign states with controllable borders, coextensive with nations. While few would argue that this is a realistic worldview, the law and legislators operate as though it were. The international system consists of sovereign states, which according to the Montevideo Convention (1933) should possess a permanent population, a defined territory, government and the capacity to enter into relations with other states. Art.2(1) of the UN Convention declares that the organisation is based on the principle of the sovereign equality of all its Members, and in Art.2, paragraphs (4) & (7) articulates the principle of non-intervention in the affairs of sovereign states. It is axiomatic that the state has the right to control its borders, and decide who might enter, 'the right to control entry and demand departure is part of the very constitution of a nation-state – as major a source of legitimate state authority as the right to dominate the means of violence' (Cohen 1994: 37). In chapter one, the links between control of entry and legitimacy were discussed. Taking a somewhat different perspective, Barry Hindess has described the division of 'the global population of hundreds of millions into the smaller sub-populations of territorial states' as a means of rendering the larger population governable (Hindess, n.d: 4). He argues that:

...The culture of citizenship, and especially the commonly held view that individuals will normally be citizens of the state in whose territory they reside, provides all modern states with good reasons for discriminating against non-citizens who cross, or who live within their borders (n.d.: 13)

Within such a worldview, the proper place for a citizen is within the territory of her state. The Second World War challenged this view - there were millions who were not in their proper place. However, rather than adjust the dominant view of reality, it was decided to make reality fit the fiction of discrete states with discrete populations. The solution to the problem of people outside the territory of their state of origin was to return them to that state - to repatriate them. Where this is impossible, asylum and resettlement would serve to assign refugees to a new state. An alternative construction, one which recognised asylum seekers as the symptoms, and the international system of states as the real problem, was, it seemed, inconceivable at that time.

The political context in which the problem was defined was the escalating Cold War, which was not only a battle for economic and military supremacy, but also a battle between two ideologies, each claiming greater legitimacy. The significance of the Cold War is that it provided a justification for the solutions eventually chosen – asylum and resettlement - and for any costs entailed in granting asylum. The Cold War was responsible for the way in which a refugee was defined. It was hoped that a generous attitude to those who defected from the East would de-legitimise, possibly even de-stabilise the Soviet regimes (Goodwin-Gill 1983; Hathaway 1990a; Zolberg 1983, 1989). The first step towards assigning responsibility for the refugee was to define the subject of the law and already at this point, the ideological differences between the two superpowers could be seen in their different perspectives on who should qualify as refugees:

The [refugee] definitions were worked out in the period 1949-51, i.e., at a time when the cold war between East and West had reached its height and when in fact the Eastern Bloc boycotted the United Nations (Melander, in Hathaway 1990a: 145)

Patricia Tuit has pointed out that what she calls ‘external refugee costs’ - costs to the host state - are reduced by:

constructing an identity of refugee which captures only a tiny proportion of the whole corpus of meanings within the notion of refugees, and by ensuring that the refugee identity selected promotes the particular political interests of the primary authors (Western European states) of the international legal regime (1996: 16).

According to Kimminich (1983: 32), the Eastern Bloc states were of the opinion that political opponents of governments then in power should not be entitled to

international protection. There was, therefore, no political offence exception in extradition treaties between those states (Goodwin-Gill 1983: 35)<sup>1</sup>. From the perspective of the Soviet Union, why should they contribute to an organisation whose purpose was to protect their emigrated enemies<sup>2</sup>? Delegates from the Soviet Union and Yugoslavia emphasised that, while they agreed that the individual had the right to oppose a government, members of the United Nations should not support the enemies of governments of member states (Kimminich 1983: 32). According to the Soviet Union, the primary function of international refugee organisations should be the repatriation of refugees to their countries of origin. The Western powers agreed to return citizens of the Soviet Union<sup>3</sup>.

These differences between East and West meant that the primary international legal instrument for the protection of refugees and their rights, the 1951 Convention, was drawn up without contributions from the Soviet Union. It could therefore be used to protect those who shared the ideological positions of the Western powers. There was a bias in favour of those leaving their countries of origin as a consequence of infractions of those rights privileged by the West - political and civil, and a bias against those whose economic and social rights - privileged by the Soviet regimes - were violated. The result was the creation of 'a regime that now excludes the majority of the world's involuntary migrants' (Hathaway 1990a: 175).

The problem then was large numbers of people outside the territory of their states. This problem was assumed to be exceptional, temporary and soluble. Such a diagnosis is unwarranted: the long history of refugee movements, and the fact that the twentieth century alone was characterised by the almost continual expulsion of peoples (Russians, Jews, Armenians, Turks and Greeks) from their states of origin across borders into other states (Marrus 1985; Zolberg 1989) are evidence that the existence of refugees and asylum seekers is normal, rather than exceptional. It was also assumed that the situation was temporary, that eventually the refugees would return to their

<sup>1</sup> Goodwin-Gill points out that at the 1977 Conference on Territorial Asylum, both the USSR and the GDR continued to emphasise 'the paramountcy of states' extradition obligations' (1983: 81).

<sup>2</sup> UN GAOR (30<sup>th</sup> plenary meeting) at 416, UN Doc.A/45 (1946), in Hathaway 1990a: 143. They were joined in their objections by the French government, who argued 'the impropriety of assisting political dissidents within the context of a refugee protection system' (Hathaway 1990a: 143).

<sup>3</sup> Kimminich (1983: 33) asserts that, in hindering the Soviet demands that the tasks of the International Refugee Organisation be confined to repatriation, the other delegates prevented the 'complete

homes if that was possible, or, if not, that they would be resettled in new homes and given the citizenship of their host state. It was inconceivable that there could exist for any length of time a large population of people who did not belong to, or enjoy, the protection of a state. The assumed norm was of sedentary peoples, attached to territory and within a state (see Chapter One). The dominant paradigm was and remains 'a state for everyone and everyone in a state' (Aleinikoff 1992: 120), and so the quicker the exceptions to the norm - refugees and stateless persons - could be rendered unexceptional the better for all concerned. And yet, throughout the nineteenth century as we have seen in the previous chapter, all of the major European cities hosted refugee populations. Nonetheless, each of the agencies charged with dealing with refugees had only a temporary mandate. Just as it was expected that the Nansen Office would have completed its task by 1938, and that the IRO would be redundant by 1950, it was hoped the Office of the United Nations High Commissioner for Refugees would have finished its work by 1953 (Annex: Statute of UNHCR, Chap.1(5)) Finally, it was assumed that this exceptional and temporary problem could be solved, and solved without changing the international system of states, or states themselves. The principles of non-intervention and state sovereignty were to remain untouched. The obvious solution had to be repatriation or, for those who could not be repatriated, asylum and resettlement<sup>4</sup>, that is the reassignment of those people to another state.

Since those addressing the issue of large numbers of people outside their states of origin were operating within a paradigm of an international system made up of sovereign states, with authority over a particular territory and population, demarcated by borders that could be controlled, those who did not fit the paradigm were seen as the problem, rather than the paradigm itself. As a result, solutions had to be designed that would readjust ill-fitting reality to this neat picture of the world, in spite of the fact for centuries, refugees had resulted from just such attempts to remake populations to fit nation-states (Arendt 1967; Zolberg 1989).

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destruction of International Refugee Law'.

<sup>4</sup> 1(b) The main task concerning displaced persons is to encourage and assist in every way possible their early return to their countries of origin, having regard to the principles laid down in paragraph (c) (ii) of the resolution adopted by the General Assembly of the United Nations on 12 February 1946 regarding the problem of refugees (Constitution of the International Refugee Organisation, Annex 1, *General Principles*).

### The Construction of Solutions

The problem was presented as one facing *states*, in particular Western states, and the state system, rather than individuals, because state norms were being challenged. Any assistance to be offered to individuals had to be rendered without infringing the rights of states to control their border, and without surrendering the rights of states to make policy. International law was to define the problem and lay down the framework within which the solution could be administered<sup>5</sup>. States were to provide the solution and to be the solution to a problem that was presumed to be temporary, exceptional and soluble. The state would offer asylum to those the state decided deserved asylum, in accordance with international law, which was in turn drawn up by states<sup>6</sup>.

...international law, like politics, is a meeting place for ethics and power...it cannot be understood independently of the political foundations in which it rests and of the political interests which it serves (Carr 1939:178-9)

International law was to provide the means of regulating the repatriation and resettlement of the refugees, as well as protecting individuals from a state's abuse of power. It specified certain commitments to refugees and asylum seekers to which the signatories agreed - that those who sought asylum would not be refouled and that once recognised as a refugee, the individual would have certain rights. These commitments were to be considered defining features of democratic states (though naturally only by those who ratified them). The emphasis on the rule of law is unsurprising. The enactment of law is a mark of the sovereignty of states - 'The State is the source of law or at least its very nature is tied up with the existence of law' (Vincent 1987: 21, Nardin 1983) and respect for the rule of law distinguishes liberal democratic regimes from despotic ones. Not only is the making of law the sole prerogative of the state within its territory, it is also the means whereby the state implements its policies. In international fora states come together to enact laws which, *in theory*, set limits to what states may or may not do, that is, to the exercise of a state's sovereignty, to its choice of policy and the way in which it implements that policy. Commentaries on international law after the Second World War emphasise this restraining function

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<sup>5</sup>Writing about international law in a different context, Evans asserts that 'since the creation of the United Nations system, conventional wisdom has it that solutions to all international problems are found by drafting international law' (Evans 1998: 210) – though this could apply equally to problems at regional and domestic levels, as will be discussed in the section on Europe in this chapter and in Chapters 4 and 5.

<sup>6</sup>It did not go wholly unnoticed that the state had also been the cause of the problem – hence the attempt to strengthen individual rights and to limit the authority a state could legitimately exercise over its citizens by drawing up a *Universal Declaration of Human Rights*.

(Hathaway 1990). It would seem that states grant asylum because they have **legally obliged** themselves to do so, creating an international body of refugee law that specifies their commitments to refugees and asylum seekers. However, this obligation is extremely weak as will be seen when the actual provisions are discussed below.

Hathaway describes three features of international refugee law - the rejection of comprehensive humanitarian and human rights based assistance, the establishment of selective burden-sharing (with a eurocentric bias), and the establishment of a protection system over which individual states, rather than an international authority, have effective control. His classification of the refugee regime prior to the inter-war years as one motivated by a universalist political philosophy and an acknowledgement of individual liberties seems overly positive in the light of the previous chapter, and based on the granting of asylum to groups rather than individuals. Though the Nansen Office and the High Commission for Refugees were charged with humanitarian tasks, their primary purpose was to regularise the status of the refugees. Hathaway's characterisation of asylum practice as the self-interested, rather than humanitarian or rights based, action of states is basically sound and accepted by other jurists prominent in this field (Hailbronner 1990; Shacknove 1993). Hathaway is particularly good on the eurocentric bias of the international regime. The UK, Belgium and the non-European states argued that the UN Convention should have universal application:

...if non-European states were to commit themselves to guaranteeing rights to immigrant European refugees, then surely it was appropriate for European states to assume a similar obligation towards refugees from other parts of the world (Hathaway 1990a 152).

The Conference of Plenipotentiaries was dominated by Western states who rejected this approach. The final definition included in the 1951 Convention required the signatories to protect only those made refugees by 'events occurring in Europe before 1 January 1951' (though they could choose to apply the Convention more widely). Through the UN, and its Economic and Social Council, responsibility for resolving the crisis was assigned to an international agency, the International Refugee Organisation, and subsequently to its successor, UNHCR. The scale of the problem meant that once again only an international agency could be equal to the task of reassigning people to different states. However, as discussed in the previous chapter, the financial, temporal and political constraints placed on the Organisation severely

limited the assistance it could offer<sup>7</sup>. These same constraints also applied to the UNHCR, whose work was expected to be social, humanitarian, and non-political in character (Annex: Statute of UNHCR, Chap.1(2)). The statute also specified that the work of the UNHCR would relate to groups and categories of refugees. This gives rise to two difficulties: although the work of the UNHCR is to relate to groups, the definition of refugees contained in the Statute (almost identical to that of Art.1 of the 1951 Convention) is individualistic, and given that this definition refers explicitly to political grounds, it is difficult to understand how its work could be anything but political. UNHCR is still facing the dilemma created by trying to reconcile these competing demands. It must negotiate with both sending and receiving countries, whose preferred solutions frequently clash. Sending countries have usually preferred repatriation because flight is an indictment of the regime. Legitimacy can only be maintained by the sending states by branding the fugitives as criminals or traitors. Repatriation is the acknowledgement by the receiving states of the legitimate authority of the sending state over those refugees who are being returned. Granting asylum is an acknowledgement that the sending state is persecuting its nationals, and a criticism of that regime. The choice of solutions was dictated by the principles of state sovereignty (non-intervention in the internal affairs of states, and the right of states to decide who might enter and gain membership of the state) and political exigencies.

### *Repatriation*

Repatriation had always been the preferred solution to the problem of refugees and displaced persons. In November 1943, 44 governments established UNRRA for the purposes of repatriating those displaced by the war (Hathaway 1984: 372). In 1945 a resolution was passed that meant UNRRA could also offer protection to refugees. This led the following year to sharp criticism from the London office, which argued that the particular interpretation by the Washington office of UNRRA of Resolution 71, meant that 'political refugees of every kind', including 'malcontents' (political dissidents) would be able to avail themselves of UNRRA support (Hathaway 1984:

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<sup>7</sup>According to Kimminich (1983: 35), the IRO did not contribute directly to the history of asylum (Asylrecht), since the legal protection it offered was available only to those who have already been granted asylum. However, this accusation can also be levelled at those Conventions and Declarations concluded after this war: Art.14(1) of the 1948 Universal Declaration of Human Rights (UDHR), the 1950 Statute of the United Nations High Commissioner for Refugees (UNHCR), the Geneva Convention relating to the Status of Refugees (1951) and the European Convention on Human Rights and Fundamental Freedoms (ECHR). All of these instruments (except the UNHCR Statute) list the rights to which refugees are entitled - *once they have been legally recognised as such*

373). It was assumed that people would want to return to their homes and should be assisted to do so. Those who didn't want to return were disloyal citizens, and not to be welcomed by other states. This is a continuation of the view that had been dominant, in particular in Germany during the nineteenth century, that states were mutually obliged to recognise and support each other's sovereignty by extraditing fugitives. Following attacks by the Eastern Bloc countries on the new UNRRA policy, which enabled their citizens to evade their duty to assist in the reconstruction of their states by seeking refuge in the West, a requirement for 'concrete evidence' of persecution was introduced. This ingrained assumption about the ties that bind citizens to their states explains the repatriation of hundreds of thousands who had been displaced from the territory of the Soviet Union<sup>8</sup> by the Allied Forces after the war, a repatriation that could not be described as voluntary.

The constitution of the IRO, which took over the tasks of UNRRA, defined a refugee as someone who could not or, as a result of valid objections, would not be repatriated. Its primary task was still repatriation<sup>9</sup>, though this was subject to disputes between the US and its allies and the Eastern Bloc states. At this time, the US argued that individuals had the right to choose to migrate in search of personal freedom (Hathaway 1984: 374), while the USSR insisted on the duties of their citizens, and that, as contributors to the budgets of international relief agencies, they should not be obliged to indirectly assist those who shirked their responsibilities (Hathaway 1984: 375). With the drafting of the UDHR and the 1951 Convention, the emphasis shifted from repatriation, which amounted to tacit support for the legitimacy of the USSR, to asylum and non-refoulement, which involve implicit, if not explicit criticisms of the sending regimes. While repatriation has usually been undertaken under the auspices of the UNHCR, or at least with its co-operation, West European states, especially Britain and Germany have been reluctant to surrender control of deciding claims for asylum, that is, deciding who may enter their territory, to an international organisation<sup>10</sup>.

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<sup>8</sup>Though many of those carrying out this duty objected strongly.

<sup>9</sup>The actual functions of the IRO included: repatriation; identification; registration and classification; care and assistance; legal and political protection; and transport, resettlement and reestablishment of persons of concern to the Organisation.



### *Asylum*

Art.14 of the UDHR states ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’. The apparent generosity of Art.14, signalled by the universality of its scope, is undermined by the reality that it only offers protection once asylum has been granted. It does not grant the right to asylum, only the right to request it and, if granted asylum, the right not to be removed from the country of asylum<sup>11</sup>. The corresponding duty is on the persecuting state not to pursue the fugitive, but to recognise that she is now the responsibility of the second state. However, the political and ideological considerations alluded to above, meant that the Convention was as binding as a paper chain. The weaknesses of the Convention, from the point of view of the refugee, lie in what Hathaway has called a ‘strategically conceived definitional focus’ and the fact that ‘direct control of the determination procedures rests with states’ (Hathaway 1990a 140). Defining the subject of the law, specifying to whom the law should apply, that is, the target of a state’s policy, is of fundamental importance. The definition of a refugee, contained in Art.1 of the 1951 Convention, and to which most other international, regional and national instruments refer, is extraordinarily flexible. This reflects the unwillingness of the signatories of the Convention to cede control in these matters to a supranational body, and facilitates the strategic employment of asylum and refugee status by individual states.

The definition in Art.1 confines itself to those who have ‘a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’, but persecution must originate from, or be permitted by, the government of their country of nationality<sup>12</sup>. It is not sufficient that such persecution should be threatened or carried out by individuals or groups. In that case, one’s own state of nationality should offer protection, otherwise the intervening state would be usurping the power and responsibility of the state of origin. One must also be ‘outside the country of his nationality’, that is, have crossed an international frontier. Once again this is because the principle of non-intervention in the affairs of sovereign states is a fundamental precept of international law. Under the terms of both the Statute of United Nations High Commissioner for Refugees and the 1951 Convention, the definition of a refugee is individualistic; the case of each person who

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<sup>10</sup> Spain and Greece allow UNHCR to contribute to the decision-making process.

<sup>11</sup> The corresponding obligation is on the persecuting state to respect the asylum

applies for the status of refugee is examined individually by the state in which the application is lodged, to ensure that she fulfils the above criteria, *as interpreted by each individual state*. This is also true of European, British and German law<sup>13</sup>. There are a number of possible reasons for this: first, the emphasis on each individual's human rights means that each individual has the right to have his or her claim examined; secondly, scarce resources mean that only those who are 'genuinely' persecuted should have access to those resources; and finally, each individual could be screened for his or her potential usefulness to the host state. In other words, admission is determined primarily by political and ideological considerations (Hailbronner 1990: 347), therefore the 'right...to enjoy asylum...may not be construed so as to include any claim, moral or otherwise, to be granted asylum' (Plender 1988: 101)<sup>14</sup>. Asylum remains a right of states, not of individuals.

#### *Non-refoulement*

Perhaps the single most effective article of international law has been Art.33 of the 1951 Convention, which prohibits *refoulement*, the return of a refugee 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. *Non-Refoulement* is not the same as asylum – it does not guarantee protection, it offers no special status. Yet many refugees have successfully used Art.33 to avoid return. Can this be taken to mean that Art.33 undermines the sovereignty of the state, and its right to determine who qualifies for protection by imposing an inescapable obligation on the state? There has been some discussion as to whether the principle of non-refoulement applies only after a *refugee* has crossed the border. If this were the

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<sup>12</sup>It being assumed that everyone has or should have a country of nationality.

<sup>13</sup>However, the Statute of UNHCR lays down that the 'work of the High Commissioner...shall relate, as a rule, to groups and categories of refugees'. Thus it has been possible to extend the mandate of UNHCR to cover 'refugees of concern to the international community', not to the extent of ensuring asylum for them, but ensuring material assistance and facilitating 'voluntary repatriation'. UNHCR has also, on occasion, been able to offer protection. While these 'Mandate refugees' are not automatically entitled to asylum, their status may facilitate their stay in a host country as 'Contingent' or 'Quota' refugees (as happened with the Chilean, Vietnamese and eventually Yugoslavian refugees). The reason for the general preference for mandate refugees (Britain is an exception to this rule - see Chapter 4) is that it enables states to maintain control of which, and how many, refugees they accept, and therefore to limit the numbers of people to whom they are obligated.

<sup>14</sup>Grahl-Madsen, on the other hand, is of the opinion that 'the Declaration on Territorial Asylum and Resolution (67) 14 by the general Assembly of the United Nations and the Committee of Ministers of the Council of Europe [goes] beyond the principle of non-refoulement to include non-rejection at the frontier and this gives refugees a moral choice to be given asylum if they are in need of it' (1980: 43). It seems strange to argue that one has a moral choice to be given anything. Grahl-Madsen's logic seems distinctly faulty here.

case, since the state is the final arbiter of refugeehood, the answer would appear to be 'no, sovereignty is not undermined'. Although Atle Grah-Madsen (1972: 94) is of the opinion that 'its [Art.33's] direct applicability is restricted to persons who are 'refugees' as defined in Art. 1 of the Refugee Convention', and who are physically present within the state's jurisdiction, since Art.33 prohibits the return of a refugee to any territory where she fears persecution, it would seem illogical to return such a person before the absence of such fear has been established. Therefore *non-refoulement* ought not to depend on formal recognition as a refugee, but if it were not so dependent, and if Art.33 does grant a right to remain, at least until the claimant's fear has been proved to be unfounded, this would amount to a curtailment of the state's right to control entry.

Although *non-refoulement* is widely respected and implemented, it still remains within the discretionary power of states, since they argue that they have 'no duty to admit' - 'no foreigner could claim the right of entry into any state unless that right were guaranteed by a treaty'<sup>15</sup>. And any idea that *non-refoulement* circumscribes the authority of states is undermined by part two of Art.33 itself:

The benefit of the present provision may not, however, be claimed by a *refugee* whom there are *reasonable* grounds for regarding as a danger to the security of the country in which he is...(emphasis added).

Since the state still has the right to decide who is, or isn't a refugee, to decide what are *reasonable grounds*, and to decide what constitutes a danger to national security, there are ways around its putative legal obligations. Kay Hailbronner (1990: 354), for example, argues that 'State practice does not suggest that the prohibition of refoulement stands in the way of entry restrictions, visa requirements or transport regulations'. States can and do operate the 'safe first country' principle and justify it by arguing that the state is returning the applicant - not yet recognised as a refugee - to a country through which she has travelled, which is a signatory of the Geneva Convention, in which she has no reason to fear persecution<sup>16</sup>, and in which she should therefore have applied for asylum. The creation of extraterritorial areas at ports and airports (such as Frankfurt) enables states to argue that the asylum seeker has not yet

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<sup>15</sup>UK delegate at the Third Session of the General Assembly 1948.

<sup>16</sup>See Amnesty International, *Passing the Buck: Deficient Home Office Practice in 'Safe Third Country' Asylum Cases*, July 1993, Amnesty International British Section, AIBS/RO/1/93, London

entered the territory of the state, therefore the state cannot be said to have any obligations to that person. More importantly the state can declare the applicant or refugee to be a danger ‘to the security of the country’<sup>17</sup>. ‘No state is obliged by current international law to admit to its territory a person who establishes that he is a refugee’, according to Richard Plender (1988: 415), ‘...the Geneva Convention of 1951 is silent on the question of the State’s alleged duty to grant asylum’.

Nothing in subsequent international treaties, conventions or declarations goes any further towards restricting the discretionary powers of states to withhold asylum, to repel those claiming asylum or to oblige them to grant asylum. The Declaration on Territorial Asylum, signed in 1967, was intended to strengthen the protection of refugees. Art.1(1) referred specifically to Art.14 of the UDHR (unlike the 1951 Convention) and Art.3(1) of the Declaration reinforces the principle of *non-refoulement* unequivocally<sup>18</sup>, yet the remainder of the Declaration again specifies exceptions to this rule<sup>19</sup>, which leave a great deal of discretion to the host State. The Declaration is primarily a reaffirmation of the sovereign rights of states in matters relating to asylum - ‘It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum’ (Art.1(3)) and ‘The situation of persons referred to in article 1, paragraph 1, is, *without prejudice to the sovereignty of states*.., of concern to the international community’ (Art.2(1) emphasis added)<sup>20</sup>. Furthermore, neither the Declaration nor the Protocol of 1967<sup>21</sup> is a legally binding instrument imposing obligations on signatories - they remain merely recommendations. States, having agreed the obligations, have not created an agency which could enforce those

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<sup>17</sup>In Britain, the Home Secretary doesn’t even have to justify such a declaration. See *R v Secretary of State for the Home Department, ex parte Hosenball*.

<sup>18</sup>‘No person referred to in article 1, paragraph 1 [i.e. entitled to invoke article 14 of the Universal Declaration], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution’.

<sup>19</sup>One of the most surprising aspects of the Declaration on Territorial Asylum, given its particularly conservative nature, is that it ten years passed before it was presented to the Commission on Human Rights, set up by the Economic and Social Council.

<sup>20</sup>The Declaration also singled out ‘persons struggling against colonialism’ (Art.1(1)).

<sup>21</sup>The Protocol, to which states are not obliged to accede, offers states the opportunity to disregard the geographical limitations contained in the 1951 Convention referred to above, as well as the temporal limitation which defined refugees as those who fled ‘events occurring before 1 January 1951’. Currently only Hungary, Malta and Turkey have not done so. Monaco has not acceded to the Protocol, which for the first time made the 1951 Convention an international instrument of global application (Kimminich 1983: 72).

obligations because they are not prepared to hand sovereignty to a supranational body. Were they do so, it would contravene Art.2 (7) of the United Nations Charter<sup>22</sup>:

Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

As a result, the power of international law is principally declaratory, but not constitutive, it sets but does not enforce standards (Goodwin-Gill 1983, 1995; Plender 1988; Shacknove 1988, 1993). Though this is not an insignificant function, it does not, cannot, oblige states to grant asylum, or prevent them from *refouling* asylum seekers. The limits set by sovereign states to the commitments and obligations they are prepared to undertake, mean that international law could not hope to address the problem of refugees, even as conceived in the post-war period. Jean-Pierre Hocké, the previous UN High Commissioner for Refugees, has written that:

no purpose would be served by continuing to look at today's refugee movements solely in the context of the existing legal framework, which does not begin to cover the entire spectrum of involuntary movement (1990: 39)

The international legal instruments, drawn up as the post-war construction of the refugee problem took shape, continue to govern the international refugee regime, although they are increasingly being criticised as inadequate and unequal to the demands of the modern refugee problem<sup>23</sup>. Perhaps the fact that for the past twenty-five years there has been no major addition to international refugee law, is a tacit admission of the inability of international law, and the practices it regulates - repatriation, asylum and non-refoulement, to respond to the problem as it was defined. Instead, regulation of refugees and asylum seekers continues to be governed by

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<sup>22</sup>Watson (1979) has pointed out that those who attack 'traditional' international law are doing so unfairly because it is not equal to the tasks demanded of it because it is not part of a supranational legal order.

<sup>23</sup>The complete list of international instruments is not particularly impressive:

1945 <i>Charter of the United Nations</i>	1954	<i>Convention on Diplomatic Asylum and the Convention Relating to the Status of Stateless Persons</i>
1948 <i>Universal Declaration of Human Rights</i>		
1950 <i>Statute of UNHCR</i>	1967	<i>Protocol to the Geneva Convention and the Declaration on Territorial Asylum</i>
1951 <i>Convention relating to the status of Refugees</i>	1973	<i>Protocol relating to Refugee Seamen</i>

There have been no new International Conventions, Declarations, or Protocols relating to refugees since the 1973 Protocol, though there have been developments at regional level. Following the breakdown of the 1977 UN Conference on Territorial Asylum, the Committee of Ministers of the Council of Europe adopted the Declaration on Territorial Asylum later the same year. Since the numbers have been increasing since that date, this cannot be because those legal instruments have done the job required of them.

national law, which, in Europe, is being augmented by European law. In the following section, the European context and the European response is analysed, before turning to more recent developments.

### **The Development of a European Response**

In the post-war period, the European institution that had most significance for refugees was the Council of Europe. The Council of Europe has been remarkably prolific, producing Conventions, Agreements, Recommendations and Resolutions<sup>24</sup>.

The most significant of these is the first, the European Convention on Human Rights and Fundamental Freedoms. However, in the ECHR, there is no reference to refugees, asylum or non-refoulement. This may be because at the time of writing - 1950 - the Universal Declaration already contained an article guaranteeing the 'right to seek and to enjoy asylum, and the 1951 Convention on the Status of Refugees was nearing completion, so that it may have been felt there was no need for such an article<sup>25</sup>.

The Convention did, however set up a European Court of Human Rights, which any 'person, non-governmental organisation, or group of individuals', believing their rights under the Convention to have been violated, may petition. In the absence of articles guaranteeing asylum or protection against *non-refoulement*, anyone wishing to petition the Court would have to invoke Art.3, which prohibits 'torture and inhuman or degrading punishment'<sup>26</sup>. However, this system suffers from the same drawbacks as the international system, it is undermined by the lack of enforcement powers, and by the priority given to the right of states to decide when the Convention applies. For example, the fourth Protocol to the Convention covers free movement within a territory and the freedom to leave any territory including one's own, before going on to declare that such rights may be restricted in 'the interests of national security or public safety [and] for the maintenance of "ordre public"'. Therefore, the role of the Commission and the Court is restricted to that of review and 'not that of an appeal court from the decisions of national tribunals' (Brownlie 1983: 338)<sup>27</sup>. In the years

<sup>24</sup> Appendix 1 indicates a selection of these instruments.

<sup>25</sup> However, the inclusion of other articles, almost identical to those in the Universal Declaration, would seem to contradict this view.

<sup>26</sup> They may also invoke other articles in relation to freedom from compulsory labour, deprivation of life or liberty, of freedom of thought, expression and religion.

<sup>27</sup> In addition, the right to a hearing is not automatic. The petition must first be lodged with the European Commission, also set up by the Convention, who then decides on the admissibility of the petition. Between 1953 and 1969, only 59 out of 3,797 applications were considered admissible. (See

that followed the Council of Europe made a number of endeavours to create a strong and binding commitment to refugees<sup>28</sup>, but was defeated at each attempt. The most that the Council could do was recommend that those in danger of persecution should not be refouled and that people should be allowed to seek asylum. Following the breakdown of the 1977 UN Conference on Territorial Asylum, the Committee of Ministers of the Council of Europe adopted the Declaration on Territorial Asylum later the same year. The purpose of this action was to reaffirm the positive attitudes of the member states to the principle of asylum (ECRE 1993) and to the UN Declaration on Territorial Asylum. But once again, this is not a legally binding instrument<sup>29</sup>.

However, people did find refuge in Europe. For two decades, from the 1950s until the 1970s, asylum was granted in Europe without the existence of a right to asylum. Rising standards of living, labour shortages and booming economies meant that European refugees were welcome, especially in Germany, Britain and France. With the start of global recession in 1973, the response to migrants changed, but the continuing Cold War meant that fugitives from the Communist states continued to find sanctuary in the West, in spite of the inadequacy of international and regional law. The 1980s saw a rash of recommendations and resolutions at European level from the Council of Europe<sup>30</sup>, though increasingly this issue was appearing on the

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Plender, 1988: Chap.7 for applications of Convention)

<sup>28</sup>The Parliamentary Assembly of the Council of Europe in 1961 recommended (Rec.293) that the Second Protocol to the European Convention (1950) should contain an article on asylum. Originally, this was to have granted a right to asylum, but this was deemed unacceptable. Instead, it was suggested that a reference to Art.14 of the Universal Declaration would suffice, but this was rejected, and as a result, the Second Protocol contains no reference either to refugees or to asylum. Nonetheless, the pressure to include an 'asylum article' in another Protocol continued and in 1967 the Council of Europe passed Resolution (67) 14 on Asylum to Persons in Danger of Persecution. This was in response to Recommendation 434 (1965) of the Consultative Assembly on the 'Granting of the Right of Asylum to European Refugees', but it was not the binding provision required by that recommendation. Instead Resolution (67) 14 merely recommends that members of the Council should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum in their territory; that persons in danger of persecution should not be refouled, rejected or expelled. However, it also states that if a government should have to do any of the aforementioned, it should offer the person to be refouled the opportunity of going to a country where s/he does not fear persecution. Finally, if as a result of fulfilling its obligations as outlined above, the government in question should face difficulties, other governments should consider measures to assist in overcoming these difficulties. Once again, States are the subjects and objects of these recommendations and asylum seekers and refugees are at best, incidental, at worst, a source of difficulty for states.

<sup>29</sup>The Declaration offered three recommendations: relating to *de facto* refugees; the harmonisation of eligibility practice; and certain aspects of the right to asylum.

<sup>30</sup>Additional Protocol of 5 May 1988; Protocol to the European Social Charter; European Agreement on the Transfer of Responsibility for Refugees (1980); Recommendation No.R(81) of the Committee of Ministers on the Harmonization of National Procedures relating to Asylum; Recommendation No.R(84) of the Committee of Ministers relating to the protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees; Recommendation of the

agenda of the European Communities (EC). As Joly has written, once the Council of Europe had lost the lead to the EC, 'discussions on refugee protection moved from a human rights platform...to a platform concentrating on political and economic preoccupations in the region' (1996: 47). These preoccupations were with the opening of borders to the East and the creation of a single market.

### *The Single Market*

The primary reason for the shifting of asylum issues from the Council of Europe to the European Community was the drive towards the creation of a single internal European market. However, although progress towards a single market was an EC project, concerns raised in relation to movement into and within the single market were treated from the outset as intergovernmental issues, and dealt with outside the formal structures of the EC. The Single European Act was signed in 1986 and ratified in 1987. Its purpose was to abolish internal borders creating an internal market for goods, persons, services and capital. In advance of this development, a group of 5 countries (the BeNeLux countries, France and Germany) signed an agreement in 1985 in Schengen to create a frontier-free space for the free movement of goods, services and person between and across their territories by gradually abolishing controls at the common frontiers. They were later joined by Italy, Spain, Portugal and Greece in the early 1990s and by Austria in 1995. This process of creating 'Schengenland' created an awareness of 'common problems', which necessitated increased consultation on the strengthening of the external borders, on visa checks, asylum applications and illegal migration. Although the Schengen Agreement did not contain provisions directly relating to refugees and asylum seekers, it did specify certain areas of common interest to these countries, including Aliens' Law and border controls.

Schengen was not the only intergovernmental agreement/group, which operated outside the control of the European institutions, thereby giving rise to concern over civil liberties, accountability and transparency. TREVI was a forum for discussions between the Interior and Justice Ministers of the EC states, formed in 1975. At that time, it was primarily concerned with terrorism and drug trafficking, but by the 1980s, its interests extended to immigration and asylum issues. In 1986 the Ad Hoc Group on Immigration was established to deal specifically those issues and to 'examine the

measures to be taken to reach a common policy to put an end to the abusive use of the right to asylum' (cited in Joly and Cohen 1989: 367). Two years later the Group of Co-ordinators was formed. This consisted 'of senior officials of the member states and representatives of the European Commission and was to be responsible for supervising activities associated with the implementation of free movement' (Collinson 1993: 112-3). The work of these groups was not open to scrutiny by either the European Parliament or national parliaments. Petra Hanff revealed that the German Greens relied on briefings from Amnesty International, who received information from sympathisers within the secretariat<sup>31</sup>. These intergovernmental groups, characterised by secrecy and a lack of accountability, were responsible for drafting the European conventions<sup>32</sup>, which were to have the most significant impact on the treatment of asylum seekers in the 1990s.

### *The End of the Cold War*

While the EC had been working towards greater integration of markets and more permeable European borders for capital, goods, services and people for sometime, this process received a major jolt at the end of the 1980s. Suddenly, the Berlin Wall was being demolished, and very quickly all the other East European borders came down. The project to create a single European market had been formulated at a time when Western Europe's Eastern borders were patrolled by the states of the Soviet Bloc - who actively prevented their citizens from moving westwards - something the Western powers despaired until the curtain came down. Inevitably, many of those who chose to leave headed West, to the consternation of West European states, including Britain and Germany. Now those states that had reduced immigration since the 1970s<sup>33</sup> were faced with what was feared to be uncontrollable migration from the East. The opening of those borders led to scare stories in the West, with, for example, Ken Clarke, the British Home Secretary at the time, warning of the danger of 7 million Soviet citizens seeking entry to the EU (2 million left the Soviet Union - most going to America and Israel). Those scare stories seemed to have some justification when in 1991 war started in Yugoslavia, sending 5 million people northwards into the

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<sup>31</sup>Interview 26 March 1996

<sup>32</sup>The Schengen and Dublin Conventions and the Convention on the Crossing of External Borders

<sup>33</sup>In the 1950s, there had been a net loss to Europe through migration of 2.7 million people. In the 1960s, the migration balance was slightly positive (250,000), while in the 1970s, migration increased the population of Europe by 1.9 million. However, with the introduction of restrictions, this fell to 1.6million in the 1980s (Münz 1995: 8).

EC and its neighbouring states of Austria, Hungary and Czechoslovakia<sup>34</sup>. At Conferences convened by the Council of Europe in January 1991, and the EC Ministers responsible for Migration Affairs a few months later, it was recognised that co-operation with the states of the former Eastern Bloc would be necessary to prevent 'disorderly migration' (cited in Collinson 1993: 116). The 1990s have been marked by the rapid emergence of a European policy on immigration and asylum, but one which remains firmly intergovernmental. The Schengen and Dublin Conventions, which form the basis of a common European immigration and asylum policy, are the fruit of intergovernmental, rather than supranational, negotiations.

The Convention on the Application of the Schengen Agreement (1990) covered a number of cross border issues, including the entry of asylum seekers but the Dublin Convention (1990) solely addressed asylum claims. Since the SEA would permit free movement within the EC, there was a perceived need to clarify which state would be responsible for examining the claims lodged in one of the member states of the community, and to ensure that an asylum seeker could not make multiple applications within the EC<sup>35</sup>. The Dublin Convention was supposed to put an end to the problem of 'refugees in orbit', individuals for whom no state would take responsibility. For the first time the Dublin Convention imposes a responsibility on states to examine asylum requests. Applications should be processed in the country of first arrival, unless for a limited number of reasons, there are good grounds for permitting the application to be made in another country. However, it does not prevent member states from returning asylum seekers to non-EC states, and does not require that the returning state ensure that the 'safe' third country adheres to the 1951 Convention or the 1967 Protocol (Amnesty International 1993).

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<sup>34</sup> The arrival of these refugees demonstrated the inadequacy of the 1951 Convention, since these people didn't meet the criteria of Art.1. However, that particular problem was resolved at national level by Germany, which had received 75% of the civil war refugees from the former Yugoslavia. The Federal Republic removed the Yugoslav refugees from the asylum process by creating a special category of civil war refugees (see Chapter Five). However, more than this was needed if the developing political and economic instability in Eastern Europe was not to spread to the West.

<sup>35</sup> Although the Dublin Convention defines for the first time an asylum request and an asylum seeker, and although both definitions refer explicitly to the 1951 Convention as amended by the 1967 Protocol, it contravenes the position taken by the Executive Committee of the UN, which 'recognised that a decision by a Contracting State...not to recognise refugee status does not preclude another state from examining a new request for refugee status.'

As the intergovernmental bodies were pushing member states to ratify the Schengen and Dublin Conventions (the latter was finally ratified by every state only at the end of 1997), which would protect the external borders of the EC, the EC was becoming the European Union (EU). The Treaty on European Union (Maastricht 1991) provides for integration to be built on three ‘Pillars’ –the first consisting of all previous Community treaties, the second a Common Foreign and Security Policy and the third, co-operation on Justice and Home Affairs<sup>36</sup>. At Maastricht, the Commission and the European Parliament were determined to bring the work of the intergovernmental bodies such as TREVI, the Ad Hoc group under their control, making them more accountable and transparent. However, this aim has only really been achieved in relation to visa policy, which was transferred to the first pillar (Community matters) under Article 100c. Instead, asylum and immigration are grouped together with drug trafficking and crime under Article K.1, of Title VI of the TEU, covering provisions on (intergovernmental) co-operation in the fields of Justice and Home Affairs (the third pillar).

In spite of pressure from the European Parliament, the TEU has in fact strengthened and institutionalised the intergovernmental negotiating framework. Lavenex describes an internal tension between the intergovernmental structures of the third pillar, whose ‘scope for action is largely reactive and limited mostly to procedural measures for combating illegal immigration and limiting the numbers of asylum seekers’ (1997: 18) and the European Parliament and the European Commission, which aim for a more comprehensive strategy addressing the source, entry and settlement of migrants. Nonetheless, the latter approach meets constant resistance from the Council of Ministers for whom internal security is a matter of Justice and Home Affairs, not to be surrendered to supranational bodies. The second and third pillars deal with matters of key importance to national sovereignty, and as such are discussed on an intergovernmental basis. Integration is proceeding, but states are refusing to surrender sovereignty in that area where it is most manifest – the admission and settlement of aliens.

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<sup>36</sup>As Collinson (1993: 114) has pointed out, the absence of direct reference to issues of migration under the second pillar, does not mean that they are of no relevance to foreign and security matters (see below).

European asylum policy is subject to a variety of different tensions. A declining birth rate means that Europe's labour markets and welfare systems require a continuous flow of migrants to sustain them, but both are, it is argued (Brown 1997; Freeman 1986), threatened by migration, which depresses wages in the former, and places overwhelming demands on the latter. The restrictive impulses of national governments concerned to assert their sovereignty (that is, their ability to control entry) are confronted by the demands of the market for greater mobility, not just of goods and capital, but also of labour. There is conflict between humanitarian and human rights lobbies and a rising tide of racism and far right violence throughout Europe (Cornelius et al 1994; Miles and Thränhardt 1995). Miles and Thränhardt argue that the logic of exclusion prevails because there is no longer any need for the 'mass migration of unskilled labour' and because of 'racist conceptions of otherness' (1995: 3). In Europe high levels of unemployment create resistance to the newcomers, 'the discourse of European elites aimed at the creation of a European identity can be analysed in terms of the renewal of the nationalist logic in the Gellnerian sense' (Martiniello 1995: 41), and universal obligations are dismantled by the deconstruction and transformation of asylum seekers into economic migrants, whose human rights have not been violated and who are not in need of humanitarian assistance. This deconstruction of asylum seekers as a category of those to whom duties are owed, occurs at a time when a European identity, functional for European capital is being constructed, but this is an exclusionary identity, one constructed in response to a threat, which is itself artificial.

### **A Reconstruction of the Refugee Problem**

Uncontrolled movements across borders are considered a security threat because they are a challenge to the sovereignty of the state, to its power to control entry. In the post Cold War era, refugees and asylum seekers are grouped together with drug traffickers and terrorists as the biggest threat to security in Europe. It is now increasingly recognised that the problem of refugees is not temporary, that perhaps like the poor, refugees will always be with us. The refugee problem cannot be solved by repatriating all those who flee, or reassigning them to another state. It cannot be assumed that conflicts, and the need for places of safety, will last only a few years. Not all conflicts have lasted as long as the Palestinian/Israeli situation, but in Afghanistan, Kurdistan and Algeria, to name only those closest to Europe, conditions ensure a steady supply

of refugees. And where the conflict has ended, at least on paper, as in the states of the former Yugoslavia, there is no guarantee that people will be able to return. If the refugee problem cannot be solved then it, and its alleged effects, must be regulated and controlled. The most important thing for states is that they remain in control – of their borders and their population. As the demands for greater co-operation and harmonisation in the areas covered by the ‘third pillar’ of the Treaty on European Union (Maastricht) – Justice and Home Affairs – grow, individual states are insisting on their right to continue to deter and to control entry<sup>37</sup>. Methods range from sealing up their own borders, using armed guards and infra-red technology, to incarcerating asylum seekers in detention centres, substituting food parcels for welfare payments, and transferring responsibility for the care of refugees from the state to private charities. These methods are justified by reference to the threat posed by asylum seekers.

Monica Den Boer describes three cornerstones for the construction of (illegal) immigration as a threat to the internal security of the EU member states, but asylum seekers, in legal and political discourse separate and distinct from migrants, are subject to the same construction as a threat<sup>38</sup>: ‘the link between immigration and crime proper (which includes human smuggling activities); the link between immigration and the unlawful exploitation of social benefit provisions; and the link between immigration and the instability caused by xenophobia and racism’ (1995: 98)<sup>39</sup>. Research at a European level reflects a growing concern with security, whether that security is defined in terms of secure borders (Widgren 1993) or more widely as ‘societal’ or individual security (Lavenex 1997; Waever 1996)<sup>40</sup>. However, much of this research is concerned with perceived threats to the security of European citizens, rather than asylum seekers, who have suffered direct and violent attacks in Europe.

Widgren (1993) refers to ‘irregular’ and ‘uncontrolled’ migratory movements as a concern of EC and G-24 states. But the threat he warns of is not solely conceived of

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<sup>37</sup> Certain members of the German, Bavarian and Saxon governments demanded the dismantling of Schengen, if Italy continued to offer asylum to Kurds from Turkey (*Guardian* 5 & 6 January 1998).

<sup>38</sup> However, this particular process occurs at national level, and is therefore examined in greater detail in the chapters that follow.

<sup>39</sup> The construction of asylum seekers as threats to welfare and stability are examined more closely in the three chapters that follow.

<sup>40</sup> See Chapter One

as a threat to individual states. Widgren supports the view of a Europe besieged by uncontrolled masses. He specifies four categories of migrants - those with the right of residence, asylum seekers, 'ex-nationals' (ethnic Germans and Greeks from the Soviet Union), and illegal entrants. Those who have the right of residence are unproblematic for Widgren, since their status is regulated and their rights and duties clear. 'Ex-nationals' are not a problem because their numbers are finite. However, the second and fourth groups are a source of concern, as their numbers are rising and resist containment. It is the uncontrolled nature of the movement which worries European states, and creates the perception of threat. This leads to strained relations between European states who are unsure whether they can trust the other member states to be as strict on immigration control as they are. However, paradoxically this is forcing them 'to consult with each other and co-ordinate policies for controlling migration, especially refugee flows' (Cornelius et al 1994: 11).

The result of this 'securitising' of asylum seekers and refugees, of constructing their presence as a threat is that refugee policy in the European Union member states has become little more than a drive to control and reduce numbers by harmonising the immigration and asylum laws and practice of the member states. This is achieved by incorporating the harshest immigration control measures from each state's armoury. It is difficult if not impossible for states to resist this trend. The drive towards harmonisation of national laws and regulations governing entry into the Single Market for the purpose of claiming asylum or migration is an integral part of the European defence system against uncontrolled population movements. Randall argues that 'a state which unilaterally adopts a liberal policy on access will find other states gratefully directing asylum seekers in its direction' (1993: 230). While this seemed to be the case earlier this year when it was alleged that Belgium was directing asylum seekers to Britain via the Channel tunnel<sup>41</sup>, in fact, such states come under massive pressure to toe the European line for fear that those who enter such a liberal state will move to less liberal ones within the frontier free zone.

When in 1997, Italy received 2,500 Kurdish asylum seekers and announced that it welcomed refugees with 'an open heart and open arms', it was swiftly rebuked by

states like Germany, which has a large Kurdish population, and was concerned that the newcomers would move north across the German border. In spite of initial rejection of what was seen in Italy as interference in its affairs, it has since succumbed to pressure from Germany, Austria and France and introduced measures to contain the problem - abolishing its 15-day grace period before a refugee denied admission must leave the country (*Guardian* 10.1.1998). It would seem that the EU brought pressure to bear on Turkey to prevent the Kurds gaining access to the EU via Italy and Greece, rather than to cease its persecution of the Kurds (*Guardian* 10.1.1998). Concern about free movement within the area of the European Union has also led to pressure on the Union's relations with its neighbours to the east and south (Joly 1996; Lavenex 1997) and brought asylum and migration within the sphere of interest of the second pillar, relating to the Union's Common Foreign and Security Policy. Attempts to gain or regain control are not confined to one's own territory or borders. They also include putting pressure on refugee producing states to control emigration, and on other states not to grant asylum. Pressure is being brought to bear on those states that make up the Union's buffer zone, and which are waiting to join the Union, to prevent asylum applicants from using their territories as transit zones en route to Western Europe. The pressure for would-be members to harmonise is assisted by training border personnel and subsidising equipment for detecting people attempting border crossings at night. Kees Groenendijk argues that such concerns are ill-founded, since previous enlargements have not led to the expected massive migrations (1994: 59).

### **New Solutions - Containment and Temporary Asylum**

Now that refugees and asylum seekers are firmly on the security agenda, the range of possible solutions is broadened. The failure of, in particular, the industrialised states to halt the numbers arriving at their borders has led to the espousal of new solutions - containment - the attempt to prevent refugees leaving their countries of origin, and temporary asylum - in exchange for admit refugees, states are guaranteed that their sojourn will be temporary.

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<sup>41</sup> Britain's asylum policy could hardly be described as liberal - the reason that access was possible via the Tunnel was that Eurostar had been exempt from the Carriers' Liability Act. This loophole was quickly closed, once the arrival of a number of asylum seekers became public knowledge.

### *Containment*

Containment is justified by invoking a new human right - the 'right to remain'<sup>42</sup>. This policy dates in particular from the Gulf War, which saw the creation of the 'Kurdish Safe Zone' in 1991, and the conflict in Yugoslavia when 'Safe Havens' were created in different areas. The justification for these enclaves was that, according to Baroness Chalker (Shacknove 1993: 521) 'a thousand times more refugees' from Bosnia could be assisted *in situ*, rather than by an offer of asylum in Britain. The importance of keeping families and communities together, of not assisting with ethnic cleansing was also stressed in the media (references), though the logic of this was lost on many of those trapped in Safe Havens, the safety of which could not or would not be guaranteed<sup>43</sup>. A more insidious justification is that, since it is the refugees' governments that are to blame for their plight, it is up to them to remain and fight for improved conditions - they are responsible for their own plight - not us.

International refugee and human rights lawyers such as Shacknove and Hathaway, condemning this policy of containment as a cynical attempt to keep refugees as far away from the Western states as possible, have warned of the consequences for the international system of states (Shacknove 1993), as well as for those who need to leave their countries, and attacked it as 'ridiculous' and 'evil', a means 'for keeping the abused in a situation in which the abuse can continue' (Hathaway 1995: 293). As Lord Owen at the time argued in a letter to Paddy Ashdown (leader of the British Liberal Democrats), to establish Safe Havens is to 'make ourselves accomplices to this evil of ethnic cleansing' (cited in Vulliamy 1994: 245). Forcing people to remain in a dangerous situation in the name of a 'new' right is to deprive them of an older and more established right - the right to leave their countries to seek asylum.

### *Temporary Asylum*

Faced with the reluctance of states to grant asylum to any but a few carefully selected refugees, and with the power of the wealthier states to keep those numbers low, a lobby has emerged, which argues that, since self-interest is the primary factor driving

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<sup>42</sup>Hathaway argues that it 'is meaningless as a 'new' right because if already-recognised rights, like freedom from cruel and inhuman treatment, were in fact respected, the 'right to remain' would be redundant' (1995: 293).

<sup>43</sup>Shortly after Srebrenica was declared the first Safe Haven, it was subjected to heavy bombardment, as were all of the other Safe Havens in the course of the war.

the asylum policy of states, appeals to them must be framed in those terms. Hathaway argues:

The strategic challenge to reformers is thus to frame the human rights vision of refugee protection in a way which takes reasonable account of the perceived self interest of states, and hence stands a chance of adoption and meaningful implementation (Hathaway 1991: 114)

Scholars such as Hathaway (1991) have conceded that, since it is not possible to persuade states to grant permanent asylum to significant numbers, the focus should shift to temporary asylum. Driven by the concern that the current regime offers protection to a tiny minority, and anxious to extend protection, he argues for the strengthening of a universal right to temporary asylum, reassuring states that 'all but a very small minority-predominantly young, male, and mobile-either find protection in states adjoining their own, or are unable to escape at all' (1991: 128). Others, such as Daniel Warner (1992) and Elizabeth Ferris (1993), warn that promoting temporary asylum is undermining the concept of asylum itself. If states only agree to take in refugees on condition that they leave again, there is an incentive for states to take steps to ensure that these refugees do not integrate. This is currently the situation in parts of Germany, where asylum seekers are segregated in holding centres<sup>44</sup>.

The negative affect of an increased reliance on temporary, as opposed to permanent asylum, is that it fails to give to refugees that which they most need, a sense of security. Without the assurance that they are entitled to remain and to rebuild their lives, their integration into the host society will be fraught with difficulty. It is hard to see how maintaining and extending an exceptional status will avoid the creation of second, or even third class citizenship in the host state. Furthermore, temporary admission overlooks the reality that many of the conflicts from which people flee are far from temporary, but continue sometimes for decades. Many of those who leave are prevented from returning to their countries of origin for years, by which time they may well have produced a second generation who would be unwilling to return to a country of which they know little (Iraqis, Afghanis, Kurds). A further problem with temporary asylum is that it likely to be used for those who are actually at or inside the border, since it offers a means to regularise their status. It is less likely to be used for

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<sup>44</sup> See Chapter 4 on Germany for an example of temporary asylum granted to Bosnian and Croatian refugees, who were expected to leave Germany once the Dayton Agreement had been signed.

those who have not yet arrived on or near the territory, since they do not exercise the same degree of pressure or urgency.

### Conclusion

At the end of the twentieth century there is a general consensus that the continuing existence of, and increase in, numbers of refugees and asylum-seekers constitutes a problem. For most of the people who are displaced from their homes the problem is the same one that has faced refugees since the development of the modern state: in the current system of nation-states, they are deprived of the rights guaranteed by membership of a state, of any sense of security, and of the possibility of making a home and providing for their families, that is, of regaining that degree of control over their own lives enjoyed by most citizens of most nation-states<sup>45</sup>. For West European (and other developed) states, and their representatives, the 'problem' is different, but a problem not dissimilar to that facing them fifty years ago. The problem for states is large numbers of people outside the territory of their state of origin - who do not want to return to those states. Refugees and asylum-seekers continue to present a problem because they represent a challenge to the accepted order of things - a world of discrete nation-states with distinct territories, controllable borders and particular and sedentary populations, a world in which it is legitimate to both exclude and admit migrants in the national interest. Like all migrants, refugees move across these borders, settle in these territories and become part of these populations. What distinguishes refugees from other migrants is that states were apparently prepared to accept that they had a stronger claim to entry, and to recognise that claim in international law.

Yet, international law is hobbled by a paradox: it was enacted to solve the problems, not of refugees, but of states faced with the possible entry of large numbers of refugees, with the result that the constraints it seeks to impose on the discretion of states to admit or exclude refugees and asylum seekers could not be allowed to have any force whatsoever. According to Hathaway, the purpose of asylum and of current refugee law:

is not specifically to meet the needs of the refugees themselves (as both the humanitarian and human rights paradigms would suggest), but rather is to govern disruptions of regulated international migration in accordance with the interests of states (Hathaway 1990: 133)

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<sup>45</sup>This is not a judgement on the degree of control possessed by citizens generally.

National security overrides any international obligations because state or national sovereignty is paramount. This is the single most effective obstacle to recognition of a right to asylum. States are sovereign entities that have the right, and the power, to decide who may enter the territory of the state, since control of entry is one of the defining powers of the state. International law not only accepts, but enshrines this right. International law is premised on the existence and legitimacy of a world of separate sovereign states with the right to control entry to their territories, and with the right to 'interpret and apply their own obligations' (Watson 1979: 625). International human rights law cannot be enforced within those states - the existence of an international body with such authority would contravene the sovereignty of individual states<sup>46</sup>.

Were a right to asylum, which would entail the right of an individual to claim entry to a particular state, to be recognised, the sovereignty of the state would be compromised. As a result, although there is some debate surrounding this issue, in fact the state is not legally obliged to grant asylum to anyone<sup>47</sup>, it only appears to be - 'that which is called a right to asylum is nothing more than the facility of each state to offer it to those that request it' (De Visscher 1970: 223)<sup>48</sup>. It is worth spelling this out - states are not obliged to grant asylum, they have the right to refuse entry to anyone and cannot be accused of acting illegally when they do so. They simply have to assert that national security would be compromised by the admission of this or that person.

However, states do grant asylum. They do so for reasons of state, which are not always or necessarily economic or material - they may also be political and ideal. There have always been practical reasons why individual states granted asylum, such as answering the need for labour, or a shortage of particular skills. There have also been, as was shown in the previous chapters, less tangible reasons, such as proving just how liberal a state can be. Such considerations, which sometimes come into conflict (Shacknove 1993:518), will be covered in the following chapters. In

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<sup>46</sup> Instead, more powerful states, such as the US, try to ensure compliance with human rights law, for example, by using their economic and political muscle. However, the inconsistency with which such pressure is applied, for example on China, where there are gross human rights violations, and on Cuba, where the violations are not of the same magnitude, serves to demonstrate the vulnerability of the refugee and human rights regimes to exploitation for political (and economic) ends.

<sup>47</sup> Germany is a special case and will be dealt with in Chapter Four.

<sup>48</sup> 'Ce que l'on appelle le droit d'asile n'est autre chose que la facilité pour tout Etat d'offrir asile à qui le demande'. See Plender 1988: 394-399.

highlighting this exploitation of refugees as a resource, and a source of legitimization, it is not being suggested that concern for the individual and the refugee was not important in drafting the international and regional instruments, which continue to offer protection to certain individuals. Those who met to decide on the best way of implementing the solutions – repatriation or resettlement – may have been concerned to improve the conditions of those displaced by the war. They were also, one assumes, profoundly affected by the experience of the war years, and anxious to ensure that the appalling vulnerability of the individual in relation to the state that had been exposed so brutally by the Nazi dictatorship should be reduced. This goes some way towards explaining the shift from a comprehensive humanitarian response, to one of human rights protection (Hathaway 1990: 140-1).

The protection of human rights should have meant that humanitarian crises would no longer occur, but very quickly the considerations of national governments and the emerging Cold War, again changed the priorities of States' representatives in the various international fora. At the outbreak of the Cold War the *rhetoric* of universal humanitarian values and of universal human rights was being used in an attempt, not only to distinguish Western governments from the Nazi regime that had been vanquished in the war, but also from the Soviet regime, which placed the collectivity above the individual. Yet even in the West, these same values were always balanced against the rights and needs of states (their right to control entry and their need both for cheap labour and for legitimisation) when designing appropriate responses to the refugee problem. So that the primary rights and duties specified in the Conventions, Charters and Declarations were those of states (Plender 1988: 394)<sup>49</sup>.

The most that can be claimed is that the problem, whether one defines it as significant numbers of people outside the territories of their states of origin, or the inability of states to accommodate such a situation, has not been resolved. It has already suggested that this is due to a misdiagnosis of the problem. There are at least two possible ways forward from this position. The first would be to attempt a correct

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<sup>49</sup>During the discussions, states' representatives were constantly driven to defend the rights of their states against the claims of asylum seekers, so that it seemed, 'it was a conference for the protection of helpless sovereign states against the wicked refugee' (Statement of Mr Rees of the International Association of Voluntary Agencies, UN GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting at 4, UN DOC.A/CONF.2/SR.19, at 4(1951), cited in Hathaway 1990: 145).

diagnosis, and a second would be to ask what exactly states were hoping to achieve with their chosen solutions. Answers to this question have been indicated throughout this chapter: such as the attribution of responsibility for refugees; the assertion of control over entry, and related to that, over the identity of the state's peoples and over the costs ensuing from refugee protection in host states; in short the reduction of the numbers arriving at European borders requesting asylum. Nonetheless, in spite of the scale and persistence of the 'refugee problem', and of increasing moves towards regional co-operation, individual states still prefer to maintain control of entry, for whatever reason it is sought:

The emergent body of refugee law is an amalgam of international, regional and national rules and procedures. But it is national law and practice, particularly with regard to immigration, which in reality determines an individual's right to asylum (Bridges, cited in Lambert 1995: xi).

In the following chapters, the practices and policies of two individual states are analysed, and the different factors shaping policy and practice examined. Having argued that international and regional laws do not act as a liberalising force, but instead confirm the power and discretion of individual states, Chapters Four and Five examine that power and discretion and ask, in the absence of enforceable international legal obligations, what does motivate Britain and Germany to grant asylum.

## CHAPTER FOUR

### REFUGEE AND ASYLUM POLICIES IN BRITAIN

Prior to 1993, there was no primary legislation dealing specifically with asylum in Britain. Though asylum was mentioned in the immigration rules, British governments tended to respond on an ad hoc basis to the issues raised by particular groups of refugees, such as the Chileans in 1973 and the Vietnamese Boat people a few years later. However, the late 1980s and early 1990s saw some important changes. The number of applications increased from 4,000 in 1988 to 11,640 in 1989, 26,205 in 1990, and 44,840 in 1991. In addition, from constituting only a small percentage of entrants they had become within only a few years the largest single category (excluding visitors and transit passengers). And perhaps most significantly, these changes occurred at a time of political upheaval in Europe. Just as the European Community was moving towards a single market by abolishing border controls within the Community, the borders to the East opened, and war began in Yugoslavia. These events combined to place asylum and asylum seekers firmly on the British political and policy agenda. As a result, a Bill was presented to the House of Commons in 1992, the purpose of which was to reduce the number of applicants who could claim asylum in Britain (JWCI: 1995)<sup>1</sup>, to reduce the time spent in Britain by applicants by categorising some claims as inadmissible, and to facilitate the speedy removal of those whose claims were rejected. The Asylum and Immigration Appeals Act finally came into force on 26 July 1993, to be followed three years later by the Asylum and Immigration Act (1996), which denied to certain classes of asylum applicants access to social security and legal aid, in order to remove what was seen as an incentive to migrants to apply for asylum in Britain (Howard, Hansard 11. December 1995, Col.702).

It is interesting to note that the first time asylum appears in statutory domestic law - until 1993 Britain had had no statutory law covering the grant of asylum - it is in order to restrict access to it. It is surprising for a number of reasons: firstly, Britain's pride in its international reputation as a haven for political refugees; secondly, Britain already had a system of entry controls in place which were unmatched elsewhere in Europe; and thirdly,

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<sup>1</sup>It also removed the right of appeal against refusal to enter from visitors, prospective students and students

the numbers of applicants for asylum, which allegedly occasioned the need for this new legislation, were small by comparison with other European countries (and actually decreasing while the debates on the Acts were taking place). So whence came the impetus for this new legislation? What were the factors or interests behind the change in asylum policy which occurred in the early 1990s?

These factors can be categorised as historical, external and internal. Rather than deal with each of these separately, the significance of each is explored within different periods. The chapter is divided into four sections: 1945-70, which covers a period of enormous change in Britain - post-war reconstruction, the loss of Empire and status, and the arrival of European, West Indian and Asian migrants who would help to shape a new British identity; 1970-79, when asylum was reintroduced, and refugees from Chile and Vietnam were accepted as quota refugees; 1979-1989, during which time almost as much legislation was introduced as during the previous seventy years, all of it designed to restrict the entry of migrants, including asylum seekers and refugees, into Britain; and 1989 - present covers the period from the end of the Cold War and includes the introduction of two major new pieces of legislation and the promise of more.

Historical factors, such as Britain's relationship with its former colonies, its evolution as a 'multicultural' state and the absence of asylum in legislation explain the relationship between asylum, immigration and the ties of empire. Although I have stressed that the focus in this work is asylum, since the British government has recognised, at least in its rhetoric, certain obligations to refugees which it does not extend to immigrants, nonetheless, it is not possible, especially in Britain, to look at asylum in isolation from immigration. Asylum has throughout this century been treated as a type of immigration, so that when two acts relating to asylum are finally introduced in the 1990s, they refer to both asylum and immigration. Furthermore, it has become impossible to discuss immigration, and by extension asylum, without reference to 'race relations', since immigration in Britain has been tied very firmly to race relations, and race relations have been used throughout this century, not merely to justify immigration controls, but also the restriction

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coming for less six months.

of asylum (Foot 1965; Layton-Henry 1985; Solomos 1982; 1993, 1996). It is because Britain does not concede any duty to admit immigrants, that it has sought to transform not only asylum seekers, but also its former subjects from the Commonwealth who had automatic rights of entry, into immigrants, and in particular, into 'economic' migrants. Thus by controlling the identity of would-be entrants, Britain endeavours to control admittance.

The external factors relate to global events that were perceived to have real or potential consequences for Britain. The admission of refugees and asylum seekers was not a major problem, so long as their states of origin made it difficult for them to leave. Various methods of control such as visas had been introduced to cope with specific incidences (for example, an increase in Tamil asylum seekers from Sri Lanka in 1985), but the opening of the Berlin Wall in 1989, the subsequent collapse of the Soviet Union and the outbreak of war in Yugoslavia, raised the spectre of millions of people fleeing westwards. Finally, internal factors, less dramatic than global events, but as significant, were the crisis of the welfare state, economic recession and upheavals such as the poll tax riots, which called into question Britain's political stability. This chapter will show that asylum policy has been shaped by all of these disparate factors.

### **The Post-War Period 1945-1970**

In the aftermath of the Second World War, the centre of an Empire spread over four continents and recognised as a world power, Britain seemed secure in its position as one of the world powers, a position confirmed at the end of the war by being numbered among the five permanent members of the UN Security Council. Although there were no laws or rules governing asylum at this time, asylum was granted. How often and to whom was affected by the extraordinary degree of discretion which the Home Office had in controlling entry, due to the absence of legal constraints; a massive labour shortage, estimated at the end of 1946 at 1,346,000 (Joshi & Carter 1984: 55) and the development of the Welfare State; the beginning of the Cold War and the break up of the Empire.

### *An Unconstitutional State?*

In the aftermath of the Second World War, representatives of the international community came together to prepare the Universal Declaration of Human Rights (UDHR) and the Convention relating to the Status of Refugees (1951 Convention). The context in which these documents were drawn up has been discussed in the previous chapter - the impact of Nazism was still fresh in people's minds and the Cold War had just begun. The former meant that there was a determination to create a regime that would ensure that human beings would never again be treated in the same way by states. The latter meant a state of tension that might at any time escalate into war, circumstances that meant states were suspicious of entrants from the East. During the discussions on what was to become Art.14 of UDHR and the *travaux préparatoires* for the 1951 Convention, Britain successfully resisted any attempt alter the *ex gratia* nature of asylum, arguing that states have 'no duty to admit' - 'no foreigner could claim the right of entry into any state unless that right were guaranteed by a treaty'<sup>2</sup>. However, even if the 1951 Convention, ratified by Britain in 1954, had included a right of individuals to asylum, this would have had little impact on British asylum policy. Britain's legal system is dualist, in that while parliament - the legislature - is the *domestic* law-making body, it is the executive - the government - which signs international law. International law has no power then, until an act of parliament anchors it in domestic law. Neither Art.14 (UDHR) nor the 1951 Convention imposed enforceable obligations on Britain, until the 1993 Asylum and Immigration Appeals Act explicitly referred to Britain's obligations under the Convention. However, the executive always retains the trump card - entry can be refused, or deportation allowed, in the name of national security.

Britain has therefore had in the post-war period an extraordinary degree of flexibility and control in relation to issues of immigration and asylum by comparison with other European states, such as Germany. Unlike other European states, Britain has no written constitution and no bill of rights, so the constraints on the government of the day are limited. This made it possible for the Labour government in 1968 to rush through a second Commonwealth Immigrants Act in three days. Unlike in Germany, where constitutional

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<sup>2</sup>UK delegate at the Third Session of the General Assembly, 1948

change necessitates a two-thirds majority making the government dependent on the co-operation of the opposition parties, in Britain a simple majority suffices to change any law. A cabinet minister at the time reflected later that the introduction of the 1968 Act ‘would have been declared unconstitutional in any country with a written constitution and a Supreme court’ (Crossman, cited in Robertson 1989: 317). Britain’s legal system means that governments can and do respond quickly to changing circumstances. Not that there are no constraints on British governments, as shown by the delays in getting the 1993 Act through parliament, but they do have a range of powers remarkable among European liberal democracies<sup>3</sup>. This factor accounts for differences in the tone and urgency of the asylum debates in Britain and Germany. In Germany, asylum provision was firmly anchored in the written constitution, so that when the government decided to amend it, the resistance and reactions were more intense. This is discussed at greater length in Chapters Five and Six.

### *Welfare and Labour*

In the post-war period, the Beveridge report launched a blueprint for an expansion of the welfare state which was to cure the five great ills - ignorance, disease, idleness, squalor and want. The welfare state was to be funded by all, both through social or national insurance and through taxation, and available to all. This move to an inclusive universal welfare system would have implications for asylum policy forty years later, though this was not obvious at the time. However, while the prospect of full employment made such goals seem ambitious but achievable, chronic labour shortages were holding back economic growth and creating an upward pressure on wages. Such circumstances ensured asylum seekers would be permitted entry.

In the United Kingdom, the post-war labour shortage and the humanitarian desire to accommodate refugees were both instrumental in ensuring the settlement of 200,000

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<sup>3</sup>The standard text by A.V.Dicey *Introduction to the Study of the Law of the Constitution* (1885/1959) argues that the rule of law in England protects the rights of individuals in a way which is ‘peculiar to England’ p.188), by which is meant, in a way that is better than on the continent. Moving from one dubious claim to another, Dicey goes on to claim “In almost every continental community the executive exercises far wider discretionary authority in the matter of...expulsion from its territory, and the like than is either legally claimed or in fact exerted by the government in England”. The executive in Britain might not have chosen to exercise its powers as often, but this is not the same as not having those powers (see Chapter 2).

immigrants, about half of whom were former members of the Polish armed forces (Plender 1988: 81).

At the end of the war, since the Poles and the Irish - Britain's usual reserve army of labour - could not meet labour demands, attention turned to the more than one million people in Displaced Persons (DPs) camps on the European mainland. Between 1947 and 1949, approximately 75,000 of them were brought to Britain<sup>4</sup>, but not as quota refugees to be settled. Instead they were renamed the European Volunteer Workers (EVWs) and admitted to Britain for a limited period and expected to work in those sectors worst affected by shortages<sup>5</sup>. However, the demands of the labour market and the propaganda value of the DPs did not mean that they were met with a unanimous welcome. Just as with immigration generally, the demands of the free market and capitalism met with resistance from indigenous labour, fearful of the pressure on wages. The NUM, for example, objected for this reason to Polish and Italian DPs being brought over to work in the mines (Dummett & Nicol 1990: 176; Joshi & Carter 1984: 56).

The DPs were not the only source of additional labour at the time: they were augmented by arrivals from the New Commonwealth, although at this stage the numbers were very small<sup>6</sup>. In 1948 the British Nationality Act reaffirmed the right of Commonwealth citizens to freely enter Britain. Holmes (1988: 257) argues that the 'Act was certainly not a cynical manoeuvre to allow for the importation of labour...it was an affirmation of responsibility by the centre of that Commonwealth to its constituent population'. While others agree that it 'sought to reinforce a notion of imperial unity wobbling under the impact of decolonisation' (Carter et al 1996: 142), and that facilitating the import of cheap labour might not have been its primary goal, Collinson (1993: 49) points out that in the same year a working party on Employment in the United Kingdom of Surplus Colonial Labour was

<sup>4</sup>See Cohen 1994 for a discussion of the ethnic discrimination at work in the selection of workers from the DP camps.

<sup>5</sup>Kay & Miles suggest that these refugees may also be referred to as 'unfree labour', since they did not have the right "return to the labour market to find an alternative buyer" (1992: 10), they could not return to their home countries, and were without the protection of a State. They did not even have the protection of the International Refugee Organisation, since it was not party to the EVW scheme.

<sup>6</sup>The largest group came on the *ss Empire Windrush*, but immigrants from the Commonwealth were never as numerous as the Irish, who still came in large numbers. As a result of the McCarran-Walter Immigration Act in 1952, which meant West Indians were no longer able to settle in the US, many looked instead towards the Mother Country for opportunity.

established. However, so long as there was a choice, the Europeans were preferred not only because their admission could be controlled in a way that the entry of British subjects (from the Commonwealth) could not, but because they could be moved from one sector to another, from one geographical area to another, and because they could always be deported<sup>7</sup>.

There was also the issue of colour - 'there was considerable prejudice against the recruitment of black colonial workers' (Layton-Henry 1994: 284; Solomos 1992, 1993) and much of this prejudice was located among the political elite. The Labour Home Secretary, Chuter-Ede remarked that:

he would be much happier if the intake could be limited to entrants from the Western Countries, whose traditions and social background were more nearly equal to our own and in whose case it would be possible to apply the sanction of deportation (Joshi & Carter 1984: 56).

However, when prejudice was voiced, it was usually to attribute it to members of the general public. The working party referred to above 'concluded that, in view of the probable discrimination which would be directed towards 'coloured' workers, large scale immigration from the colonies should not be encouraged (Collinson 1993: 49). Foot (1965) and others have debated whether the cause of these reactions, to both DPs and Commonwealth subjects, lies in elite racism or in elite reactions to popular racism. It seems that when the demand for labour grows, expressions of prejudice become less acceptable. When labour demands made the import of the DPs necessary, some MPs argued that the government must remove 'this wretched prejudice' against DPs, who 'would be a great benefit to our stock' (Cohen 1994: 75-6)<sup>8</sup>.

Paul Foot (1965: 116) has remarked on the facility with which individual MPs can dramatically change their principles depending on economic circumstances: once the DPs camps had been emptied (in the early 1950s), resistance to Commonwealth subjects abated though it didn't disappear. Commonwealth migrants became more attractive as the labour

<sup>7</sup> Displaced Persons were not only a source of cheap labour and desirable skills, but they "were firmly anti-Soviet, a posture that conformed to Britain's position at the opening of the Cold War" (Cohen 1994: 75)

<sup>8</sup> A second factor operating in favour of the use of DPs, was that it was possible for the government to recruit

shortages continued. No special provisions had to be made for them, the government didn't have to pay their fares or accommodation, and they weren't subject to immigration control. Racist rhetoric again ceded place to more liberal voices. As a result of the demand for labour, the more racialist MPs, such as Sir Cyril Osborne were kept in check throughout the 1950s by their Conservative colleagues. However, resentment against the black immigrants was fuelled by the appalling social conditions into which they had been forced by years of neglect. A campaign was launched which laid responsibility for those conditions at the door of the migrants, rather than government or local authorities. When resentment erupted into riots in 1958, the response was that the numbers coming had to be reduced. Rumours of impending restrictive legislation led to an upsurge in the numbers. Having averaged 20,000 per year, in 1960 there were 58,100 and in 1961 115,150<sup>9</sup>. In 1962 the government passed the Commonwealth Immigrants Act, which curbed immigration from the Commonwealth while leaving unrestricted the inflow of unskilled labour from the Republic of Ireland. The Liberal and Labour parties objected to it as a racialist piece of legislation, although Labour conspicuously failed to repeal it on being returned to power.

### *The Cold War and the Commonwealth*

In 1956, several thousand Hungarian refugees were admitted into Britain with ease, as were small numbers of Czechs, Poles and Soviet citizens. While Britain had little problem offering refuge to Czechs following Dubcek's fall in 1968, the arrival of large numbers of East African Asians fleeing Kenya demonstrated clearly the different perceptions of the two groups and provoked a rapid and dramatic response. Britain introduced the Commonwealth Immigration Act (1968) which, having passed through parliament in three days, deprived the East African Asians of the right to enter the territory of the State whose passport they held<sup>10</sup>. By this time a clear distinction had emerged between refugees and immigrants. Immigrants were black and came from former Colonies and the

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single persons without dependants, that is, only those who could make an active contribution.

<sup>9</sup> Enoch Powell, Minister for Health from 1960-1963, encouraged the recruitment of nurses from overseas to support the expanding NHS.

<sup>10</sup> This right is reaffirmed in the Preamble to the Declaration on Territorial Asylum, and Art.3(1) of the Fourth Protocol to the European Convention on Human Rights reads 'No one shall be deprived of the right to enter the territory of the state of which he is a national', but the United Kingdom has consistently refused

Commonwealth (regardless of their motives for leaving), while refugees were white and came from Communist regimes (regardless of their motives for leaving). The latter also possessed a propaganda value not shared by immigrants (refugees) from black Africa.

The East African Asians are an interesting case in point and illustrate very neatly the different treatment of different groups of asylum seekers. They could be considered asylum seekers since they met some of the 1951 Convention criteria. They had crossed international borders and had a well-founded fear of persecution. However, the persecution was not by the state of which they were nationals - the UK, so in theory, they should have been able to claim the protection of that state, since, according to Art.13 of the Universal Declaration, '[e]veryone has the right to leave any country, including his own, and to return to his country'<sup>11</sup>. Fearing the large numbers who might come to Britain, entitled as Citizens of the UK and Colonies to enter the territory of the state, the Act excluded those who had not acquired their citizenship in the United Kingdom itself, or through a parent who had so acquired citizenship<sup>12</sup>. As a result, East African Asians were effectively deprived of citizenship and became 'refugees in orbit' unable to enter Britain or any other country. Although eventually some were allowed to enter and remain, many spent long months shuttling between one country and another. Once again, Britain sought to control the numbers of refugees entering Britain by enacting immigration legislation, in which no mention was made of refuge, asylum or persecution<sup>13</sup>. The impetus behind this legislation derived from racism and the need for control. Refugees from Communist

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to ratify this Protocol.

<sup>11</sup>This was disputed by Enoch Powell who argued that 'the practice of international law which requires a country to readmit or admit its own nationals applies in our case only to those who belong to the UK and not to other Commonwealth countries, whether classified as citizens of the UK and Colonies or not' (cited in Cohen 1994: 50).

<sup>12</sup>In a case brought against the UK by the European Commission, the Commission found that this Act was in breach of the Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which prohibits inhuman and degrading treatment. The decision was based on the speed with which the Act was passed, and the fact that, in effect, it discriminated against the colour of the refugees. However, the decision of the Commission was not confirmed by a judgement of the Court (see Plender 1988: 228), which would not, in any case, have the power to force the UK to repeal this legislation, although due to the pressure, the UK did increase the number of special vouchers to approximately 5000 per annum.

<sup>13</sup>British governments have become adept at framing legislation in which the targets of that legislation are not mentioned. See Dummett & Nicol for a discussion of the 1981 Nationality Act, which without referring to black people, or non-Europeans, managed to ensure that 'virtually all the existing British nationals who were non-European and who were outside the United Kingdom were to receive a practically valueless form of nationality'(1990: 245)

regimes were few in number, so not a threat to control, and white, so not a problem for integration. On the other hand, the entry of the East African Asians, who held British passports, couldn't be controlled and they were not white, thus, it would seem, they constituted both a threat to the state and to the whiteness of the nation<sup>14</sup>.

This period marks the shift from Empire to nation, as the area of the British Empire, on which the sun never set was reduced to the United Kingdom of Britain and Northern Ireland and some small islands. This development necessitated a re-evaluation of what it meant to be British. Until this century, hostility to strangers was not based on any perceived threat to national identity: it was more likely to be as a result of economic competition, as was the case with the Elizabethan guilds. This may have been due to a certain confidence derived from an awareness of Britain as a Great Power. However, throughout the twentieth century, this confidence has been eroded and in its place there is uncertainty about what it means to be British, and the role of Britain in the world. One indication of this uncertainty is the legislation enacted with the purpose of defining British nationality and citizenship, that is, of defining who has a right of entry<sup>15</sup>.

### **The Re-emergence of Asylum 1970-1979**

The Conservative manifesto for the 1970 general election promised that future migration would only be allowed in strictly defined special cases. When, after fifty-six years, reference was again made to those who sought entry for reasons of persecution, it was at the end of the Immigration Rules (1970), as one of the reasons for granting leave to appeal against refusal of entry clearance. This did not however, change the discretionary nature of the granting of asylum, nor did it mark the emergence of a clear asylum policy. Asylum seekers were few in number and came primarily from East European countries. As such, little provision had to be made for them. A brief mention in the Immigration Rules was deemed sufficient to regulate their entry.

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<sup>14</sup>Debates in the House of Commons voiced concern about threats to the white man "It is time someone in this country spoke up for the white man and I propose to do so"(cited in Dummett & Nicol 1990: 180)

<sup>15</sup>British Nationality Act 1948 & 1981, Commonwealth Immigration Acts 1962 & 1968.

Immigration Rules do not have the force of statutory law. They are regulations issued by the Home Secretary for the guidance of immigration officials and may be changed by the Home Secretary without submitting them to parliament (this has changed since 1992<sup>16</sup>). The Rules stated that ‘where a person is Stateless or a refugee full account is to be taken of the provisions of the relevant international agreements to which the United Kingdom is a party’ and that a person shouldn’t be deported if this would mean his going to a country where he feared persecution. However, decisions on who qualified for this exemption were made at the discretion the Immigration Officer, who had the power to decide which cases to refer to the Home Office, whose decisions are beyond the reach of the courts<sup>17</sup>. It was shown in Chapter Three that, although states might sign up to various international conventions, those conventions, since they contained no supervisory mechanism, imposed no enforceable obligations on States parties, and so did not alter the discretionary nature of British asylum practice which has remained constant throughout its short and fragmentary history. This has meant, therefore, that asylum has always been unapologetically subject to domestic and foreign considerations.

The Home Secretary’s power to make Immigration Rules, and hence to stipulate the criteria for recognising asylum seekers was confirmed in the 1971 Immigration Act. Parliament has little or no control in the drafting of these rules, which specify who may enter and/or stay and under what conditions. In addition it gave the Home Secretary and the Immigration authorities extraordinary and largely unrestrained powers to detain asylum seekers. These may, without a court appearance, be detained indefinitely, and without proper information about the reasons for their detention. According to the Immigration Act (1971) an asylum seeker had the right to appeal against refusal of entry clearance. If an asylum seeker applied for leave to enter as a visitor or a student (a common occurrence, given the difficulties a dissident would have going to the British Embassy and requesting permission to enter as an asylum seeker) and was refused, s/he had a right of appeal. However, s/he could not win such an appeal, as ‘there are no

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<sup>16</sup>From 1992, MPs may request that changes be submitted for scrutiny.

<sup>17</sup>‘The 1971 [Immigration] Act does not allow the courts of this country to participate in the decision making or appellate process which control and regulate the right to enter and remain in the United Kingdom. This is not surprising. Decisions under the Act are administrative and discretionary rather than judicial and imperative’ (*Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940).

provisions in any Act or rules for entry clearance for asylum' (JWCI 1995: 96)<sup>18</sup>. Dunstan (1995: 132) has pointed out that these powers were originally intended to apply to would-be visitors to Britain who were refused entry at a port, but that, especially since the 1980s, they are being routinely used against asylum seekers. While the Home Office claims it only detains those who are likely to abscond, a closer inspection of the cases reveals the inadequacy of this explanation, and suggests instead that its primary purpose is deterrence.

### *Stepping up Control*

The 1971 Act was indicative of the government's intention to assert further control over entrance, especially of non-Europeans. The immigration controls were not applied indiscriminately to all Commonwealth citizens, only to those from the 'New Commonwealth', who are predominantly non-white. While any racial bias is disputed by the government, and while colour is not alluded to in the legislation, as Anne Dummett succinctly points out, the lines have been drawn:

...In such a way that the vast majority of British citizens, free from immigration control, are white people (at a rough estimate 54 out of a total of 57 million) while over 95 per cent of the people in the four categories of British without right of entry are of non-European descent (1986: 146).

In 1973, the year that the 1971 Immigration Act became operative, the oil crisis threw economies across the globe into crisis, in Britain unemployment was rising along with inflation, far-right parties such as the National Front were gaining support and Britain joined the European Economic Community. At the same time, several thousand refugees left Chile following the overthrow of the left-wing Allende government (Cohen 1991: 9-10). The following year, three thousand of these were admitted into Britain as quota refugees. Their cause was assisted by a new Labour government, broadly sympathetic to the Allende government, which could justify this humanitarian response. However, since this was only five years after the introduction of the 1968 Commonwealth Immigrants Act, the suspicion must remain that the colour of the immigrants may have been as significant as their ideological allegiance. Their cause would also have been aided by the fact that the

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<sup>18</sup>This anomaly was corrected by the 1993 Asylum and Immigration Appeals Act by abolishing this right of appeal.

government was in control of the number and manner of their arrival, and the credit that could be gained from assisting this group.

Although they were fleeing a Communist regime, the reaction to Vietnamese refugees by a Conservative government was different, in part because the Conservative government (and the Labour government until 1970) had supported American policy in Vietnam. Pictures of their panic-stricken flight in overcrowded and fragile boats filled the world's press. More than one million people fled to be met with almost unanimous hostility from neighbouring countries of first refuge, such as Malaysia, Indonesia, the Philippines, Singapore, Thailand and Hong Kong. The UNHCR helped to resettle many of them elsewhere by persuading other countries to take quotas<sup>19</sup>. Britain was perceived by the international community to have a special duty to those who found themselves in Hong Kong, a crown colony. Finally, under pressure from the UN, Britain agreed to take a quota of 10,000<sup>20</sup>. A third group wanting to enter Britain were the East African Asians expelled in 1972 by Idi Amin from Uganda. Fears that 50,000 to 60,000 might try to come to Britain persuaded the government to enter into negotiations with other Commonwealth countries, such as Canada and India, so that the burden might be shared. The actual number who came to Britain from Uganda in 1972 was 28,000.

Immigration had been a significant item on the political agenda throughout the 1970s, but by the end of the decade the number of people entering had dropped to a yearly average of 75,000, less than the number people leaving Britain each year. This was due less to a reduction in the causes of flight, than to Britain's capacity to shield itself from unwanted entrants as a result of the cumulative effect of legislation that minimised its obligation to

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<sup>19</sup>It was this, and the promise of financial and material aid, that persuaded some of the neighbouring countries to allow the boat-people temporary refuge. However, large numbers died at sea and more are still in camps in Hong Kong and elsewhere. A public outcry in 1990 prevented the Conservative government from forcibly repatriating Vietnamese refugees from Hong Kong to Vietnam as part of the preparations for the handover in 1997.

<sup>20</sup>Quota refugees are those who are accepted as a group, rather than selected individually, and they are usually accepted for settlement before arrival in Britain. Governments appear to accept quota refugees in response to particular humanitarian crises and requests from UNHCR. Certain factors work in favour of accepting a quota of refugees, rather than admitting individuals at ports: there is a strong element of control involved; governments stipulate how many they will take; and they are seen to be responding in a humane manner. Given the power of the British government to implement an extremely restrictive entry policy, it is surprising that it has not exploited the advantages offered by Quota refugees to any great extent.

permit the entry of aliens, including Commonwealth citizens. It would seem that Britain had no further need strengthen control of its borders. However, the immigration or 'race' card was too useful a vote-winner to be ignored.

### The Start of the Retreat 1979-1989

With the election in 1979 of a Conservative government under Margaret Thatcher, legislation to further restrict the entry of migrants escalated. Table 4.1 details the different pieces of legislation passed by successive governments this century.

*Table 4.1 LEGISLATION RELATING TO REFUGEES AND ASYLUM SEEKERS*

Year	Legislation
1905 Con.	Aliens Act (with clause permitting entry of persecutees)
1914 Con.	Aliens Restriction Act (suspension of above clause)
1919 Con.	Aliens Restriction Act (abolition of clause)
1948 Lab.	Nationalities Act (permits entry to Britain of Commonwealth Citizens)
1962 Con.	Commonwealth Immigrants Act (restricts of entry of Commonwealth Citizens)
1968 Lab.	Commonwealth Immigrants Act (removes right of entry from those without nationality)
1969 Lab.	Immigration Appeals Act (creates Immigration Appeals Tribunal)
1970 Con.	Immigration Rules (first mention of persecution since 1914)
1971 Con.	Immigration Act (subjects Citizens of New Commonwealth to further restrictions)
1973 Con.	Immigration Rules (eases entry for EEC nationals)
1980 Con.	Immigration Rules
1981 Con.	British Nationality Act (restricts British citizenship further)
1984 Con.	Immigration Procedure Rules (provides for appeals to be heard by single adjudicator)
1985 Con.	Change to Immigration Procedure Rules (introduction of visas for Tamils)
1986 Con.	Changes to Immigration Rules
1987 Con.	Carriers Liability Act (fines of £1,000 introduced for carrying passengers with false or inadequate documentation)
1988 Con.	Immigration Act (repeal of right of men settled in UK pre-1973 to be joined by their family)
1993 Con.	Asylum and Immigration Appeals Act (introduced restrictions on those who could apply for asylum in Britain and faster deportations)
1996 Con.	Asylum and Immigration Act (reduced access to social services for certain asylum seekers)

Although it could be argued that there has been more legislation on refugees and immigrants under Conservative governments simply because the Conservative party has been in government for more years than the Labour party, it is still noteworthy that all of the Conservative legislation has been restrictive. Of the three pieces of legislation brought

in by a Labour government, only one has been designed to keep people out<sup>21</sup>. The table shows clearly the Conservatives' concern with migration. Of the eighteen years that the last government was in power, new legislation or rules were introduced in nine of them, almost every year of Thatcher's premiership. While in opposition, Thatcher had used the immigration issue to mobilise a fear of being 'swamped by people of a different culture'. In the run-up to the 1979 election, she identified with the concerns of potential National Front voters in order to swing their support behind the Conservative party

Mrs Thatcher was aware of the populist appeal of racism. Immediately after she made her "swamping" remarks about immigration in January 1978, the Conservatives rose five points in the opinion polls. During her tenure support for the National Front all but evaporated (*Times* 15.2.1992).

The insertion of 'culture', a code for 'race', into the debate served to legitimate a distinction between 'us' and 'them', a distinction expressed in the 1981 British Nationality Act, which 'enshrine[d] the existing racially discriminatory provisions of immigration law under the new clothing of British citizenship and the right of abode' (Macdonald cited in Solomos 1993: 71). Although primary immigration had virtually ceased and entry to Britain could now only be achieved via family reunion and applications for asylum, the call to restrict immigration further was perceived as a definite vote winner<sup>22</sup>.

As a result, the 1980s in Britain saw a number of changes in the Immigration Rules in order to increase the power of the Home Office to control entry. The three main areas of change were appeals (Immigration Rules); visas (Immigration Rules); and the introduction of the Carriers' Liability Act (1987). The practical details of the appeals system set up by the Immigration Acts were amended by the Immigration Procedure Rules (1984), which provided for appeals to be first heard by a single adjudicator. If the appeal was lost, the applicant then had the right to appeal to the Immigration Appeal Tribunal. People who were refused asylum did not have a separate appeal system.

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<sup>21</sup> Given the manner of its introduction and the content of the 1968 Commonwealth Immigrants Act, this should not necessarily be a source of pride for the Labour Party. The 1948 Act guaranteed rights of entry to all Commonwealth citizens, and the 1969 Immigration Appeals Act set up an Immigration Appeal Tribunal to hear appeals against decisions to refuse entry. However, the government amended the bill before the final reading to require entry certificates from dependants. Should applications for these certificates be refused, appeals would have to be submitted by post.

A new hurdle for asylum seekers was erected by introduction of visa requirements the following year. Without a visa, potential claimants are unable to embark on the journey to Britain. The Immigration Service appears unconcerned that it may be very difficult for a dissident to obtain a passport from the authorities who might be persecuting her. As Robin Cohen (1994: 83) and Erika Feller (1989:64) have pointed out, visiting the British embassy to obtain a visa may in itself be seen as a subversive act. Interestingly, visas are either not required for those who are attempting to enter Britain from non-refugee-producing countries, or are much easier to acquire, but they are introduced whenever numbers of refugees from a particular country increase substantially. The Tamils in 1985 were followed in 1989 by Turkish nationals, when Kurds were fleeing Turkey and in 1991 by Ugandan nationals.

Possibly the most significant piece of legislation to be passed in the 1980s was the Carriers' Liability Act (1987)<sup>23</sup>. The sole purpose of this Act was to reduce the number of immigrants reaching Britain. The effect for asylum seekers was to create another hurdle to be overcome before they could leave their country of origin. The Act made carriers liable for passengers who travel without papers or with incorrect papers. Initially fines were set at £1.000<sup>24</sup>. Ticket clerks of airline and shipping companies were turned into unofficial immigration officers, with the right to refuse passage to anyone not in possession of valid passports and visas. This contravenes the spirit if not the letter of Art.31 of the 1951 Convention, which prohibits the imposition of penalties for unlawful entry<sup>25</sup>.

In spite of these new restrictions, most of these people could not be returned to their country of origin. In these cases, Exceptional Leave to Remain was granted. This status is

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<sup>22</sup>This remained a Conservative strategy throughout its eighteen years in government.

<sup>23</sup>This followed an incident at Heathrow airport involving 58 Tamil asylum seekers, who arrived without valid documents. The Home Office decided to detain the Tamils pending deportation. However, after a widely reported protest by men during an attempt to deport them, and representations by lawyers, the Tamils were allowed to put their case, and most were allowed to remain.

<sup>24</sup>Since increased to £2,000.

<sup>25</sup>As Cohen points out, the Carriers' Liability was not without precedence: Very little has changed since 1905. The Aliens Act was interpreted in such a way that those awaiting a decision on entering the country and those refused entry had to be kept on board the same boat on which they arrived- and the detainee escaped' (Cohen, S 1988: 15).

much less secure and carries far fewer rights than asylum<sup>26</sup>. Without granting either refugee status or asylum, it allows an asylum applicant, or those fleeing events such as civil war (who are not eligible for refugee status) to remain temporarily until conditions in their country of origin improve sufficiently to permit their return. The government originally claimed that it was granted on compassionate grounds, but then, in the debates leading up to the 1993 Act changed tack and said it was granted to those whose length of stay in Britain made it difficult to remove them<sup>27</sup>. In this way, it attempted to remove the moral obligation which might be owed to such people, and justified granting it to far fewer. The advantage for the state of granting ELR, rather than asylum, is that it does not grant claim rights against the state, and the state retains the option to withdraw leave and deport those granted ELR, that is, the State remains in control. However, ELR also allows the government to point to the very low recognition rates and to use these as evidence of mass abuse of the system necessitating new and draconian measures to deal with the 'cheats' even though by the end of the eighties the Home Office had at its disposal all the instruments required to control entry into Britain. And so, within a few years, the Conservative government once again began to argue for new legislation.

### **1989 to the Present**

The primary factors underlying the debate at the beginning of the nineties were not dissimilar to those at the end of the Second World War: but now it was the end, rather than the beginning of the Cold War, which meant an increase in the number of people coming from Eastern Europe, while the numbers coming from Africa and Asia remained constant; the crisis, rather than the creation, of the welfare state; unemployment rather than a labour shortage; and whereas, after the war, Britain's identity as the centre of the Empire was crumbling, it was now Europe which seemed to pose a threat to British identity and sovereignty, especially as a result of the drive to open internal borders. Each of these threats were presented as a function of the numbers coming to Britain, and the apparently inevitable conclusion was that the admission of asylum seekers had to be

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<sup>26</sup> Although it is not a legal status under the 1951 Convention, Britain is not the only state to grant it.

<sup>27</sup> While ELR is still granted to more applicants than asylum, prior to 1993, the percentage of ELR granted was considerably higher.

curtailed. Since the numbers were in fact very small, and decreasing, this focus on asylum requires some explanation.

In the light of the analysis provided in Chapter Two, a simple explanation might be that the costs of granting asylum had come to outweigh the benefits, in other words, the most important condition necessary for granting asylum was no longer in place in Britain. It may have seemed as though asylum no longer served any obvious purpose for the state - Britain has no longer any need for refugees as a source of labour or skills and with the demise of the Soviet Union it is no longer needed to legitimate one ideology over another. And yet such an explanation does not suffice. Although Britain has restricted access to asylum, it has not renounced it altogether.

The debates leading up to the introduction of the 1993 and 1996 Acts, the first to deal almost exclusively with asylum, while exposing certain party differences, also revealed areas of broad consensus, both between the main political parties and within the general population. None of the representatives of the different parties suggested that Britain cease to grant asylum. All agreed that that the granting of asylum was the mark of a civilized and liberal state and that Britain had certain legal and humanitarian obligations. Occasionally reference was made to the benefits Britain derived from this practice, but there was a sense that it should be granted even where there were no benefits to be had. This Britain emerges as a liberal state, in which citizens and non-citizens alike are protected by the impartial rule of law, a state linked by historical ties of empire and universal humanitarian obligations to the rest of the world. It is a Britain that is open, confident and secure.

On the other hand, there were concerns related to numbers - 'that Britain would be swamped unless European leaders acted fast to close weak borders' (Douglas Hurd, 1991 Conservative Party Conference); and to the types of people who were coming - 'bogus refugees and illegal immigrants' (Daily Express 4.11.1991), who, being poor, entailed costs to the welfare state, and therefore to the tax-payer, and being foreign, placed

demands on tolerance (Churchill, *The Times* May 31, 1993)<sup>28</sup>. This Britain is an overcrowded island 'if one keeps filling the pot with water it will overflow' (Terry Dicks, Col.1148, 13.11.1991)<sup>29</sup>, with a distinctive, but threatened national identity, a welfare state already in crisis, but threatened further by newcomers, who can now gain access through the European Union, which it seems has breached Britain's sovereignty. Unlike the first characterisation, this Britain appears closed, threatened and insecure.

The 1993 Act was the culmination of a prolonged campaign by the Conservative government, aided and abetted by the right wing press (Kaye 1994; 1998a; 1998b; 1998c) to create an image of a besieged Britain, endangered by 'sponging', culturally alien hordes. When Kenneth Baker announced that he would introduce an Asylum Bill he argued that the impetus came from the number of 'bogus' applicants 'I believe that the rapid rejection of a large number of unfounded claims and the early departure of those applications...will play a major part in deterring further abuse of the process' (*Guardian* 3.7.1991). Throughout the debates following each reading of the 1991 (and 1992) Bill, references were made by the majority of speakers to the problem of 'bogus' asylum seekers, and to the costs involved. The Bill came under attack from the opposition (though they did flirt with the idea of a compromise before the election) as well as a variety of NGOs, but was eventually abandoned due to the approaching 1992 election. However, it did feature towards the end of the election campaign, used by the Conservatives to attack Labour by blurring the distinction between immigration and asylum. Kenneth Baker<sup>30</sup> warned that large-scale immigration was responsible for the violent attacks on foreigners in Germany. Picking up the theme, *The Sun* (4.4.1992), under the headline 'Human Tide Labour would let in', argued that Labour would let in 'tens of thousands of immigrants' if they won the election (cited in Kaye 1994<sup>31</sup>). Layton-Henry argued in 1993 that the Conservative were 'desperately playing the race card in a last ditch attempt to win an election' (1993: 26).

<sup>28</sup> For a detailed analysis of press coverage of the asylum/refugee issue between 1990 and 1996, see Ronald Kaye (1998) 'Redefining the Refugee: The UK Media Portrayal of Asylum Seekers' in *The New Migration in Europe: Social Constructions and Social Realities*, Khalid Koser ed., Macmillan, Basingstoke.

<sup>29</sup> In the same debate, see also Roger Gale, Col.1109, David Evans, Col.1113

<sup>30</sup> Kenneth Baker was not alone in his claims, the debates in Hansard are full of such warnings.

<sup>31</sup> Much of the material for this section came from Ron Kaye's articles on asylum and the political agenda

### *The Numbers Game*

Given the actual numbers coming into Britain, the fact that in the two years prior to the introduction these numbers were going down, the government was extraordinarily successful in constructing a problem out of nowhere. It did this by effectively ignoring one set of numbers - those coming - and focusing on another, the numbers actually granted asylum. It was helped in this strategy by the fact that the Labour Party failed to focus attention on the small number of entrants (although Tony Blair did point out, albeit only in passing, that the figures had halved in 1992, *Hansard* Col.36, 2.11.1992) and accepted that the numbers of 'bogus' asylum seekers were a real problem (see Blair as above). As can be seen from table 4.2 below, numbers had remained pretty constant during the ten years up to 1989, only exceeding 6,000 in 1980. The figures that gave rise to concern were those for 1989, 1990 and 1991. However, it should be borne in mind that these numbers were not large by comparison with the numbers of people who had come to Britain in the early 1960s. If one adds asylum seekers to the number of those accepted for settlement (see table 4.2), the numbers entering Britain have remained fairly constant. Whether this is because, or in spite, of the legislation introduced during the past twenty years is a matter of argument.

*Table 4.2 Total Applications (acceptances for settlement + asylum seekers)*

1994	32,831	(88,500)	1986	4,266	(50,000)
1993	22,370	(78,000)	1985	4,389	(60,000)
1992	24,600	(77,000)	1984	2,905	(54,000)
1991	44,840	(98,000)	1983	4,296	(57,500)
1990	26,205	(78,000)	1982	4,223	(59,000)
1989	11,640	(60,500)	1981	2,900*	(61,000)
1988	3,998	(53,300)	1980	9,900*	(79,500)
1987	4,256	(50,000)	1979	1,600*	(72,500)

(fig.1 sources: 1985-1994 British Refugee Council and Home Office Statistical Bulletins, 1979-1984 Layton-Henry 1994: 278 \* approximately. The figures in brackets are approximate since they are compilations of different Home Office statistics, but as approximations they still serve to indicate a general trend.)

As can be seen from table 4.2, while the number of entrants has fluctuated in the fifteen years covered by the table, the proportion of asylum seekers who make up the total has been increasing. In 1989 the numbers of asylum seekers increased by 192% and the following year by 126% and in 1991 by 71%. Given the events in Eastern Europe at the time, these increases were unsurprising. What is less easy to explain is why the proportion

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(1994, 1998a, 1998b, 1998c).

of migrants was reducing. In response to the growing number of asylum seekers, and Britain's inadequate legislative provision, Jeremy Corbyn introduced a bill to create a refugee protection agency to decide requests for refugee status, a refugee review board to hear appeals and to introduce a charter of rights for asylum seekers and refugees. This never got beyond the first reading. Instead, the government quickly attempted to introduce their own restrictive legislation. The decrease in numbers in 1992 and 1993, in spite of the escalating war in Yugoslavia, which might have been taken as proof of Britain's ability to control entry, did not cause the government to abandon this attempt. The official explanation for the falling numbers is that they were a result of measures introduced in November 1991 'to deter multiple and other fraudulent applications' (Home Office Statistical Bulletin 15/97). The number of prosecutions for such attempted fraud is very few (a handful), and it is very unlikely that fraudulent and multiple claims would have accounted for a reduction of 22,400.

Although in absolute terms the numbers themselves were not large, it was argued that following the collapse of the Soviet Union, there was the *potential* for an uncontrollable influx. In 1992, Kenneth Baker, the then Home Secretary warned, 'There could be 7 million people seeking exit visas from Russia'<sup>32</sup>. The figures in table 4.3 reflect events such as the opening of East European borders in 1989 and the start of the Yugoslav conflict, while placing in context the number of asylum applications to Britain (see figures in italics below). 1989 saw an increase in the number of applications to each of the countries below. In 1990, numbers increased again in Britain, Switzerland and Germany, while Sweden saw a slight dip and France a reduction of 9,000. These trends continued in 1991, with increases again in Britain, Switzerland and Germany. However, although the numbers of refugees from Yugoslavia entering Germany and Switzerland had increased, very few of them arrived in Britain. It was not until the following year (1992) that these refugees suddenly appeared at the top of the list of people applying for asylum in Britain (see Chapter Six, table 6.2). However, the total number of applicants to Britain fell in

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<sup>32</sup>More realistic estimates suggested 1-2 million might apply. Even these were too high. The expected 'flood' did not materialise. According to the UNHCR report cited above, Russian citizens have not come in large numbers. The same report compiled a 'Top 10' list of countries of origin for the years 1988 - 1992. While Turkey and the former Yugoslavia have been in the top 3 in each of those years, Russia wasn't anywhere to be seen.

1992 to 24,600, while the numbers of applicants to Germany and Sweden increased dramatically. This was due, in the case of Sweden, to the large number of quota refugees it took in, and in Germany to geopolitical factors (see next chapter). France and Switzerland mirrored the trend in Britain that year.

*Table 4.3 Number of Asylum Applications (in thousands)*

<i>State</i>	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
Brit.	4.3	3.9	5.5	4.8	5.2	5.3	11.6	26.2	44.8	24.6	22.4
Switz.	7.9	7.5	9.7	8.6	10.9	16.8	24.4	35.9	41.7	18.2	24.7
Swed.	3.0	12.0	14.5	14.6	18.1	19.6	30.4	29.4	27.4	83.2	37.6
Fr.	15.0	16.0	25.8	23.5	24.9	31.7	58.8	49.8	45.9	26.8	27.6
Ger.	19.7	35.3	73.9	99.7	57.4	103.1	121.3	193.1	256.1	438.1	322.8

(Source: UNHCR Report 1994 *Die Lage der Flüchtlinge der Welt* s.173. \* The original UNHCR figures were estimates. I have replaced them with the published Home Office figures for those two years. In the same report a list of the 50 countries with the largest number of refugees relative to population places Sweden at #12 (1:26.7), Denmark at #30 (1:88.9), Germany at #33 (1:97) and Switzerland at #49 (252.3). Neither France nor Britain appear on the list).

These figures were ignored in the debates. Instead, attention was focused on the question of fraud and recognition rates in order to deconstruct the 'morally untouchable category of the deserving political refugee' and to introduce the 'disguised economic migrant' (Cohen 1994: 82). In this way the government could retain the moral high ground, and demonise the majority of applicants, providing itself with a useful scapegoat for other ills. Having first argued that the purpose of the bill was to prevent 'bogus' asylum applicants from gaining access to Britain and the benefits it provided, the government went on to assert that Britain could not afford to take all of the 'genuine refugees' who might wish to come. This argument was used to justify those provisions that would affect 'genuine' asylum seekers, such as the 'safe third country rule'.

#### *Recognition Rates and Fraudulent Claims*

One argument was that asylum seekers constituted a problem out of proportion to their size, if only because they could apparently multiply themselves at will. Kenneth Baker cited the case of 'Eight asylum seekers [who when] arrested in August [1991] were found to have made 100 asylum and social security applications between them<sup>33</sup>', (*Hansard* 21

<sup>33</sup>Elder statesmen of the Conservative party were not above enlisting the assistance of the tabloid press. Norman Tebbit, in the debate on the abandoned Asylum Bill (*Hansard* 21.1.1992 Col 199), referred to an article in the *News of the World* (a 'newspaper' not renowned for the accuracy of its claims), which reported the case of a Mr Avedila, who with the (unwitting) assistance of the British Refugee Council, had created fifteen different identities for himself (purporting in each case to be an asylum seeker) and was claiming the

November 1991, Col 1090). Without denying the costs to the taxpayer (and the damage done to the credibility of other asylum seekers), these cases amounted to less than a couple of hundred, out of a total of more than 44,800 applications that year. However, such scare stories were coupled with what had become very low recognition rates.

Grants of asylum had sunk from a high point of 31% (2,210) in 1989, to 23% (920) in 1990, 8% (505) in 1991 and 3% (1,115) in 1992 (Home Office Statistical Bulletin 17/94). On the basis of two years, 1991 and 1992, reports in the press referred to the tiny percentage of 'genuine' refugees, ignoring those granted ELR<sup>34</sup>, or those who were granted asylum on appeal<sup>35</sup>. However, further examination of the Home Office statistics reveals that the majority of applicants prior to the 1993 Act, were either granted asylum (24% 1985 - 10% 1993), Exceptional Leave to Remain (57% 1985 - 76% 1993), or permitted to stay pending appeal, or a decision on their application. So, until 1993, it was recognised that the majority of people *should* not be returned to their countries of origin, either because, according to the Geneva Convention, they feared persecution on the grounds of their race, religion, political opinion or membership of a social group, or because conditions in their country of origin made it dangerous to return. Only a minority were deemed undeserving of any protection, before the passage of the AIAA (1993). It is not the increase in the numbers reaching European countries which is surprising, but rather the ability of Britain to keep these people at arms length. This increase in the number of refugees applying for asylum in Europe cannot be simply explained away as an increase in the number of 'economic migrants', but is due instead to the documented increase in the number of refugees generally. The Act did not address or refer to the causes of flight. Instead, it merely redefined those who were eligible to apply, reducing numbers who are granted asylum or permitted to remain legally by introducing criteria that are almost impossible to fulfil<sup>36</sup>.

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maximum amount of housing and other benefits. According to Mr Tebbit, Mr Avedila had since left the country under yet another name, making verification of the story difficult.

<sup>34</sup> 55% (3,860) in 1989; 60% (2,400) in 1990; 36% (2,190) in 1991; and 44% (15,325) in 1992.

<sup>35</sup> Statistics unavailable

<sup>36</sup> Britain is not alone in this. Redefining refugees out of existence is the preferred solution of the Northern/Western states.

It is worth recalling that the claims that 'many people are now using asylum claims as a means of evading immigration control'<sup>37</sup> were being made just as the war in Yugoslavia was forcing millions to flee ethnic cleansing. Rather than suggest that, as Britain has the power to control entry to a greater degree than other European states, and receives far fewer refugees than France or Germany, it could take in quota refugees<sup>38</sup>, the British government failed initially to take advantage of this propaganda opportunity, and in 1992 introduced visas for those fleeing the Yugoslav conflict. In November of that year, the government did announce that it would be willing to receive 1,000 ex-detainees and their dependants (estimated at a further 3,000) from Bosnia and other parts of the former Yugoslavia on an exceptional basis, for an initial period of six months. However, eighteen months later, less than 1,600 had been admitted. Unsurprisingly then, the government decided within two years to introduce new legislation. One weapon against the increase was to be the introduction of a white list. In 1995, Michael Howard suggested that this would include Pakistan, Cyprus, Ghana, India, Bulgaria, Poland and Romania. Speculation that Nigeria would be included on the proposed white list caused outrage, although the government had already been operating such a list unofficially (of more than 2,000 claims from Nigeria in 1995, only one was granted asylum and two Exceptional Leave to Remain).

Although applications from African states constituted 51% of all applicants in 1995, and 37% in 1996, only 6% of those recognised as a refugee and granted asylum in 1995 were from Africa. In 1996, it was 9%. The reluctance of the British government to grant secure status and the right to permanent residence to asylum seekers from Africa is further highlighted by an examination of the countries of origin of those given Exceptional Leave to Remain. In 1995, 48% of grants of ELR (a status that can be revoked when the government decides circumstances have changed sufficiently for the asylum seeker to return) were to Somalis, who received 71% of all grants of ELR in 1996. Asylum seekers from Asia have even less chance of being allowed to remain. Although asylum seekers

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<sup>37</sup> Kenneth Baker, Home Secretary, Second Reading of the Asylum Bill, November 1991

<sup>38</sup> According to Home Office Statistics, the total number of refugees resettled-quota refugees plus individual asylum grants-in the UK during the eighties was 14,897. This is a tiny fraction of those resettled in Austria, France, Germany or Sweden.

from Asia<sup>39</sup> accounted for 25% of applicants in 1995 and 1996, the numbers from this region actually granted asylum in those years were 60 (4.5%) and 50 (2.2%) respectively. Of those Asians granted ELR (20% and 9%), most were from Afghanistan (695 out of 895 in 1995 and 415 out of 480 in 1996), which like Somalia, is a state that has collapsed.

## Threats

All of these statistics were used to support the claims that Britain was facing a crisis, that these people constituted a threat to Britain, to its welfare state, to its identity and to its existence as a liberal polity. In this section, these threats are examined in greater detail.

### *Threat to the Welfare State*

At the same time as the numbers of people seeking refuge in Britain increased, it was facing economic difficulties. In 1990-91, rising inflation, a worsening balance of payments and a fall in industrial production saw Britain enter a period of deep and prolonged recession. In the drive to cut public spending benefit fraud and cheats were targeted. By focusing on the tiny percentage of applicants who were actually granted asylum, asylum seekers were targeted as cheats - a drain on the public purse (the tabloid press focused on the numbers of applicants granted Convention status *at the first hearing*, ignoring the numbers actually permitted to remain legally):

By claiming asylum, those who have no basis to remain here can not only substantially prolong their stay, but gain access to benefit and housing at public expense...Of the 40,000 asylum applicants currently being supported on benefit, very few will be found to merit asylum or exceptional leave to remain...My right honourable friend the Secretary of State for the Environment has concluded that the same arguments apply in relation to social housing (Michael Howard Hansard 20 November 1992, Col.336)<sup>40</sup>.

These 'bogus' refugees were depicted as 'illegal' immigrants exploiting Britain's 'lax' asylum laws to take advantage of Britain's welfare benefits:

<sup>39</sup> Afghanistan, China, India, Pakistan, Sri Lanka

<sup>40</sup>The previous Home Secretary, Kenneth Clarke put it another way a few weeks earlier, 'Open entry to anyone who managed to get to our frontier, or into our territory from a third-world, troubled country would lead to terrible pressures on our employment, on our housing, on our social services, on our health system and on our education system. If we are to generous, it is the population of our inner cities, our urban poor and our homeless who will be the main sufferers from misguided liberalism' (Hansard 2 November 1992,

the easiest way to clamber on board the Great British Gravy Train is to enter the country on a visitor's visa or slip in illegally. Then if you're caught, just claim political asylum (Daily Mail 13/3/95).

In response to the alleged burden on the welfare state, local Authorities were relieved of the duty to accommodate asylum seekers awaiting a decision, once they have temporary accommodation, even if this is only a floor in a church or a volunteer's home. The Member for Harborough summed up the argument thus:

Our duties to our citizens include the duty to protect our welfare and benefit budgets and our housing system at a time of economic stringency...Those who should not be here but who have got round the system by false applications are of no benefit to our own people (Edward Garnier, Hansard 2.November 1992 Col.61)

Nonetheless, even after 1993 Act curtailed access to housing, it was still felt that Britain offered too many incentives by way of benefits and the government followed the AIAA with the Asylum and Immigration Act 1996. This Act restricted access to child benefit, housing and other social security benefits, as well as extending the scope of the 'fast track' asylum appeals procedure with the introduction of 'White Lists' (Gillespie 1996: 86). The new housing provision provides that only those who apply for asylum within three days of entry, and are without temporary accommodation, will be entitled to housing. This time restriction also applies to child and social security benefit claimants.

#### *Threat to British Identity*

There appears to be a perception that those coming are 'more' different than previous entrants, that they will change British identity. In spite of the increase in numbers coming from Europe, approximately half of all asylum seekers come from Africa and Asia. The arrival of people from very different cultures was referred to during the debates on both Bills (Hansard Kenneth Baker, Col.1088, John Carlisle, Col.1133, 13.11.1991), provoking accusations of racism from opposition members who rose to speak. These fears were particularly evident during the Salman Rushdie affair (Cohen 1995: 191; Solomos 1993).

As Loescher puts it:

It is not only the increasing costs of processing requests for asylum from developing countries, but the gulf between the cultural backgrounds of contemporary refugee groups and that of Europeans that causes problems. Most European governments have serious reservations about the ability of these new arrivals to adjust to life in Europe, and about the willingness of their own people to tolerate aliens in their midst...Northern governments, most notably in Western Europe, *find themselves obliged* to apply ever stricter restrictions on immigration (Loescher, 1992: 19, emphasis added).

Given the small number of refugees entering Britain, relative to other European state, it is difficult to understand this perception of a threat to British identity, even if that identity is conceived in terms of colour, religion or shared history. In the discussion of the Asylum and Immigration Bill the exclusionary elements of the Bill were highlighted, not just by Labour, migrant groups and the left-leaning broadsheets, but by members of the Government. Gillian Shepherd, Minister for Education and Employment pointed out that that the requirement that employers check the immigration status of new or potential employees could make employers even more reluctant to take on black workers (Guardian 17.11.95). The consistently reiterated argument used to support both the 1993 and 1996 legislation, that curbs on immigration and the numbers of asylum seekers was necessary to promote good race relations 'seems to suggest that black people invite racism on themselves just by their mere presence' (Riyait, Letters, Guardian 13.12.1995). The Economist came out strongly against the bill:

Foreigner bashing is reckoned to be popular; and since Labour has to consider the sensibilities of its black and brown supporters, it is one of the few policies on which the Tories can claim leadership (though Labour's record o immigration is actually similar). Nevertheless, by promoting anti-immigrant policies the government risks encouraging racism and undermining liberty. It deserves contempt, not votes, for proposing this nasty little bill (9.12.1995).

If one takes seriously the claims that liberal, humanitarian and 'civilized' values and tolerance are an integral part of what it means to be British, then it is this restrictive legislation which constitutes a threat to British identity.

#### *The Threat to the Liberal State*

The counter argument suggests that the liberal polity itself was endangered by refugees. The only time that the proponents of the Bill alluded to the fact that most asylum seekers

arriving in Europe went to Germany was when warning of the consequences large numbers of asylum seekers would have for social harmony, that is racial violence, hostel burning and the rise of the far right. Douglas Hurd, the then foreign secretary, chairing an informal meeting of EC foreign ministers in 1992, said that Britain could not increase its refugee intake. The government would not risk a resurgence of the racial tension and “considerable political and economic dislocation” seen in the 1960s and 1970s (The Times 14.9.1992). Again, during the Second Reading of the Bill, members held up the spectacle of the violent attacks on hostels for asylum seekers in Germany as a warning of what might happen in Britain if the influx of asylum seekers was not checked:

A vast horde of aspirant economic migrants is creating pressures in Europe, leading to political responses that are extremely distasteful to democrats...We should face up to the fact that the United Kingdom is not immune to such pressures...We have good race relations, and, by and large, the days of National Front marches are gone; but that improvement is based on public trust in our tight immigration controls. If those controls are doubted, we shall risk a resurgence of the National Front and other such nasty activists (Jacques Arnold Hansard 2.11.1992, Col.71)

Opponents of the bill, mostly though not exclusively on the labour benches were accused of offering an ‘open door’ policy which would fatally damage the race relations in Britain

Kenneth Baker, the home secretary, formally announced the bill to cheers at last year’s Tory party conference, where he accused his Labour opposite number of ‘attempting to pander to ethnic minorities’ (The Times 15.2.1992).

However, The Times, normally a supporter of the government, went on to warn of the consequences of such attacks:

His supposed crackdown on ‘bogus’ refugees inspired a stream of vitriol in the popular press against a ‘flood’ of illegal immigrants. Mr Major should tell his ministers to button their lips in the run-up to the election, even if a bill would still be introduced should he win.

Two cases illustrate a different kind of threat to the liberal polity. In 1990, when the British government attempted to forcibly expel some of the Vietnamese held in camps in Hong Kong, what Hollifield refers to as ‘embedded liberalism’ (1992: 28), that is, the liberal values of the British public, restrained government actions. Given that pictures of these people fifteen years previously had been beamed into our homes, and that they preferred to live in appalling conditions in Hong Kong detention camps rather than be returned to Vietnam, the engagement of public sympathy is understandable.

The case of Al-Masari is interesting, however, because he is painted as a fundamentalist and therefore hostile to Britain's liberal values, and as a clever and capable man, and therefore dangerous. However, a commitment to those same liberal values entails granting asylum to those who, like Al-Masari, fear persecution for their political opinions. The situation became even more complicated when the government, sensitive to the needs of certain British companies wishing to do business with Saudi Arabia, Al-Masari's country of origin, had to choose between competing obligations - to the interests of capital and to its liberal values. In spite of an initial decision to remove him from Britain, the outcry at the abandonment of liberal principle forced the government to allow him to stay. Joppke (1998: 109-52) has identified the significance of adherence to liberal principles as internal restraints on the exercise of state sovereignty. By extension, it can be argued that the greatest danger to the liberal polity is from the state itself (Official Secrets Act, Prevention of Terrorism Act, Criminal Justice Act).

#### *Opposition to the Bill*

The Labour opposition, instead of using such data to rebut the spurious claims from the proponents of the bill, chose to accept the government's claims, that there were 'too many' applicants and that many were 'bogus'. Roy Hattersley, for example, while arguing against the bill, accepted the basic premise of the government's argument:

Let us make clear-beyond doubt I hope that bogus asylum seekers must be prevented from entering the country. This is an honourable and sensible objective and our amendment reflects our determination to ensure that bogus asylum seekers are identified and denied entry (Roy Hattersley, cited in Greater Manchester Immigration Aid Unit 1993: 7).

As a result, during the course of the debates, senior members of the opposition concentrated on the details of the bill. Blair stressed the impact that certain measures, such as the curtailment of leave for those making an in-country application, the accelerated appeals procedures which would affect many more asylum seekers than those whose claims were 'manifestly unfounded' and the removal of certain rights to appeal would have on 'genuine' asylum seekers ([Hansard](#) 2.11.1992). During the second reading of the original 1992 bill, there was some concern on the government benches about the proposed

withdrawal of legal aid for immigration and asylum cases, and a cross-party motion (early-day motion 130) was submitted to that effect. However, it was left to backbenchers such as Max Madden, Jeremy Corbyn, Bernie Grant and Robert MacLennan to point out the racist nature of the bill (Hansard 2.Nov.1992, Col.65). There was also some disquiet about the bill in the Lords. During the bill's second reading in the Upper House, two of the Law Lords, Lord Taylor and Lord Woolf expressed concern over the draconian removal of the right of appeal, 'an inevitable consequence of the present proposal if they are enacted is that they will lead to a substantial increase in the number of applications for judicial review' (Hansard 1993).

Outside parliament, opposition to the 1993 Act came from a number of sources, including the Refugee Council<sup>41</sup>, Amnesty International, the Joint Council for the Welfare of Immigrants, as well as more radical groups, such as the Greater Manchester Immigration Aid Unit. While the latter took the initiative in the campaign against the 1993 Act, the Unit's radical demands for an end to all immigration controls failed to pull together a broad-based coalition<sup>42</sup>. Nonetheless, there was co-operation. Since 1990, when the government announced a review of asylum procedures and threatened to end legal aid, representatives of AI, the Refugee Council, JCWI and the Refugee Legal Centre had met monthly. Although each group did its own briefings to government, there was a division of labour. JCWI concentrated on appeals, the Refugee Council on welfare issues and AI on protection. A letter writing campaign was organised<sup>43</sup>, including, according to Peter Lloyd (Hansard Col.432, 26.11.1991) 200 from MPs and 820 from the general public, most of whom were members of AI, Charter '87, and the Asylum Rights Campaign.

According to Jan Shaw of AI<sup>44</sup>, the campaign against the 1993 Bill contributed to two victories - the retention of legal aid, which had been threatened, and the extension of a right of appeal to everyone rejected (though latter was due more to the European Court

<sup>41</sup> Although European Council on Refugees and Exiles did not get directly involved in the 1993 or 1996 campaigns, they did supply the Refugee Council with comparative studies and statistics.

<sup>42</sup> According to Jude Woodward of the CAIAB in a personal interview 26.May 1998.

<sup>43</sup> In response to a letter from an AI member, Richard Needham MP wrote 'the amount of money spent on dealing with asylum seekers is some 60 times greater than the amount of money donated by the Western world to the UN for refugee agencies' (11.3.92, AI archive).

and the former to the Law Lords). The campaign against the 1996 Bill was far more broadly based. In June 1995, Diane Abbott convened the first meeting of twenty different organisations in the House of Commons. The headquarters of the Coalition Against the Immigration and Asylum Bill was at the offices of the National Assembly Against Racism (NAAR), and included all of the established groups already mentioned as well as more radical groups, such as the No Pass Laws Campaign and the Movement for Justice (three of whose members covered Brian Mawhinny in orange paint during a reading of the bill). The Bill was attacked on a number of grounds, including the reintroduction of measures to deprive asylum seekers of benefits, measures already condemned by the Commission for Racial Equality as 'anti-black and xenophobic' (*Guardian* 24.11.1995)<sup>45</sup>. The introduction of the white list too gave rise to accusations of racism. This loose coalition included many in the Lords (who amended the bill so that those applicants who applied within three days instead of one, would not lose their entitlement to benefit) and from some on the government backbenches, notably Jim Lester, who backed Labour's (unsuccessful) call for the Bill to be sent to a Special Standing Committee for Scrutiny.

However, in spite of mass lobbies of parliament, demonstrations, the formation of local groups such as WALFAIR (Waltham Forest Asylum and Immigration Rights Group), the Close Down Harmondsworth Campaign, support from Stonewall, Unison, the National Council of Hindu Temples, the Graphical, Paper & Media Union, the TGWU and many dozens more, in spite of submissions from many different groups, in the words of Jan Shaw 'we had no effect on the bill at all'<sup>46</sup>. The government forced through the legislation and its effects were quickly felt.

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<sup>44</sup>Personal interview, 25.May 1998

<sup>45</sup>Peter Lilley's attempt to introduce regulations that prevented asylum seekers whose initial application was rejected, and who decided to appeal, from receiving benefits while awaiting a final outcome, was quashed by a ruling of the Court of Appeal (21.6.1996), on the basis the minister had over-stepped his powers and failed to consult parliament. Lord Justice Brown went further, stating that no civilised country could tolerate such treatment. The court of appeal also judged that the denial of temporary housing to asylum seekers was unlawful. Lilley reacted by including both measures in the 1996 Act, and the courts were chastised by Michael Howard in *The Times* 25.6.96 and by the *Telegraph* 22.6.96.

### *The Impact of the Acts*

If the purpose of the 1993 Asylum and Immigration Act was to reduce the number of asylum applicants entering Britain, then it must be judged a failure. The numbers of applicants actually went up from 22,400 in 1993, to 33,000 in 1994 and 44,000 in 1995. As pointed out in the Home Office's Statistical Bulletin (9/96: para.2), 'in Europe, only the United Kingdom saw a significant increase in the proportion of applications made since 1994'. The reasons for these increases are not easily discerned, but the Conservative government argued that the benefits to which asylum seekers were entitled while going through the asylum process were part of the problem<sup>47</sup>. The government then introduced further legislation, which made asylum seekers dependent on charity in order to survive in Britain. The purpose of this legislation was to deter potential asylum seekers at the point when they were choosing a possible destination. Yet by the time the 1996 Act had reached the statute books numbers had already dropped sharply, down to 27,900 in 1996 from 43,900 the previous year, 1995.

So far in the discussion has been on the different forces shaping asylum arrival in statutory law. But what exactly is the status of asylum in Britain at the end of the second millennium? It continues to be granted, but only to a select few, ELR is still in use though much reduced, and the numbers who manage to actually put in a claim for asylum are once again decreasing, in spite of the increasing number of refugees globally. In order to 'enjoy asylum' in Britain, one should come from certain countries where there is 'a general threat of persecution'<sup>48</sup>, one should gather documentary evidence of persecution, a passport and a visa (but it must be for the purpose of claiming asylum, otherwise one is liable to prosecution for deception - unfortunately Britain does not grant such visas)<sup>49</sup>, one should

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<sup>46</sup> Personal interview, 27.5.1998.

<sup>47</sup> During the debate on the Asylum and Immigration Bill ([Hansard](#) Col.1703, 20.11.1995), Michael Howard, the then Home Secretary argued that 'The present benefit rules are an open invitation to persons from abroad to make unfounded asylum claims'.

<sup>48</sup> The so-called 'White List'.

<sup>49</sup> If a refugee has managed to arrive at a British port or airport by using false documents, a common practice given the difficulties outlined above, s/he can also be removed without examination of the claim (Immigration Rule 7.2). This is in direct contravention of Article 31, of the UN Convention '*[penalties shall not be imposed] on account of their illegal entry or presence*'.

fly or sail directly to Britain, with no stops en route<sup>50</sup>, one should make the claim within 48 hours of entering Britain, and one should disclose all relevant (in the eyes of the Home Office) information immediately on arrival. Furthermore, it is important to have sufficient funds to engage a solicitor and a barrister, and to pay for accommodation and sustenance.

Given the difficulty of obtaining a visa to enter Britain, some of those intent on seeking asylum would purchase a ticket for a destination (often in Eastern Europe) which entailed a stop en route in Britain, intending to disembark and claim asylum when the aircraft touched down in Britain. The 1993 Act has extended the provisions' of the Carriers' Liability Act so that airlines must now demand transit visas for Britain from intending passengers. The measures taken against 'bogus' refugees included fingerprinting to prevent multiple social security claims, and the curtailment of leave for those who have entered on a student or visitors visa (the only possible way of entering for an asylum applicant since visas are not granted abroad to those seeking asylum), but who subsequently applies for and fails to receive asylum. It further enables the Home Office to detain such rejected applicants pending deportation. The 1993 Act also removed the government's obligation to house asylum seekers. As a representative of the Refugee Council<sup>51</sup> remarked:

as we predicted, it seemed as if the Government was using asylum seekers to test out its new homelessness policies: a total review of the homelessness legislation was announced after the Act became law.

Although this new legislation makes explicit reference to the UK's obligations under the 1951 Act, '[t]he curious fact about the 1951 Convention's operation in the United Kingdom is that nothing done or sought to be done by the law and policy can be said to be in breach of the international obligations in relation to refugees' (Addo 1994: 107)<sup>52</sup>. This is consistent with the analysis presented in Chapter Two.

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<sup>50</sup> Under the new legislation, if a person wishing to claim asylum has travelled through a country which the Home Office deems to be 'safe', 'refusal and removal without examination of the substance of the claim' (Immigration Rule 2,11) will follow. The potential asylum-seeker will be returned to that country, although 'adequate safeguards are still lacking to ensure that s/he...will not be returned by that country to one where s/he fears persecution' (British Refugee Council factsheet #2). This can mean that s/he may be shuttled from country to country, becoming a 'refugee-in-orbit'.

<sup>51</sup> From paper delivered to 1994 conference, *The Asylum and Immigration Appeals Act: A Follow-Up Conference to Examine its Impact*.

<sup>52</sup> Therefore the then Home Secretary's claim that 'There is no question...but that the 1951 Convention

## Prospects for the Future

During the 1997 elections, immigration and asylum were not on the electoral agenda. Given that Labour's promises not to raise taxes and to stick to Chancellor Kenneth Clarke's spending plans undermined potential attacks on Labour as the tax and spend party, this forbearance on the part of the Conservatives, who had traditionally gained from immigration issues in elections is, at first sight, puzzling. There are, however, two possible explanations. Firstly, the numbers had once again dropped in the previous year, from 43,800 in 1995 to 27,000 in 1996. It may have been possible to whip up support for restrictions in spite of falling numbers, by stressing the numbers who might come against a background of war in Yugoslavia, and Chechnya, but things had calmed down considerably in 1996. Secondly, the 1993 Act had apparently failed, since numbers had increased in the following two years, and Peter Lilley's measures to restrict access to benefits and housing had been successfully challenged necessitating the 1996 legislation. The Government may have felt rather vulnerable on this issue.

The election of a Labour government on 1 May 1997 led to expectations of an asylum policy more concerned with social justice than narrow national interest. Part of the reason for these expectations lay in the way in which sections of the Labour party opposed at least key elements of the legislation introduced by the conservatives in the 1990s. But early indications about the extent of any reforms that will be introduced by the new administration are not positive. According to a spokesperson at the Immigration Department at Lunar House there has been little change in the aftermath of the 1997 general election<sup>53</sup>. Reviews have been instituted into legal aid for asylum seekers, the asylum and immigration appeals process, regulation of immigration advisors (in order to weed out those who are incompetent and/or unscrupulous<sup>54</sup>) and 'to identify ways of

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imposes obligations that we are happy to accept' (Ken Clarke, Hansard 2.11.1992, Col.23) is somewhat disingenuous.

<sup>53</sup>This spokesperson could not confirm that deportations to Algeria and Zaire had been suspended, although solicitors representing asylum seekers have informed us that this is the case.

<sup>54</sup>In a Radio 4 interview on the Today programme (January 1998), the Home Secretary seemed less concerned that the creation of a register for immigration advisors (announced following the review in January 1998), would make the exploitation of vulnerable people more difficult, than that it would also prevent advisors assisting 'bogus' claimants exploiting the system. The distinct impression given, was that

minimising costs across government with a view to containing those costs well within the total provision for asylum seekers in existing Departmental programmes' (Mike O'Brien, Immigration Minister, Hansard 4.12.1997, Col. 294).

On 27 October 1997 Jack Straw announced that where officials believe that a claim is manifestly unfounded, an asylum seeker will have only 5 days to appeal, instead of the current 28 days. This is in response to the arrival of approx. 800 applicants from the Czech Republic and Slovakia, of whom only 400 remain in the country, and to attacks from the Tories and Tory press that they weren't doing anything to stop the flow. In February 1998, the Home Office introduced a register for Immigration Advisors. While this could offer protection to asylum seekers, in a radio interview Jack Straw placed more emphasis on his intention that the register would prevent practitioners assisting 'bogus' asylum seekers to exploit the system.

It is unlikely that the present government will repeal or significantly change the Carriers' Liability Act (1987), the Asylum and Immigration Appeals Act (1993), or the Asylum and Immigration Act (1996). Instead, the comprehensive review published in July 1998 promises a reduction of the numbers of appeals to one, faster deportations, the dispersal of applications from areas of high to low concentration and an increase in the numbers detained. Those rejected but not detained will have to sign on, probably at a local benefit office, once a week. Cash benefits will not be reintroduced, instead applicants will be issued with vouchers for food, clothing and other essentials. Asylum seekers will be given five instead of twenty-five days to make representations after the first interview. Immigration officers will be given new powers to enter and search buildings, and the police will be given new powers to fingerprint and to arrest those attempting to enter the country illegally. Overseas visitors will be asked to post financial bonds, returnable when they leave the country. However, not all of the measures are negative: asylum seekers held in detention centres will be given the right to a bail hearing before a judge within seven days, and will receive written reasons for their detention; the 'White List' of countries will be abolished (though this may simply mean a return to the old 'unofficial' list). 10,000

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the Home Secretary wished to appear, or to be, tougher than his predecessor.

applicants who have been waiting for a decision for more than five years will be given indefinite leave to remain and at least 20,000 more who have been waiting between three and five years will be allowed to stay for a further four years if they have family ties or have given service to the community.

### **Conclusion**

During the debate which followed the Second Reading of the AIAA in the House, the member for Ealing North referred to Britain's 'moral duty to be compassionate to the many asylum seekers who are in difficulty' (John Greenway, Hansard 2.11.1992, Col.57). Britain has always seen itself as a beacon of liberal progressiveness, drawing those from less enlightened regimes 'because of the standards and values that they believe we encapsulate and personify' (Patrick Cormack in Hansard 15.7.1996, Col.862). It seemed logical that those denied free speech, free association, religious and political freedom would want to come to a country where such freedoms were fundamental rights. That Britain was attractive for these reasons confirmed its superiority over other countries and the granting of asylum confirmed Britain's image of itself as free and fair and of its political system as a proper model for the rest of the world. To abandon this mythical tradition would call into question those -liberal- values that underpin the nation's self-image

And so, even supporters of legislation designed to restrict entry for asylum seekers to Britain ritually reaffirmed their state's commitment to continue this liberal tradition of providing sanctuary 'to those who genuinely fear persecution'. This moral commitment is the source of confusion and reflects the contradiction referred to in Chapter Two between the obligations of the State and of the liberal polity. On the one hand, it was reasserted time and again that of course there was an obligation to 'genuine' refugees, and that the legislation was only designed to keep at bay 'bogus' refugees, who it is asserted, make up the majority of claimants. This created a need to deconstruct the morally untouchable category of 'the deserving political refugee' by introducing the 'disguised economic

migrant' (Cohen 1995: 82), who behaved immorally by making it difficult for genuine asylum-seekers, by 'clogging up the system', and prolonging the processing period<sup>55</sup>.

However, even a commitment limited to 'genuine' asylum seekers opens up certain dangers since it can still be construed as universal, as it is not only - or at all - owed to the citizenry, but to *anyone* fearing persecution. Britain cannot control the number of 'genuine' asylum seekers, which may be created by states and events over which it has little or no control, and so a liberal commitment to admitting 'genuine asylum seekers' involves a surrender of control, of sovereignty, to outside forces. It was therefore claimed that Britain could not be expected to grant asylum to every 'genuine' refugee, no matter how pressing their claim, since there were simply too many of them. Any state's first duty must be to its citizens, and with that in mind Britain had a right to select from among even the 'genuine' refugees those who had ties to Britain (Anne Widdecombe, Hansard 15 July 1996, Col. 823) or who would prove an asset to Britain. This claim is particular and fundamentally different from the universal obligation, and provides the moral justification for *raison d'état*. It is also the position, described in Chapter Two, of Michael Walzer and the Communitarians.

Shortages in the labour market, rather than humanitarian interests, persuaded Britain to open its doors to asylum seekers and migrants in the immediate post-war period. After the war, Britain's alleged generous treatment of the Jews, fed the myth of its 'decency' and 'liberality'. This has led to a certain complacency, a belief that there was no need to change or improve Britain's asylum policy, because Britain could be trusted to be liberal, tolerant and fair-minded. Unlike Germany, which as a defeated nation was forced to reconstruct itself as a liberal polity and to make reparations to refugees by enshrining within its constitution an obligation to grant asylum, Britain sanitised its history, and reified the mythical 'long and honourable tradition' (Ken Clarke, Hansard 2 November 1992, Col.21):

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<sup>55</sup>The category of 'bogus asylum-seeker' is a new one, and provides a useful scapegoat for the Immigration Service and the Home Office in Britain. It is this group, rather than the servants of the Crown, who are accused of behaving immorally.

One of the things that has made Britain a great country...is the fact that it has been through the centuries a safe haven for those who have fled from desperate regimes and terrible conditions (Patrick Cormack, Hansard 15 July 1996, Col.861)  
and

Historically, we stand head and shoulders above almost any other nation in our reception of genuine asylum seekers (Iain Duncan-Smith, Hansard 2.11.1992, Col.52)

This particular image of Britain has been shown to be largely without basis in fact, especially by historians and lawyers (Bevan 1986; Cohen 1988; Dummett & Nicol 1990; Holmes 1991; Kay & Miles 1992; Kushner 1990; Kushner & Lunn 1990; London 1990), and yet it still persists. Asylum offers the opportunity demonstrate that Britain is a liberal polity, as well as 'to create a favourable impression in the world' (Marrus, 1988: 153).

The issue of asylum exposes different features of the British state, the tensions between them and the demands placed on the state by Britain's claim to be a *liberal democratic* state. These facets of the British state - a European island, a liberal democracy, a former colonial and world power, a free market welfare state - and the sometimes conflicting demands arising from them, have shaped asylum law, policy and practice. Asylum is not granted as a result of any coherent programme imposed by government, or of a single value system or ideology:

Since the state is structured by the capacity of one or several classes to realise their specific interests, it is to be expected that policies will not be uniform, but result from a sometimes contradictory series of decisions and non-decisions taken to meet perceived or real dangers (Solomos et al 1982: 19)

Asylum seekers in the early 1990s constituted one such perceived danger. However, one should be wary of characterising this process as a completely ad hoc response to events. While conditioned by competing, contradictory factors and interests whose relative weights ebb and flow over time, certain factors remain more significant than others for policy. The need for control, to assert the sovereign power of the state, and to ensure its stability by legitimising that control over its population, is what drives asylum policy in Britain. In the next chapter, the question will be asked whether the same holds true for Germany.

## CHAPTER FIVE

### REFUGEE AND ASYLUM POLITICS IN GERMANY

In the autumn of 1992, Helmut Kohl threatened to declare a state of emergency in Germany, a state which had enjoyed almost unbroken economic, social and political stability since its creation in 1949. Once before, in 1977, faced with terrorist attacks on the state itself, Helmut Schmidt had 'thought the unthinkable'. Fifteen years later, what comparable threat menaced the Republic? Kohl warned of the 'danger of a profound crisis of confidence in our democratic state' as a result of the increase in the numbers of migrants, in particular asylum seekers, which had crossed 'the threshold of our capacity' (*Spiegel* 46/1992)<sup>1</sup>. The German state at this time was economically the strongest of the European states and it was politically stable, having had only six changes of government since the founding of the Federal Republic in 1949.

This chapter examines the factors which explain how a state that, when weak and in difficulties, could grant an apparently unrestricted right to asylum, could eviscerate that same right when rich and powerful. It will be shown that the heart of this paradox is a tension between the different states - constitutional, welfare, social market and national - that make up the Federal Republic of Germany. The first section details the reconstruction of the state as a liberal constitutional state, a national state, and a social market state within the context of Europe and the Cold War. This is followed by an examination of the shifts in policy and the different approaches of the two main parties are considered. Although the FRG's asylum policy had been growing increasingly restrictive, throughout this period the constitutional provision for those who are politically persecuted remained inviolate. The third section examines the factors that removed the taboo that had protected Art.16(2)2. In the fourth section, as in the previous chapter, the threats that asylum seekers apparently pose are evaluated, before turning to an analysis of the response to those threats - the new Art.16a. In the conclusion, the impact of the 1998 election is sketched and prospects for the future of asylum in Germany examined.

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<sup>1</sup>Even academics have accepted this particular representation of the situation at the time - see Buzan and Robertson (p. 132) in Waever *et al* (1993).

Until 1989, applications for asylum to Germany had fluctuated considerably, from over 100,000 in 1980 to less than 20,000 in 1983, until in 1992 Germany received over 400,000 people claiming asylum. Not only were the numbers of asylum applicants in Germany escalating, but the numbers of asylum seekers entering Germany, as a proportion of the total number of claimants in Europe was also growing steadily. This increase in the number of asylum seekers was occurring at a time of considerable change in Germany. Following the fall of the Berlin Wall in 1989, the Federal Republic had absorbed the German Democratic Republic, which entailed fundamental social, economic and political change for the population of East Germany, and high economic costs for the reunited populations. In addition, relaxation of exit controls in the Soviet Union meant that two and a half million ethnic Germans could, by virtue of Art.116 of the Basic Law, enter Germany and claim full citizenship rights. The rights of these two groups to all the benefits enjoyed by the citizens of the Federal Republic were secure (Kurthen 1995: 921; Räthzel 1990: 40) though some restrictions on the entry of Aussiedlers would eventually be introduced<sup>2</sup>. The case of the asylum seekers was different. As far as many were concerned, the overwhelming majority were not genuine refugees (Kurthen 1995: 925; Martin 1994), and as such, were parasitical on the German welfare state (see Münch 1993: 178).

Kohl's concern about the large number of asylum seekers was not new, debates about Germany's asylum provision had been rumbling on in certain Länder in particular (Klausmeier 1984; Bröker/Rautenberg 1986). But in 1992, violence erupted in cities across Germany directed at asylum seekers and visible foreigners generally. These attacks by the far-right on asylum seekers and foreigners challenged Germans' and non-Germans' faith in the Republic as a liberal polity. The response of the government to rise in extreme right-wing violence was to accept their primary targets as legitimate. Therefore, attention was focused on Art.16(2)2 of the Basic Law 'Politisch Verfolgte genießen Asylrecht' as the source of the problems facing the state and society. Eventually, a hard-won consensus agreed that a resolution of Germany's problems could only be achieved by amending

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<sup>2</sup>Edmund Stoiber, Prime Minister of Bavaria insisted in a conversation with Gerhard Schröder, Prime Minister of Lower Saxony, that Aussiedler should obviously be exempt from migration restrictions and they were a completely different category from refugees, asylum seekers or guestworkers (Spiegel 4.4.1993: 111-112). This had been emphasised by a resolution 5. at the CSU conference, which stated 'The integration of Aussiedler must be sharply distinguished from that of the "Ausländerproblematik" (the problem of foreigners). Aussiedlers are German. They deserve our help and solidarity' 13-16 January

Art.16(2)2. Uniquely, the German Basic Law guaranteed to anyone suffering political persecution, the *right* to asylum. The uniqueness of this provision rendered it vulnerable to arguments that German refugee practice should be brought into line with that of other West European countries, and that those other countries should share the burden under which the Republic threatened to collapse. The campaign to change Art.16(2)2 led in 1993 to the addition of clauses that exempted large numbers of people from the right to seek asylum in Germany. As a result, the number of applicants fell sharply in the following years. It would seem that the problem had been correctly diagnosed and the appropriate solution found. However, this chapter suggests that both the conceptualisation of the problem and of the solution to the 'asylum question' was an inevitable result of the structure of the German state as a Rechts-, Sozial- and Volksstaat.

### **The German State Re-invented<sup>3</sup>**

At the end of the Second World War, Germany was defeated and devastated, the great cities almost levelled, 80% of residential areas destroyed or damaged, and although its industrial capacity had suffered minimal damage, the extensive damage to the transportation network led to a paralysis of the economy in 1945/46. Apart from structural damage, it played host to millions of Displaced Persons and refugees - most, though not all ethnic Germans, as well as Ukrainians, Poles and people from the Baltic States<sup>4</sup>. Originally divided into four Besatzungszone<sup>5</sup>, by 1948 Germany had split in two<sup>6</sup>, divided by the Iron Curtain, and on the front line of the Cold War between two implacable ideological foes. Although West Germany's asylum policy and practice was deeply influenced by the Second World War and its geopolitical position during the Cold War, these were not the sole factors at work. The structure of the West German state itself dictated the way in which it responded to the demands of outsiders. In this section, the

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1992.

<sup>3</sup>The FRG was legally constituted as a new political order for a transitional period, not as a new state, although to all intents and purposes, this is how it developed, and so I follow common usage by referring to the West German state.

<sup>4</sup>Müller (1990) disputes the contention of von Schmoller that the DPs still in Germany in 1947, when the International Refugee Organization was founded, were in fact refugees from the Red Army. He maintains the DPs included forced labour from Poland and the Ukraine.

<sup>5</sup>They were the American, British, French and Soviet zones of occupation.

<sup>6</sup>This chapter is concerned with the Federal Republic of Germany and so the forty year history of the GDR is not referred to, although it did have asylum provisions. See Andreas Zimmerman (1994) Das neue Grundrecht auf Asyl, Springer Verlag, Berlin.

different features of the state, and the different ways in which they moulded asylum policy and practice are discussed, before examining how the politics of the Cold War affected the impact of these features on the reception of refugees.

### *Rechtsstaat*

Occupied at first by the Allied powers (1945-1949), it was soon recognised that future stability necessitated the setting up of a *Rechtsstaat* (Art.20(3)). Bismarck's German state had been highly juridical, so this development was not without precedent<sup>7</sup>. The new Republic was to be a federal social democracy (Arts.20(1) & 28(1)), which combined liberal values, such as the freedom of the individual (Art.2), with social provisions provided by a strong, but limited state power. During the drawing up of what to become the Grundgesetz, the FRG's Basic Law<sup>8</sup>, cognizance was taken of the contemporary political situation, Germany's recent history - the twelve years of Nazi rule, as well as the weaknesses of the Weimar Republic, which were held to be partly responsible for Hitler's rise to power. Therefore the Basic Law enshrined certain rights for its citizens (Arts 1-19) which could only be altered with a two-thirds majority in both the Bundestag and the Bundesrat (Art.79(2)). Constrained by the Basic Law (and the constitutional court) and the powers delegated to the Länder, as well as by international law which, once signed automatically becomes part of, and takes precedence over German domestic law (though not the constitution, Art.25), the power of the government to act unilaterally was severely and deliberately curtailed. This is in distinct contrast to the discretionary powers of the British government, and particularly the Home Office, in matters of immigration and asylum.

Of those rights most stringently protected by the constitution, Art.16(2)<sup>2</sup> is the only one that does not apply to German citizens, but exclusively to aliens or stateless persons. Furthermore, the protection of Art.19(4)<sup>9</sup> referred to anyone, not only German citizens,

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<sup>7</sup> Both the Basic Law and the Weimarer Constitution are influenced by the Paulskirch Constitution, rejected by Frederick William IV of Prussia in 1849.

<sup>8</sup> Although the Basic Law has functioned as a constitution since 1949, it was not created as a constitution, since it was assumed in West Germany that the division of Germany would only be temporary. In contrast, the GDR was constituted as a new state with its own constitution.

<sup>9</sup> Art.19(4) - Anyone whose rights are violated by public authority, has recourse to legal action.

and allowed asylum seekers access to the courts, so as to claim their right to asylum<sup>10</sup>. As a result, asylum practice in the FRG was not as responsive to political pressure as asylum practice in Britain. The constitutional provision for asylum not only distinguished the FRG from other states, but also from previous German regimes. Neither the Imperial Constitution of 1871, the constitutions of the individual states, nor the Weimar Constitution defined a political act or made provision for asylum<sup>11</sup>. Art.16(2)2 was drafted in order to ensure that Germany, which had so recently caused so many to flee, should become a haven for all who were politically persecuted - the committee chose this version of Art.16(2) in consideration of 'the tragedy of our state's legal situation' (Federal Archives, B106/47448, Art.16, Abs.2, p.5-6)<sup>12</sup>. As a result, this article grants to those who are politically persecuted a subjective *right* to asylum. As such, Art.16(2)2 GG is generally held to be unique, although Kimminich warns that 17 different states do contain a subjective right to asylum, though in each case there are certain limitations or conditions (Kimminich 1983: 95-7). The authors of the Basic Law, however, refrained deliberately from defining 'politically persecuted', so that it might be interpreted as widely as necessary. They were aware that this could, and should, mean that it might be necessary, 'to accept large numbers of people, who are completely opposed to our views and laws'

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<sup>10</sup> Although Art.16(2)2 was in place from 1949 onwards, there were no procedures created for the recognition of asylum seekers until the beginning of 1953 and the passing of the Asylverordnung, which stated that foreign refugees were those who met the criteria of Art.1 of the Geneva Convention. For the next thirteen years, asylum was granted according to the more restrictive provisions of that Convention, and Art.16(2)2 was virtually ignored. Unlike Art.16(2)2 GG, there were temporal and geographic restrictions written into the 1951 Convention (see chapter three). It was not until the Aliens' Law of 1965, which referred to both the 1951 Convention and Art.16(2)2, that this was remedied. Once an asylum claim was made, a preliminary examination would be made by the Bundesamt für die Anerkennung ausländischer Flüchtlinge (the Federal Office for the Recognition of Foreign Refugees - hereinafter BA). This was followed by an examination of the case by the Recognition Committee, at which the presence of the applicant was compulsory. The decision could then be challenged before a Widerspruchsausschuß (equivalent of a judicial review), either by the asylum seeker or, usually in the case of a positive decision, by the Federal representative for asylum issues (it is highly unusual outside Germany for the state to have the right to appeal against the decision to grant asylum). If one then wanted to petition against this decision, one can proceed through three appeal stages in the administrative courts. Finally, since the right to asylum counts as one of the Basic Rights, one can appeal to the Federal Constitutional Court. At the same time one applied for asylum, one could also apply for residence. This was usually dealt with separately by the Ausländer Beh'nde (Aliens Authority - hereinafter AB).

<sup>11</sup> It was not until 1929, that political acts, for which people should not be extradited were defined as '...punishable offences, directed against the continued existance or security of the state, against the head of state or against a member of the goverment of the state as such, against a constitutional body, against the exercise of civic rights in elections or referenda, or against the state's good relations with foreign powers' ('3 II DAG).

<sup>12</sup> Der Redaktionsausschuß [habe] die Fassung des Abs.2 mit Rhcksicht auf 'die Tragik unserer staatrechtlichen Situation' gewählt.

(Dr Fecht CDU, cited in Bröker/Rautenberg 1986: 105)<sup>13</sup>. Fecht had warned that West Germany might find itself obliged to accept Italian Fascists. Another CDU member, von Mangoldt, replied that:

Granting asylum is always a question of generosity, and if one wants to be generous, then one must take the risk that one might be mistaken about a person. If one inserts a restriction, such as: a right to asylum, but only for those who share our political convictions, then that is too restrictive (von Mangoldt (CDU) quoted in Koepf 1992: 27)<sup>14</sup>.

Much of the debate in the early 1990s focused on the intentions of the drafters of the Basic Law. It was important to prove that an amendment would not represent a break with the values embodied in the Basic Law. In other words, it was essential to show that it was the circumstances not the values that had altered. Although certain commentators have argued that, 'the Fathers of the Constitutions could not have guessed that this basic right could have been abused to such a massive extent, in order to gain residence' (Schade 1990: 34)<sup>15</sup>, it has been pointed out that:

The members of the parliamentary committee, some of whom were themselves forced to emigrate during the Fascist period in Germany, ...would have been aware both of the numerical extent and the suffering of those people forced to flee between 1933 and 45, as well as the deportation of millions of people after 1945 from the 'Eastern Areas' (Bröker 1986: 103)<sup>16</sup>.

The drafters of the Constitution had had first hand experience of a problem, the scale of which dwarfed anything facing Germany in the 1990s. 14 million homeless and impoverished people had to be fed, accommodated and found work. Not only were there large numbers who might avail themselves of this right, and add to these enormous pressures, but the West German state was itself weak, and newly evolving. Unlike the Republic of the 1990s, the economy was in tatters with the state dependent on overseas aid

<sup>13</sup> 'in Massen Leute aufzunehmen, die mit unserer Auffassung und mit unserem Gesetz vollständig in Widerspruch stehen'

<sup>14</sup> 'Die Asylgewährung ist immer eine Frage der Generosität, und wenn man gener's sein will, muß man riskieren, sich gegebenfalls in der Person geirrt zu haben. Wenn man eine Einschränkung vornimmt, etwa so: Asylrecht ja, aber soweit der Mann (sic) uns politisch nahesteht oder sympathisch ist, so nimmt das zuviel weg.'

<sup>15</sup> '...die Verfassungsväter nicht ahnen konnten, daß dieses Grundrecht seit Jahren zur Aufenthaltszwingung massenhaft missbraucht werden könnte'. Kurthen claims that the writers of asylum law in 1949 stipulated that political refugees could be easily separated from so-called economic migrants and that the number of applicants would remain small, but he offers no evidence for these unique claims.

<sup>16</sup> 'Die Ausschußmitglieder des Parlamentarischen Rates, die z.T. selbst während des deutschen Faschismus emigrieren mußten..., werden sowohl vom zahlenmäßigen Ausmaß und der Leiden der zwischen 1933 und 1945 geflohenen Menschen, als auch von der millionenfachen nach 1945 einsetzenden Vertreibung der Menschen aus den 'Ostgebieten' Kenntnis gehabt haben.'

for reconstruction. Most of the housing stock had been destroyed, and accommodation was needed for the indigenous population as well as returnees and newcomers. Art.16(2)2 was not a gesture by a strong and wealthy state towards a few victims from less liberal states, as was asylum in Britain.

The first draft of the Basic Law (the *Herrenchiemsee Verfassung* of 1948) did not include any provision for granting asylum<sup>17</sup>, and during the discussions in the various committee stages, some representatives voiced concerns about the state's capacity to fulfil the obligations an unrestricted right to asylum would place on the state<sup>18</sup>. Others were worried about the dangers posed to national security if entry was permitted to 'undemocratically disposed' refugees<sup>19</sup> (Fecht, in Münch 1993: 20) or to those who had been actively engaged against democracy in their countries of origin (Münch 1993: 19). A suggested solution to the issue of who should be entitled to asylum was to confine it to 'Germans who are persecuted because of their engagement on behalf of freedom, democracy, social justice or world peace' (Art.4(2) of the 16.11.1948 draft). Wagner of the SPD pointed out that a German does not need asylum in Germany, that asylum is designed to protect those who flee other countries (Münch 1993: 19; Rautenberg 1986: 104).

Concerns about the risks that asylum involved tended to come from the Union parties, but were overruled by the arguments of Schmid and Wagner from the SPD and Renners of the KPD, as well as von Mangoldt of the CDU, on the basis that asylum must be independent of the interests of the state. It was argued by a CDU member (von Mangoldt) that any restrictions would mean that claims would have to be examined at the border by the border police, thus rendering the asylum regulation worthless (Münch 1993: 19; Rautenberg 1986: 104). The drafters of Art.16(2)2 were fully aware of the implications of granting a subjective right to asylum - they were discussed at length over a period of five months (September 1948 - January 1949), but it was decided that the political and economic costs of granting such a right had to be borne. Art.16(2)2 was a promise to take in anyone who

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<sup>17</sup>Only a provision declaring that those who did not enjoy the rights specified in the Basic Law outside the Federal Republic would not be extradited (Koepf 1992: 26, and for a more detailed discussion Münch 1993: Chapter 2).

<sup>18</sup>'Wir sind eine schwache Nation, und ohne die Mittel, weitergehenden Schutz zu gewähren, können wir nicht etwas tun, wofür wir selbst nicht die entsprechenden Mittel zur Hand haben, um es zu gewährleisten' (von Mangoldt, cited in Münch 1993: 18).

<sup>19</sup>Undemokratisch gesinnten Flüchtlingen

was persecuted, agreed to by members of all parties, at a time when the population was living in great deprivation.

Art.16(2)<sup>20</sup> was introduced under economic, political and social conditions that were far more challenging than those facing Europe today, out of a need to assert, not only remorse, but certain ‘liberal’ values that were to be the cornerstones of the new republic - justice and tolerance. These values, anchored in law, were intended as a bulwark against the possibility that the German state would ever again treat people, and not only ‘its’ people, as means rather than ends. As a result, it was important that in granting asylum only the needs of the refugee should be considered, and not the suitability of the applicant. In short then, it is beyond dispute, that the drafters of the Basic Law, and of Art.16(2)<sup>20</sup> in particular, were not motivated solely by narrow national self-interest, economic concerns or political point scoring. Though there were both material (economic and demographic) and ideal (political) benefits to be derived from welcoming those who came or returned from the East, the drafters intended to use the law to afford protection, both to citizens and to certain foreigners regardless of the costs. The German Basic Law was an expression of universal liberal norms and values that had been repressed by the Nazi dictatorship. By enshrining these norms in the constitution, it was hoped that they would ensure the preservation of the liberal character of the new Republic.

The result of this faith in the constitution was that when it seemed the citizenry was threatened by non-citizens, a legal solution to a problem, apparently caused by the law’s surrender of the state’s right to control entry (and hence sovereignty and the ability to protect and care for the citizenry), had to be found. What was forgotten during the asylum debate from the late 1970s onwards was that it was not the law alone, or even primarily, that was responsible for the successful acceptance and integration of millions of people into West German society after the Second World War. It was also economic success and an acceptance of responsibility to fellow members of the *Volk*. Art.16(2)<sup>20</sup> was created in a brief moment when universal values were given precedence over other considerations, such as the material interests of the state, and state security<sup>20</sup>, it was instead an expression

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<sup>20</sup> Though it could be argued that it was created with a view to strengthening the long term security of the German state and its people.

of the ideal interests of a political community. The demands of the nation-state, however, were not long in making themselves felt.

### *Volksstaat*

In drafting the Basic Law of the new state, it became necessary to specify to whom it applied, who was citizen. Given the desire of the Allies and the new Government to distance what was to become the Federal Republic from the Nazi state, it might have been expected, as Brubaker (1992) has pointed out in Citizenship and Nationhood in France and Germany, that *jus sanguinis*, the transmission of citizenship by blood, would have been abandoned in favour of *jus soli*, the acquisition of citizenship depending on where one is born. But the idea of the *Volk*, though relatively recent, is tenacious. It has its roots in the late eighteenth century, in the concept of an organic *Volksgemeinschaft*, a national community bound together by language, history and bloodlines. Brubaker has stressed the qualitative difference between Nazi citizenship policy and Wilhelmine policy, arguing against overemphasising the continuities between those two periods and current citizenship policy (1992: 166). A Nazi innovation was the removal of citizenship from Polish-speaking and Jewish German citizens, and the restriction of full citizenship to those of German blood. Post-War citizenship policy sustains the continuity by combining the Wilhelmine system of pure *jus sanguinis* with the territorial borders of the Nazi Reich<sup>21</sup>.

It was not simply *völkisch* ideology that determined this post-war definition of German citizenship. As Brubaker explains, 'the total collapse of the state, the massive expulsion of ethnic Germans from Eastern Europe and the Soviet Union, and the imposed division of Germany - reinforced and powerfully relegitimated...German self-understanding as an ethno-cultural nation' (1992: 168). Immediately after the Second World War few would have expected Germany, which had been a country of emigration before the war, to become attractive to immigrants. During the war, the Nazis had both expelled large numbers of people, and imported millions of forced labourers, many of whom were worked to death. And in the late 1940s, conditions in Germany - the cities a mass of rubble, people begging and scavenging in the streets - could hardly have been less inviting

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<sup>21</sup> Art 116 *Deutscher im Sinne dieses Grundgesetzes ist vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitzt oder als Flüchtling oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatte oder Abkömmling in dem Gebiete des Deutschen Reiches*

to immigrants. It is unsurprising that little thought was given to the question of naturalising foreigners who might choose to come and settle in Germany or to those who might be born in Germany of foreign parents.

The West German government was also anxious to avoid official recognition of the involuntary Cold War division of the German Democratic Republic. The division of Germany was regarded as temporary and so it was important to send a signal to Germans living in the Soviet zone that they were still considered a part of a Germany that would eventually be reunited. Art.116 refers to Germans, not West Germans. All East Germans who moved to the West were automatically and immediately granted citizenship. Finally, many Germans had been violently expelled from the Sudetenland and East German provinces ceded to Poland. The FRG was concerned to offer a home to these expellees<sup>22</sup>. The ‘ethnic Germans’ who were driven out from East European territories, the *Vertriebene*, were immediately granted German citizenship. Michelle Mattson (1995: 65) describes how in this period, sympathy lay with the *Vertriebene* who had been forcibly expelled from the Eastern territories and who had no choice but to go (return) to Germany<sup>23</sup>. In addition, provision was made for those Germans who remained within the territories of the Soviet Union.

As a result of these different considerations, Art.116 identifies two groups of Germans: a German is either someone who possesses German citizenship or a refugee or expellee of German ethnicity (*Volkszugehörigkeit*) who found themselves at the end of the war within the territory of the German Reich as it was in 1937 (see ftn.22). These extraordinary circumstances, as well as the continuing attachment to, and belief in a German nation that precedes the state, all contributed to the retention of *jus sanguinis* as the defining feature of German citizenship. This means that ‘Germanness’ is transmitted through the

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*nach dem Stande vom 31. Dezember 1937 Aufnahme gefunden hat.*

<sup>21</sup> Kurthen, summarizing Bös (1995: 930) lists some of other factors at work, arguing that ‘the referral to common ethnocultural bonds promised to guarantee national stability, identity, and continuity in times when Germany was still recovering from the devastating effects of World War II; the postwar policy of the allied victors themselves stipulated a collective and ethnic definition of Germanness. Germans were to be isolated and contained in the four occupation zones until 1949; finally in contrast to prior policies under Bismarck and Hitler, the Federal Republic had no intention to Germanize as many non-Germans as possible via immigration or the *ius soli*. For example, automatic naturalization of persons born on German territory, such as the offsprings of displaced persons waiting desperately to leave Germany once and for all, was avoided’.

generations. *Jus sanguinus* crystallises the distinction between 'us' and 'them', between those who belong and those who can never belong. Though in the post-war period this was not a problem, since refugees in the FRG were ethnically German, later on, when foreign refugees increased in number, and their countries of origin changed, this distinction became important. It was assumed that foreigners, and their children, whether refugees or not, could not become German. This in turn meant that their primary loyalty would (should) always be to their country of origin, i.e. that they would (should) return whence they came, once return became possible<sup>24</sup>.

Though Germany hosts refugees, asylum seekers and guestworkers, all foreigners, it does not play host to immigrants - theoretically. There are no laws governing immigration into Germany, since it is disputed that there are immigrants in Germany at all, instead there are only 'guest workers' and foreigners. Asylum seekers and refugees are treated separately from other foreigners, and from the beginning they were subject to different laws. Germany's position at the heart of Europe has made it easier for people to enter, but also to return, or be returned, to their countries of origin. As a result of this, there has been a stronger tradition of seasonal workers moving in and out of Germany than of permanent settlement (Bade 1984, 1987, 1992). Though this fluctuated, particularly in the 1970s, this pattern is re-establishing itself, as free movement for European Union citizens is strengthened and as unemployment rates elsewhere drive workers onto the Berlin building sites<sup>25</sup>. Such a pattern undermines any perception that it might be necessary for German citizens to adapt to what are expected to be only temporary guests.

The idea that one should ultimately return home can also be found in attitudes to asylum seekers, and the language of 'host' and 'guest' is used, not only in relation to *Gastarbeiter*, but also asylum seekers and refugees, 'whoever abuses his right to hospitality will have to leave this country' said Helmut Kohl, referring to asylum seekers (*Tagesspiegel*

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<sup>23</sup> By comparison, argues Mattson, refugees were those who chose to leave.

<sup>24</sup> Ulrich Herbert argues that in spite of cultural differences between the German *Vertriebene* from territories annexed by Poland and the Soviet Union after 1945 and West Germans, their realization that there were no prospects of a return to their homelands meant they were willing to integrate. Their common language and nationality in turn made them more acceptable to the indigenous population.

<sup>25</sup> On building sites throughout Germany, prefabricated huts (as seen in the British television series 'Auf Wiedersehen, Pet!') are used to house foreign workers, serving also to segregate and impress upon them the temporary nature of their stay.

22.3.1996). The use of this vocabulary is politically loaded. The Nazi party programme in the 1930s stated that, 'Persons who are not citizens [*Staatsbürger*] can live in Germany only as guests and must be subject to legislation governing foreigners' (Brubaker 1992: 167)<sup>26</sup>. The use of the word guest emphasises the temporary nature of the sojourn, the fact that the guests do not belong (Thränhardt 1995) and the asylum seekers' dependence on the generosity of the hosts. This generosity imposes a duty or an obligation on the guest not to outstay one's welcome in a host state, and though Kohl referred to a *Gastrecht*, a right to hospitality, this means only the right not to be treated with hostility. It does not mean a right to residence<sup>27</sup>.

The idea that one's first loyalty should be to one's country of origin can be seen most obviously in recent debates surrounding the forcible return of refugees to the states of the former Yugoslavia. The primary motivation was that the local and national authorities no longer wanted to pick up the bills for accommodating these people, but there was also a sense that now the war was at an end, it was the duty of Bosnians, Croats and Serbs to return and begin to rebuild their countries, just as the Germans had had to do after the Second World War<sup>28</sup>. Pressure was put on Bosnian, Serb and Croatian refugees to return and on the different leaders in the territories of the former Yugoslavia to permit their repatriation (*Guardian* 5.2.1998). Once the Dayton Peace Agreement was signed, Bavaria announced that it expected the refugees to return immediately, and Manfred Kanther, the Federal Minister of the Interior announced that he expected all the refugees to have been repatriated by Spring 1997, that is, within fifteen months (*Wall Street Journal* 26.4.1998).

The concept of dual citizenship is unpopular in Germany (and elsewhere) because it is presumed that it will hinder the full integration of the migrant into the new state and lead

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<sup>25</sup>Within Germany, foreigners are still regulated by a particular body of 'Foreigners Laws' (*Ausländergesetz*).

<sup>26</sup>The current usage of follows the letter of Kant's definition, but not the spirit (see Chapter One).

<sup>27</sup>Exactly these sentiments were expressed during informal conversations with students in Berlin, social workers in Leipzig and hotel workers in Stuttgart, one of whom said 'We had to do it here, we built this country up from rubble after the war with our bare hands. That's what they should do, they should go back'. The speaker was born in Dresden, but not until 1962. In an interview with Petra Hanff of the Greens (26.3.1996, Bonn), she mentioned a Green MP who escorted a Bosnian woman back to her home, only to be confronted by Serbs who refused to allow in to her home. She stressed the importance of making the point that many simply cannot return because their homes are now on the wrong side of the border or because they are in mixed marriages.

to a conflict of loyalties. This is the standard position of the Union parties (Bade 1994: 94). However, the modern German nation is itself subject to conflicting tensions: though the primacy of the nation, understood as 'an organic cultural, linguistic, or racial community-as an irreducibly particular *Volksgemeinschaft*' (Brubaker 1992: 1), is enshrined in the Basic Law, the Basic Law itself was an attempt to recreate the Federal Republic as a liberal *Rechtsstaat*, in which universal, liberal values as exemplified by Art.16(2)<sup>2</sup> were privileged.

### *Sozialmarktwirtschaft*

The creation of the Republic as both a *Rechtsstaat* and a *Volkstaat* laid the foundations for contradictions that developed through the 1980s and exploded in the early 1990s. However, at the same time, the roots of a second, equally irreconcilable contradiction can be traced back to its creation as *sozialmarktwirtschaft* - a market economy that attempted to reconcile the needs of capital and labour. Under the aegis of the three Western powers, there was never any question that the economy of the Federal Republic would be a market economy, but at the same time, the tradition of welfare provision which began under Bismarck was continued: extensive employment-based social rights were introduced, forming the core of what became a large welfare state, consuming about 30 per cent of GDP (Faist 1995: 224)<sup>29</sup>.

Though in ruins economically, the FRG recovered quickly after the war with the aid of the Marshall Plan, and by the middle of the 1950s was experiencing an 'Economic Miracle', which created a labour shortage, filled initially by the more than 4 million returning prisoners of war, 4.7 million displaced persons and 1.8 million refugees from the GDR. When the supply was exhausted, the government turned to *Gastarbeiter*, recruited from Italy, Spain, Greece and Turkey, and later, Portugal, Tunisia, Morocco and Yugoslavia. This labour migration was regulated by the Government, which signed recruitment treaties with the governments of those countries. Hollifield argues, however, that more important than a labour shortage, was 'a concern that the German economy would be unable to sustain its high rate of growth at full employment without inflation' (1992: 58). So from the beginning, foreign labour was imported in order to maintain downward pressure on

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<sup>29</sup> Faist's article discusses the sharper ethnic and racial cleavages emerging in a period of welfare

wages. The trade unions managed to exert a counter pressure, protecting both German and migrant workers, by ensuring that this reserve army of labour were paid *equivalent* wages to German workers, and receive similar employment based social benefits (Faist 1995: 228). As a result, in spite of the large numbers who were brought to Germany, there was not a great deal of overt hostility, but then again, unemployment was low, wages were rising, the numbers were controlled and the workers were, after all, guests whose stay would be only temporary. When the government managed to slow recruitment in the late sixties in reaction to economic difficulties, this last assumption seemed well-founded. However, this successful balancing act between the interests of capital and of labour was not to last.

#### *European State*

Almost from its inception, the Federal Republic has been tightly, and willingly, locked into the European project. Art.24 of the Basic Law<sup>30</sup> permitted the transfer of sovereign rights to international institutions, for example to the European Community. Consequently, European Law takes precedence over domestic law. There were two distinct reasons for this orientation towards Europe. As a capitalist economy, the removal of trade barriers, the creation of a single market, and access to the European labour market were important factors. However, membership of the European Coal And Steel Community, and later the European Economic Community was also seen as a protection from the possibility of a third war in Europe - peace was a necessary precondition for economic, political and social stability. The Federal Republic was also anxious to demonstrate its European credentials by supporting all moves to tie the European states closer together. Since the Second World War had made it difficult to be a proud German, at least one could be a proud European. Initially, West Germany's membership of the European Community had minimal effect on its asylum policy, but in the 1980s this would change dramatically, as Germany's government looked to Europe for help to share its heavy burden. At the same time, German advocacy groups were using the ECHR to delay and prevent deportations.

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retrenchment in Germany and the USA.

<sup>30</sup>In 1990, following Reunification, Art.23 which specified the jurisdiction of the Basic Law (*Geltungsbereich des Grundgesetzes*), was replaced with Art.23 (*Mitwirkung bei der Entwicklung der Europäischen Union*), which regulates the Republic's duties and obligations to promote the development of the EU.

### *The Cold War*

The Cold War also played a decisive role in the development of post-war asylum policy. In this war, refugees had an important propaganda role to play. At first, refugees came mainly from East Germany and the countries of the Soviet Bloc, and each one constituted a vote for the political system of the West and a reproach to that of the East<sup>31</sup>. Between 1945-1961, a third of the population committed the crime of *Republikflucht* - treason. After 1961 and the building of the Berlin Wall, the numbers of refugees slowed to a trickle. However, those coming from East Germany were not treated as refugees, since they were automatically granted full citizenship of the FRG. Because of its geographical position, West Germany was often the first destination of refugees from the other Soviet Bloc countries. Most of these were granted asylum without intensive scrutiny of their claims to be politically persecuted, not only because their motives for flight of less concern to the Western powers, but also because the so-called *Republikflüchtlinge* risked execution or imprisonment if they were returned. Moreover, throughout the Cold War, refugees and asylum-seekers were overwhelmingly European, few in number, and, given the conditions of the labour market, easily assimilable. Even the sudden increases in 1956 and 1968 of Hungarians and Czechs<sup>32</sup> were not seen as a cause for concern.

However, it would be wrong to see the three decades following the war as an unqualified success in terms of refugee policy and practice. Almost from the beginning, Art.16(2)2 was a contentious issue, especially in Bavaria, where the Minister for Labour in 1958 complained 'that the burden of Central and East Europeans fleeing westwards cannot be borne by Germany alone' (cited in Münch 1994: 107)<sup>33</sup>. In spite of an exceptional right to asylum, and access to the courts, West Germany's recognition rates were very low compared to other states with less 'liberal' asylum provisions: in 1962 the number of asylum seekers in FRG granted refugee status was 528, whereas in Italy it was 2,738 and in France 5,427. Although on the whole, those refused refugee status would not be

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<sup>31</sup> However, not all of them were welcomed unreservedly. From 16 February 1946 there was an official UNRRA University in Munich. It was forced to close on 31 May 1947, because Congress insisted it was serving Communist interests and refused any further financial assistance (Müller 1990: 90).

<sup>32</sup> In 1956, the FRG accepted 14,000 Hungarians and in 1968 13,000 Czechoslovakian nationals, although at the time the annual intake of asylum seekers was never more than 5,000.

<sup>33</sup> ...daß die Last der nach dem Westen flüchtenden Mittel- und Osteuropäer nicht allein von Deutschland

returned, nonetheless, practice differed considerably across the Länder, given the very large degree of autonomy they enjoyed in deciding how, or whether, they would accommodate refugees. Distinctions were made by certain Länder between different national groups. In Bavaria, for example, Yugoslavs, who made up the largest group of asylum seekers<sup>34</sup>, were designated 'economic refugees'<sup>35</sup> and refused entry at the border.

### 1973-1989 Closing the Border

In 1973, in the wake of the oil crisis and the ensuing world recession, Germany introduced an *Anwerbestopp* (an end to the active recruiting of foreign labour), hoping to limit immigration and thus resolve its unemployment crisis. The effect of this was to turn seasonal workers into permanent residents - since re-entry was going to be more difficult and since the countries of origin of the guest-workers were also affected by the world recession - the *Gastarbeiter* had little incentive to return home, preferring instead to send for their families to join them. The illusion that guestworkers would remain only so long as they were needed and would return home when the demand for labour dried up was exploded. The toleration that had been shown to the once indispensable foreign workers was replaced by resentment towards these competitors for jobs and housing.

The *Anwerbestopp* and decline in the demand for labour coincided with a perception that there was a change in the countries of origin of asylum seekers, that they were no longer primarily coming from Europe, but increasingly from the 'third world'. In addition 1973 saw an increase in the number of Palestinian asylum seekers, who, in the light of the attack at Munich Olympics the previous year, met with resistance (Prantl 1994: 137). The increase in absolute numbers meant that the provisions for asylum seekers (in particular accommodation) were no longer adequate. Between 1970 and 1980 the numbers increased from 5,388 to 33,136. Von Pollern puts the ratio of Europeans<sup>36</sup> to non-Europeans in 1968 at 93:7 and in 1977 at 25:75 (cited in Münch 1994: 108). However, according to the

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getragen werden kann.

<sup>34</sup>In 1963 90% of asylum applicants came from Yugoslavia.

<sup>35</sup>Münch notes that in 1966, during a debate on the refoulement of Soviet Bloc refugees in the Bundestag, Parliament agreed that certain asylum seekers who referred to themselves as 'economic' refugees, should nonetheless be considered politically persecuted, since it was recognized that in totalitarian regimes, in particular communist regimes, the interweaving of politics, economics and persecution is such that we cannot easily define someone as one or the other (1993: 59-60)

<sup>36</sup>These terms are not defined in the official statistics.

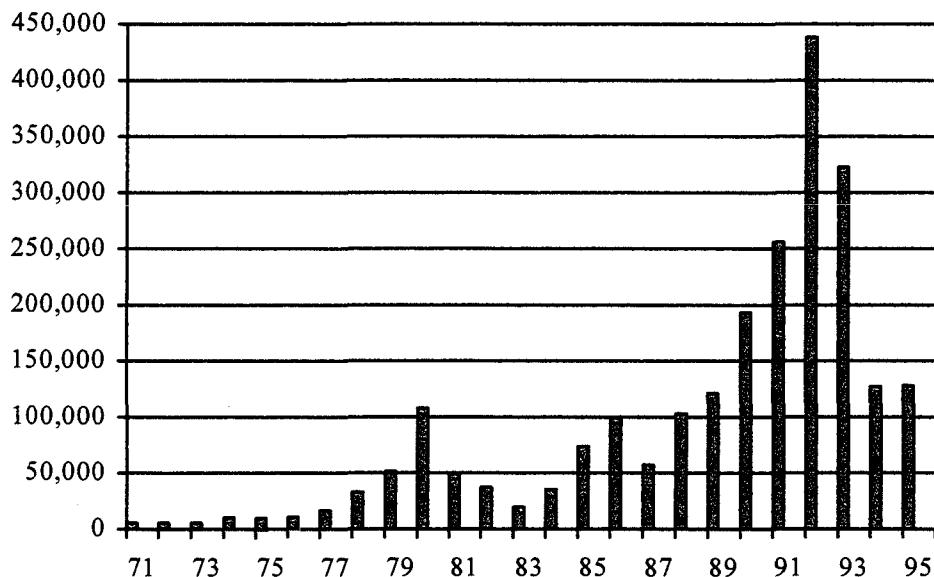
BMI's own statistics, Europeans (the BMI, like the Home Office, counts Turkish applicants as Europeans) have accounted for over 50% of all applicants in the years 1968-1973, 1980, 1987-94. Only in 1975, 1977, and between 1983-1986 have Europeans constituted less than 30% of the applicants and in most of those years they have still been the largest regional group.

Although the numbers of asylum seekers globally were increasing, and it was physically becoming easier to travel greater distances, within the FRG, as in Britain, the preferred explanation for the increase in numbers was that as the possibilities for immigration were disappearing, potential alternative gateways were being sought. Germany's putatively liberal asylum regime, and the multiple opportunities for appeal seemed to offer just such a gateway. In 1975, in order to ease the financial burdens on the Kommune as well as the Länder (although these were relatively low, since most asylum seekers did not depend on benefits - Münch 1993: 73), and to maintain the pool of cheap labour on the market without increasing immigration, asylum seekers were permitted to look for work in some Länder. The granting and withholding of the right to seek and accept work has continued to be used as a deterrent ever since. For those seeking work in the Federal Republic, but who could not gain admission, applying for asylum offered entry to the labour market, and no doubt part of the increase in numbers was due to this factor. However, it was not the only or most important motivation of the increasing number of people who came seeking asylum. *Figure 5.1* reflects political events throughout the world, the peaks corresponding with coups, wars and repression. As can be seen from *Figure 5.1*, the first time the numbers of applications exceed 100,000 is in 1980, the year that there was a military coup in Turkey, and Turks made up more than half of all applicants (57,913 out of a total of 107,818)<sup>37</sup>. The numbers decrease each year thereafter, only to increase again in 1984. In that year the largest proportion of asylum seekers are from Sri Lanka - 22.8% (8,063 out of 35,278). In 1985, this proportion remains the same, though the numbers of asylum seekers and of Tamil asylum seekers double (17,380 out of 73,832), reflecting political upheavals in Sri Lanka.

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<sup>37</sup>For details of countries of origin, see Table 6.2 in Chapter Six

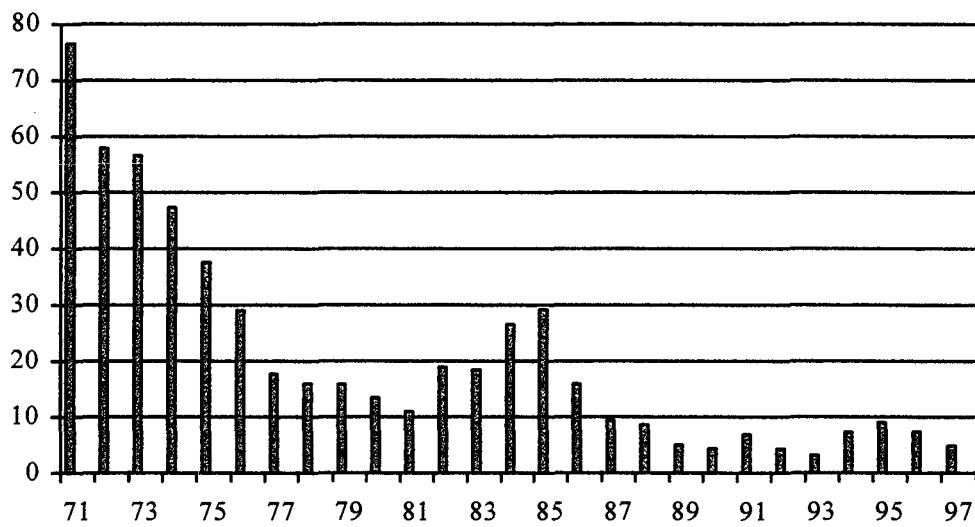
*Figure 5.1 Number of Applications for Asylum in Germany*



*Source: Bundesministerium des Innern, Bonn*

In the same year, Iranian asylum seekers are the second largest group (12% or 8,840), but the following year, 1986, as the Iran-Iraq war escalates, Iranians constitute more than 20% of all asylum seekers (21,700 out of 99,650). Finally, the increases accelerate in line with events in Eastern Europe, the Soviet Union and the war in Yugoslavia. *Figure 5.1* represents an accurate guide to the level and location of conflict of around the globe and demonstrates how open Germany was, since there is almost no time lag between events and the arrival of asylum seekers. Nonetheless, the view which had been dominant in previous years, that it was not possible to distinguish between political and economic factors in the decision to flee, had lost ground, and the media and the Union parties urged action against 'abusive' applications from 'economic' migrants, which, it was claimed, made up the vast majority of cases. This argument was justified by reference to the declining recognition rates *Figure 5.2* offers a stark contrast to *Figure 5.1*. As the numbers of asylum seekers rise between 1971 and 1980, the rates of recognition fall. Given the sharp increase in applicants in 1980, one might have expected that recognition rates would increase in 1981, as decisions are made on individual cases, but they continue to fall.

Figure 5.2 Recognition Rates of First Applications



Source: Bröker and Rautenberg (1986) and Bundesministerium des Innern, Bonn

The increase in applicants from the Middle East in 1986 as a result of conflicts in that area does not cause a corresponding increase in the recognition rates, which continue to fall until 1991. As the numbers of applications decrease after the introduction of the constitutional amendment in 1993 and the creation of the new category of 'civil war' refugees removes the Yugoslav refugees from the asylum procedures, the recognition rates do begin to climb slowly. This is seen as justifying the arguments of the supporters of the amendment who argued that it would prevent bogus applicants from entering. However, in each of the years preceding the 1998 elections, recognition rates fall - the pattern repeats itself again.

By the middle of the 1970s, the right to asylum had already been restricted in practice, though not in law. *Figure 5.2* tells only one side of a multifaceted story, and certain facts should be born in mind. The percentages in *figure 5.2* represent the proportion of positive *decisions* taken in a year, not the proportion of applications which arrived in that year. The figures hide as much as they reveal. An examination of the recognition rates for different groups, for example, demonstrates that asylum seekers from certain states had virtually no chance of being granted asylum, even when the recognition rate for that year was high. Taking 1974, the year following the overthrow of the Allende government in Chile, as an

illustration, the recognition rate for asylum seekers taken as a whole was 47.4%. However, when this is broken down by region, a new story emerges. The recognition rate for applicants from Eastern Europe was 78%, and for those from the Americas (overwhelmingly from Chile) the rate was 93.5%. Of those coming from the Middle East, site of war and civil strife during this period, only 1.4% were recognised as refugees in 1974, 1.6% in 1975, and 2.8% in 1976<sup>38</sup>. Perhaps this is not so surprising, given that in 1972, Palestinian terrorists had launched an attack at the Munich Olympics.

However, even before one could claim asylum, one had to gain entry to the FRG. In spite of claims, in particular from members of the Union parties, that one only had to say the word 'asylum' at the border or a port to gain entry, refoulement was regularly practised by the border authorities (Bröker and Rautenberg 1986: 165-6). Between 1976 and 1978, 23,000 were refused permission to enter the Federal Republic for the purpose of claiming asylum. However, in a Rechtsstaat, such actions had to have some kind of legal justification. The CDU/CSU argued that since an asylum claim was not being made when the reason a foreigner gave at the border for claiming asylum was not 'manifestly valid', it was perfectly legitimate to turn them back at the border. The right of each individual to have her case examined individually was treated with contempt when, in the period 1979/1980, the BA<sup>39</sup> processed claims at the rate of 9,000 a month, taking 20 minutes per case, and when, between 1980 and 1981, case work was eased by the use of standardised forms, which outlined the reasons for rejection for each particular nationality, merely leaving a blank for the name of the asylum seeker to be entered (Bröker and Rautenberg 1986: 159). This was a serious curtailment of the legal rights of the asylum seeker as specified in the constitution, but it also meant that recognition rates were kept very low, which in turn led to the accusation that the overwhelming majority of asylum applications were abusive. Operating on this assumption, the AB<sup>40</sup>, according to Rautenberg (1986: 167), ignored claims for asylum, asked trick questions, gave out wrong forms, or simply deported people without interviewing them.

<sup>38</sup>The data for the period 1971-79 is taken from extraordinarily detailed and comprehensive endnotes to chapter three of *Die Asylpolitik in der Bundesrepublik Deutschland* (Bröker and Rautenberg 1986). All other numerical data comes from the BMI, Bonn.

<sup>39</sup>Bundesamt für die Anerkennung Ausländischer Flüchtlinge - the Federal Office for the Recognition of Foreign Refugees.

<sup>40</sup>Ausländer Behörde - Aliens Authority. They are responsible for forwarding claims for asylum made to

These were not the only hurdles erected in the 1970s. In 1976, a visa requirement was imposed on travellers from Pakistan in response to a sharp increase from 257 applications in 1974 to 3037 in 1975<sup>41</sup>. However, these practices were, according to jurisprudence at the time, either illegal and/or unconstitutional, and so were unacceptable in a *Rechtsstaat*. Therefore the law had to be brought into line with practice. The first of a series of attempts to control the numbers of asylum seekers through enacting legislation occurred in 1978<sup>42</sup>. The *Erste Beschleunigungsgesetz*<sup>43</sup> was enacted by an SPD government under the Chancellorship of Helmut Schmidt, who had by then acquired the nickname of the 'Iron Chancellor'<sup>44</sup>.

By this time, the increasing backlog of cases meant that the asylum process could take up to six years, giving, according to critics, asylum seekers ample opportunity to abuse the system. One possibility for dealing with the backlog would have been to increase staff and resources for processing applications, or, as was suggested at the time, to grant an amnesty to 'old cases'. Instead, the Union parties seized the initiative, criticising the inactivity of the Government, and insisting on a legal solution. It was at this time that the framework within which the debate which was to rumble on for the next fifteen years was constructed. The language in which the applicants were to be described was coined - Wirtschaftsasylanten, Scheinasylanten, Armutasylanten<sup>45</sup>. This in turn reflected the supposed motivation of the asylum seekers - economic migration. The solution was also formulated - dam the flood by enacting new legislation to reduce the length of time taken to process a claim, thereby enabling the authorities to deport rejected claimants faster and prevent people from gaining access to the asylum process by preventing them from

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them to the BA.

<sup>41</sup> In spite of the visa requirement the numbers from Pakistan and India continued to grow - 3487 in 1976 and 6,520 in 1977 (Bröker and Rautenberg 1986: 145). Visas were subsequently-1980-required from Afghans, Ethiopians, Sri Lankans, Indians, Bengalis and Turks (Klausmeier 1984: 58).

<sup>42</sup> The following examination of the Federal Republic's attempts to deal with the asylum question through legislation also serves to highlight the different positions of the political parties, as well as the tensions between the Bund and the Länder, the latter usually being more in favour of measures to restrict entry than the former.

<sup>43</sup> The First Acceleration Law

<sup>44</sup> ...following his high-risk, but successful freeing of the Red Army Faction hostages in Mogadishu.

<sup>45</sup> This word was first used in the Bundestag in 1978, and quickly became common currency. The suffix -ant is usually derogatory, and found in other words such as dilettante or 'sympatisant' (sympathiser). See Mattson (1995) for an analysis of the role of language and discourse in creating 'the refugee'.

entering Germany. It was also the point at which the Union parties effectively took control of the debate.

The different approaches of the two main parties became clear - the Union parties were constantly on the attack, singling out particular nationalities, e.g. Pakistanis, Tamils, and Turks as exploiters of the system. Ammunition for such claims was provided by the very low recognition rates for these groups. The SPD was forced onto the defensive, constantly reacting to initiatives from the opposition. They rejected the targeting of certain groups<sup>46</sup> for rejection without an individual hearing, but agreed that procedures must be streamlined. After only three weeks consultation the new law was passed unanimously in the Bundestag, removing the right of an asylum seeker to appeal to a tribunal against a negative decision from the BA. The results, however, were disappointing, from the parties' point of view: the asylum process itself was not shortened since rejected applicants could appeal against the decision of the BA by taking their case to the administrative courts, and at the same time the numbers of new applications were multiplying.

As the numbers increased, so did the costs to the Länder and the local authorities. Although Bavaria had been the loudest advocate of a more stringent asylum regime - 'It cannot be the duty of the Bavarian Prime Minister to use the police force to coerce local authorities to accept such economic refugees' (Strauß, cited in Münch 1994: 78)<sup>47</sup>, the other Länder were becoming increasingly vocal<sup>48</sup>. The arguments surrounding asylum practice were given coverage in the media, which increasingly used the language of natural catastrophes - 'floods', 'avalanches', and 'waves' to describe the rapidly increasing number of 'asylanten', up from 33,136 in 1978 to 51,493 in 1979, a figure already

<sup>46</sup> Though some SPD members accepted that the majority of certain groups were abusing the system, they rejected the claim that people from that state should be automatically be deprived of a right to claim asylum 'Ich kann auch hier wieder den Ausdruck Mißbrauch nicht ohne weiteres übernehmen,...Es ist richtig, daß ein großer Teil der Pakistanis, die hierher gekommen sind, letztendlich nicht anerkannt worden sind. Es ist aber keineswegs so, daß man automatisch davon ausgehen kann, Asylbewerber aus diesem Staat könnten sich nicht mit Recht auf politische Verfolgung berufen' (Fröhlich (SPD) cited in Klausmeier 1984: 43)

<sup>47</sup> 'Es kann nicht die Aufgabe eines Bayerischen Ministerpräsidenten sein, die Kommunen durch Polizeimaßnahmen zu zwingen, solche Wirtschaftsflüchtlinge aufzunehmen'. Strauß, leader of the Bavarian CSU, was the CSU-CDU chancellor candidate in the 1980 elections and known for his demagogic style.

<sup>48</sup> Späth (CDU Baden-Württemberg) accused the government of passivity in the face of *Wirtschaftsasylantums*, and threatened to unilaterally introduce a ban on asylum-seekers working, cuts in their benefits and to accommodate them in *Sammellager*, or holding centres (see Münch 1994: 79).

exceeded by May 1980 (see figure 5.1 above). More than 50% of the applicants in 1980 came from Turkey in the wake of the military coup there<sup>49</sup>, but these were labelled economic refugees, especially since the recognition rate for this particular group was only 2.64%, and not only by representatives of the Union parties:

You don't seriously believe the exodus of Turks, who now constitute 70% of all applicants in to Germany, has anything to do with the forthcoming elections. It is caused exclusively by the poor economic conditions in Turkey. (Böhling SPD, cited in Klausmeier 1984: 46)<sup>50</sup>.

Leading up to the 1980 Federal elections, calls for a second *Beschleunigungsgesetz* were heard, and once again, it was the Union parties who were dictating the agenda. Although the governing SPD and FDP parties rejected the Union's draft bill, it became apparent that if they did not act, they would be seen as unequal to the problem as it was constructed, i.e. West Germany's inability to control the numbers entering its territory or the costs to the Kommune and Länder. The government was coming under increasing pressure from its own members at Land and local levels, since the bills for accommodation and social assistance landed on their desks.

As a result in June 1980, the government pushed through, again without consultation, a series of amendments: appeals were no longer to be heard by committees (Widerspruchsausschüsse), but by individuals, applicants lost the opportunity to present evidence in personal interviews before investigators, and claims for asylum and a resident's permit were to be decided in the same process, rather than separately. Finally, once the BA had rejected a claim, the Aliens' authority (Ausländerbehörde) was empowered to request removal immediately. In contrast to the *Erste Beschleunigungsgesetz*, the impact of the *Zweite Beschleunigungsgesetz* was quickly felt. Numbers dropped in 1981 by more than 50% to 49,391, and continued falling in the following two years. Though the asylum question was not necessarily one of the deciding factors, the SPD and FDP were returned to power in October, though only for a further two years. However, the issue did not fade as the numbers fell. The campaign to stem the

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<sup>49</sup> Between 1978-1980, there were 5,000 political murders in Turkey.

<sup>50</sup> Sie glauben doch wohl nicht im Ernst, daß der Exodus der Türken, die jetzt 70% der Bewerber stellen, auf deutschen Verhältnissen, auf den bevorstehenden Wahlen beruht. Das beruht ausschließlich auf den schlechten wirtschaftlichen Verhältnissen der Türkei.

‘flood’ of asylum seekers remained the subject of public debate<sup>51</sup>, with asylum seekers being accused of either being ‘lazy’ because they didn’t work - being subject to a ban on taking up employment - (Fellner CDU/CSU) or of taking German jobs, once they had been in the Republic long enough (Keller CDU/CSU)<sup>52</sup>. By setting a time limit to the *Zweite Beschleunigungsgesetz* (due to expire on 31.12.1983), the government ensured that the Union parties could continue their crusade.

The CDU/CSU ruled Länder and the CDU/CSU parliamentary party joined forces to demand an extension and amendments to the law<sup>53</sup>, but following the success of the elections (1980) and in view of the drop in the numbers, the coalition parties resisted the proposed changes as a patched-up job. Instead the government took into account the decisions of the Federal Administrative and Constitutional courts that any authorisation of the aliens authority to decide on the admissibility or inadmissibility of claims was inconsistent with Art.19 and Art.16(2)2. And yet, after a bitter struggle, in 1982 new asylum regulations came into effect, according to which some asylum claims could be classified as ‘Unbeachtlich’ - irrelevant, when it was believed that the claimant could have found protection elsewhere, for example had come through a ‘safe’ third country, or as ‘manifestly unfounded’. Those whose claims were so classified were then subject to ‘fast-track’ procedures and speedy deportation. Aware that these regulations could barely be considered constitutional, it was decided that they should only be valid for two years. However, following the *Machtwechsel*<sup>54</sup> later the same year, the new FDP/CDU/CSU coalition government ensued that it was extended until 1988, when the time limit was lifted.

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<sup>51</sup> Though there was a brief change of tone following two events: the suicide of Cemal Altun who jumped to his death rather than be returned to Turkey, and the publication of the ‘Toscani’ report by a UNHCR worker on the conditions in the holding centres where asylum seekers were kept. She found that, uniquely in Europe, the FRG were using conditions in the Sammellager as a means of frightening away (Abschreckungsmaßnahmen) asylum seekers (Klausmeier 1984: 73-74).

<sup>52</sup> See Margit Stöber (1990) *Politisch Verfolgte genießen Asylrecht - Positionen und Konzeptionen von CDU/CSU zu Artikel 16 Absatz 2 Satz 2 Grundgesetz 1978-1989*, Berlin.

<sup>53</sup> Klausmeier (1984: 46) highlights an interesting development at this time. Although asylum could only be granted or refused on the basis of the examination of each individual claim, while insisting that Turkish asylum seekers should be refused asylum as a group, the CDU/CSU were granting asylum to a particular sub-group of Turkish claimants, with whom they shared a common faith-Turkish Christians. The government argued that this group should not be classified as economic refugees.

<sup>54</sup> When the FDP switched allegiance to the CDU.

Following the introduction of the new law, the numbers of applications dropped to their lowest level since 1977 - 19,737. However, they quickly recovered and within three years they were once again approaching the 100,000 mark (see *Figure 5.1* above). During those years, the tone of the political debate changed. While it continued to be marked by racist claims about 'Wops' and 'Dagos' entering the Republic (Franz Josef Strauß, cited in *Spiegel* Nr.36/85), asylum seekers from particular countries were increasingly represented as criminals, drug-pushers, pimps, and prostitutes. And in certain quarters, it had also become increasingly anticommunist. Heinrich Lummer (CDU Senator in West Berlin) led the attack on Poles<sup>55</sup> and others from the Soviet Bloc, demanding an end to 'Sozialhilfe-Tourismus' - benefit tourism. For the first time, East European refugees, who until then had been treated as a special case, automatically granted asylum, came under attack. In 1985, Lummer succeeded in ensuring that those Poles who had not applied for asylum were no longer protected from deportation (since 1966 all citizens of the Soviet Bloc had automatically been protected from deportation, whether or not they applied for asylum). In part this may have been due to spy scandals plaguing the Republic at the time.

The next bill proposing changes to the regulations governing the asylum process was presented to the Bundesrat by three traditionally conservative Länder - Baden-Württemburg, Bavaria and Berlin. Among proposals to extend the ban on seeking employment for the whole duration of the asylum process, to insist that other Länder follow the rule that asylum applicants be accommodated in holding centres, rather than privately, and that they substitute benefits in kind<sup>56</sup> for cash payments, the most radical suggestion was that the grant of asylum should be subject to reexamination every two years, to check whether the criteria for recognition as a refugee still pertained. Furthermore, in addition to claims for asylum made on 'economic' grounds, claims from those fleeing 'a general emergency or warlike situation' were also to be treated as manifestly unfounded. This marked a distinct change in the debate. Previously, concern had focused on those whose claims for asylum were assumed to be abusive. This bill was a reaction to the recognition rates which increased markedly between 1982 and 1985/6

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<sup>55</sup> Throughout the 80s, Poles were either the largest, or second largest group of asylum applicants, with Berlin their first destination.

<sup>56</sup> Food and clothing parcels

(1982-6.8%; 1983-13.7%; 1984-26.6%; 1985-29.2%; 1986-15.9%)<sup>57</sup> and the growing numbers of those who could not be returned to their countries of origin because of war or war-like situations (e.g. Tamils, Iranians). In spite of the rejection by the SPD governed Länder of the bill, and objections to sections of it by the FDP in the Bundestag, the core of the bill passed into law on the 15 January 1987, the same month as the Federal elections were held, returning the CDU/CSU/FDP coalition to power.

The electoral competition generates particular pressures on parties and ensures that certain issues will feature on the political agenda. In Germany, as in other European states, the 'foreigner' question is a perennial in party manifestos, and as has just been shown proves to be a difficult issue for parties of the left. Comparing the legislative timetable with the occurrence of federal elections and sharp increases in the numbers of asylum seekers entering West Germany, a pattern emerges.

*Table 5.3*

1978	First Acceleration Law	
1980	Second Acceleration Law	Federal Elections - SPD/FDP hold power
1982	Asylum Procedure Law	Coalition reshuffle FDP realigns itself with CDU/CSU
1983		Federal Elections CDU/CSU/FDP government
1987	Law for the amending of asylum procedures and aliens law comes into effect	Federal Election CDU/CSU/FDP hold power
1988	Amendment of the asylum procedures law	
1990	Unification	Federal Elections
1992	Amendment of the asylum procedures law	Start of the election campaign/'Hot Autumn'
1993	Constitutional change to Art.16(2)2	
1994		Federal Elections CDU/CSU/FDP hold power
1998	Debate on Citizenship Law and accelerated repatriation of Yugoslav refugees	Federal Elections/SPD win

<sup>57</sup> These percentages exclude those who were granted asylum on appeal, or granted exceptional leave to remain.

Following events abroad, the numbers rise, which in turn stimulates debate about the abuse of the FRG's liberal asylum provision. This then peaks in the summer before an election leading to a change in the law. By the following year the figures have usually dropped, only to rise again in response to events abroad, and the cycle begins again. This has been the case for the last twenty years. The only election year in which asylum was not made an election issue was 1983. From 1980, when there were more than 100,000 asylum seekers arriving, the numbers had declined until in 1983 there were less than 20,000 applications (see *Figure 5.1* above). Recognition rates had increased from 7.7% in 1981 and 6.8% in 1982 to 13.7% in 1983 (see *Figure 5.2* above). Faced with these trends, it would have been difficult to make much capital out of the asylum issue. However, in 1986, as the campaign leading up to the 1987 election began, asylum resurfaced as an issue. Although, as discussed above, Bavaria, Berlin and Baden-Württemburg had already launched their campaign for much more restrictive legislation in 1985, the sudden drop in the recognition rates from almost 30% in 1985 to 15.9% in 1986, and the increase in the number of applications each year from 1983 ensured support for the suggested measures. The significance of the 1993 elections will be examined in the next section.

The departure from the norms of the *Rechtsstaat*, according to Münch, was due to the change in government in 1982:

After the change in government in Bonn, the original misgivings that had persuaded the SPD/FDP coalition to introduce the 1980 regulation for a fixed period no longer had any purchase in cabinet (1993: 101)<sup>58</sup>.

Instead, the *Volksstaat*, which until then had been inclusive - though only of 'ethnic' Germans, became explicitly exclusive. For the CDU/CSU, interests of state were more important than upholding the rights of non-citizens, even those guaranteed by the constitution. And the welfare state, which in the sixties had included the guestworkers by granting them equal social rights with German workers, became, in Thomas Faist's phrase 'ethnicized' (1995: 219-250). By the end of the eighties, West Germany's liberal constitutional provision for asylum provided a stark contrast to its very restrictive asylum

<sup>58</sup> Nach dem Regierungswechsel in Bonn hatten die ursprünglichen rechtsstaatlichen Bedenken, die damalige SPD/FDP-Koalition dazu bewogen hatten, die Regelung [of 1980] zu befristen, im Kabinett keine Lobby mehr.

practice. However, although it had become increasingly difficult for people from certain countries to gain entry, because of the visa requirements, or refugee status, because of the strict criteria for recognition, nonetheless the Republic's geographical position, developments in Eastern Europe and around the world, which caused ever more people to flee, and increasingly sophisticated 'Schlepperbände' - refugee smugglers - meant that the numbers continued to rise, and the percentage of refugees entering the EU who made their applications in the FRG rose from 43% in 1987 to 58% in 1990, and 75% in 1992. By 1989, calls for changes to Art.16(2)2 had spread, and were to become louder.

By the early 1990s Germany was facing new pressures, economic, social and political as a result of three dramatic and intimately connected events: reunification; the collapse of the Soviet Union; and the escalating war in Yugoslavia. Each of these events increased the population of Germany in a very short time by millions, who besides presenting the state with a powerful challenge, were also forced into competition with each other. A shortage of housing and increasing unemployment led to calls for prioritising the needs of these three groups of newcomers: 1) former GDR citizens, now full citizens of the Republic; 2) ethnic Germans, also entitled to full citizenship, but often with limited knowledge of German language, history and culture; and 3) asylum seekers, with limited rights and very different cultures. There were differences in the treatment and reception of these three groups, which were defended by reference to the economic, social and political challenges to the state. The demands for a change to the constitutional provision for asylum focused overwhelmingly on these costs, even though asylum seekers were the smallest of the three groups, and even though it was assumed that many of the ethnic Germans wanted to move to the Federal Republic for economic, rather than political or cultural reasons.

Economically it was argued that the welfare state could not provide for the numbers entering Germany, especially given the enormous costs associated with reunification. Socially, the advent of people with different cultures, habits and ways of life was perceived as a threat to the German way of life - Helmut Schmidt, the ex-Chancellor, echoing the fears of the Second Reich, warned of the dangers of Überfremdung. Such fears were only raised by particular groups of newcomers. And politically, the waves of extreme-right violence unleashed against the asylum-seekers (and visibly different

foreigners), and counter-attacks by the far left and the Autonomen, gave rise to fears for the survival of the liberal polity. The defenders of Art. 16(2)2 fought back by emphasising that these costs were the price Germany had to pay for its past, for maintaining its international reputation. However, for the government, one of the benefits of the sudden increase in the number of asylum seekers, was that it bought time, distracting public attention away from the internal problems facing the state, such as rising unemployment and a housing shortage, and growing *Verdrossenheit* - disenchantment with the political process, by focussing on three putative threats to the welfare state, to the liberal polity and to German national identity.

### **The Refugee Problem - A Convenient Fig-Leaf?**

Although the constitutional provision for asylum had been under attack since the late 1970s and through the 1980s, the challenges presented by the end of the Cold War and Germany's growing economic crisis provided the basis for a new and irresistible offensive. The increase in the numbers of asylum seekers was certainly dramatic, and by comparison with Britain, seems overwhelming<sup>59</sup>. These numbers were construed as a threat to the German state, as a particular national state, as a welfare state and as a liberal *Rechtsstaat*. Nonetheless, if these people were politically persecuted, or met the criteria of the 1951 Convention, they were all entitled to remain in Germany. Therefore, attention was focused on those who were rejected, but who, owing to Germany's appeal procedures, had managed to remain in the country, with access to social provisions<sup>60</sup>.

### *Threat to the Welfare State*

Following the euphoria of reunification, the 'blooming landscapes' had failed to materialise and official figures put the number of unemployed at 900,000 in the Eastern Länder alone, although the actual figures were much higher. Part-time work, job-creation

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<sup>59</sup> But once again, they need to be contextualized. Although Germany has received up to 79% of Europe's asylum seekers, Europe receives only 5% of the global total. In effect, it is the world's poorest states who foot the bill.

<sup>60</sup> As in Britain, the popular press and the more extreme political parties used numbers granted asylum on first application, which in 1989 and 1990, were 5% and 4.4% respectively (see figure 5.2 above), to stigmatize asylum seekers as *Schmarotzer* - spongers. However, the majority of asylum applicants were allowed to remain legally in Germany once they had been through all of the appeals, either because their appeal was upheld or because they were granted a 'Duldung'. Duldung translates as 'toleration', and accurately reflects the status of those permitted to remain. It is the equivalent of Britain's ELR. It was therefore recognized that the majority of applicants were in need of protection.

schemes (Arbeitsbeschaffungsmaßnahmungen), early retirement and retraining schemes helped to disguise the real extent of unemployment, but the impact in the eastern Länder was particularly harsh, as this kind of unemployment and the resulting lack of disposable income was virtually unknown in the GDR. The 'return' of ethnic Germans from the Soviet Union had been gathering pace since the liberal reforms introduced by Gorbachev in 1985. However, the collapse of the Soviet Union meant that the two and half million Soviet citizens of German ancestry were now free to return to the reunited Germany which, compared to the situation at 'home' offered unparalleled opportunities. Immediately on arrival, 'unsere Russen' were entitled to housing, to take up employment, and to all the social benefits of a citizen. Given the difficulties that many of them had with the language, most were obliged to take advantage of welfare benefits, at least initially, thus massively increasing public costs. Add to this a sharp rise in the housing deficit from 1 million homes in 1988 to 2.5 million in 1991, and in the numbers of homeless from 40,000 to over a million and the result is a deepening sense of insecurity among the population as a whole.

As Germans' disillusionment with the government grew in line with her social security bill, ways of reducing welfare payments were sought. The reduction of welfare payments to German citizens would be met with strong resistance and would have been difficult to legitimise, given that theirs is predominantly a contribution-based system. However, Germany provided non-contribution based benefits to asylum seekers - non-contributors and non-citizens<sup>61</sup>. The argument was that since asylum applicants enjoyed social security benefits during the time it took to reach a final decision, and since only a minority of applicants were recognised as 'genuine' refugees, the majority were cheating the state - and the tax-payers - out of millions of deutschmarks in benefits<sup>62</sup>.

It is not acceptable that foreigners roam the streets, begging, cheating, and stabbing people, and then when they are arrested, because they shout 'Asylum', are supported by taxpayers (Klaus Landowsky, CDU chairman, Berlin).

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<sup>61</sup>In the intervening years since the imposition of restrictions on asylum seekers, and the substitution of food parcels for cash, cuts in social security benefits are increasingly seen as inevitable and legitimate.

<sup>60</sup>When the civil war in Yugoslavia broke out, hundreds of thousands fled north to Germany. Many already had relatives there, who had come earlier as guestworkers, and it was this group which at first looked after the refugees.

The desire grew to ensure that only 'genuine' refugees could actually claim asylum, and by extension, gain access to benefits. The sudden influx of civil war refugees, who were initially channelled into the asylum process, but who by definition could not meet the criteria of the 1951 Convention, had the effect of massively distorting the recognition rates, reinforcing the impression that 'genuine' refugees are a tiny minority, and that the majority of asylum seekers are welfare 'cheats'. In such circumstances, asylum seekers, in spite of regulations prohibiting them from working and confining applicants to hostels, offered an easy target both for the Molotov-cocktail wielding mobs and the political elite.

The welfare state is itself the site of yet another contradiction. While there are those who argue that large numbers of refugees and migrants place an insupportable burden on the welfare state, others have pointed out that 'if economic growth, the welfare state and high living standards in general are to be maintained, then some migration must continue' (Heisler and Layton-Henry 1993: 152), if only because of the declining birth and mortality rate.

#### *Threat to the Liberal Rechtsstaat*

Events at Hoyerswerda, Rostock and Möln shook Germans' belief in what Habermas has referred to as the 'Second Big Lie' (1993: 136) - 'we have finally all become normal again'. A vicious circle was created in which the political discussions of the crisis heightened tension on the streets, and violence on the streets ensured louder calls for 'something to be done'. Attacks on asylum hostels, witnessed and applauded by crowds of onlookers demonstrated the growing confidence of, and support for the far-right. In September 1991, a block of flats in Hoyerswerda in which asylum seekers were housed was attacked and the inhabitants had to be bussed out under a hail of rocks and stones. This event shocked Germans and made front pages around the world. But worse was to come. Almost one year later on the 22nd of August, a gang of Neo-Nazis gathered outside another asylum home, this time in Rostock-Lichtenhagen. For four days the gang shouted, threw stones and Molotov cocktails and finally set the hostel alight. All of this was done under the eyes of neighbouring residents who cheered and applauded in what had become a nightmarish orgy of racism and violence. Though the police were present, they delayed intervening, and quickly withdrew to become spectators themselves.

The impact of this single event was immense. Foreigners throughout Germany - asylum seekers, guestworkers, and anyone who was visibly different were traumatised and terrified, and avoided going out at night in many of the cities. The members of ANTIFA, a loose grouping of militant anti-fascist youths, felt vindicated in their distrust of and hostility to the police. Though the overwhelming majority of those present outside the hostel in Rostock had either been attacking or supporting the attacks, most of the arrests came on the third night and were of ANTIFA members who arrived to try and drive off the Neo-Nazis. That the liberal state was endangered there was little doubt, but by whom? By an extraordinary sleight of hand, the Union parties managed to present the attacks as the fault, not of extremists who carried out the attacks, the police who failed to adequately protect the victims, or the political elite who chose to excuse and even justify the attacks, but of the victims themselves. Edmund Stoiber, then Interior Minister for Bavaria wrote:

The abuse of the right to asylum is creating unrest and anger in the population, and thereby the basis for toleration of the extremists, which they would not otherwise enjoy. (Bayernkurier 3.10.92)<sup>63</sup>

Dieter Heckelmann (CDU Innensenator Berlin) argued that the expressions of approval at Rostock were not due to 'the radical right, hostility to foreigners or even racism, but to fully justified dissatisfaction at the mass abuse of the right to asylum'. The liberal state was threatened by the rise in far right violence, but this was seen as an understandable response to the numbers of 'bogus' asylum seekers, the real threat. As a Spiegel commentator explained, Kohl was driven to threaten a state of emergency, not because of millions unemployed, or ruined state finances, or a lack of housing, nor because of the violent acts of the far right - 'the most urgent problem facing the Chancellor is how to rescue Germany from the world's refugees' (46/1992: 24-5).

The SPD agreed that the only way to diffuse the situation was to co-operate with the coalition government and work out a compromise. In November, the month that 3 Turkish women were burnt to death in Möln in yet another racist attack, the SPD performed the 'Petersberger Turn' and agreed to amend the Constitution. During the final debate on the

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<sup>63</sup>Der Mißbrauch des Asylrechts schafft Unmut und Zorn in der Bevölkerung und damit Grundlagen für eine hohe Akzeptanz von Extremisten, die diese sonst nie bekämen. In Die Zeit (30. August 1991), Stoiber was unafraid to use terms such as 'durchrasste Gesellschaft' (mongrelized society) to describe a multicultural society. See also Bade 1994 and Kemmerich 1994.

amendment (26 May 1993), the FDP chairman, Hermann Otto Solms argued that failure to amend the constitution would undermine Germany's entire democratic system, and that he would be voting for the amendment for the security of the Rechtsstaat, and the stability of the democratic order.

### *Threat to Identity*

Following the collapse of the Soviet Bloc the population of the German Republic changed dramatically. The 16 million citizens of the GDR and two and a half million ethnic Germans in the Soviet Bloc had always been entitled to full German citizenship, and because of Art.116 and because of the concept of 'Germanness' outlined above were not considered to pose any threat to the national identity of the Republic. However, simultaneously, the German population was being further increased by large numbers of Yugoslavs fleeing the war in their country, as well as an increase in refugees and asylum seekers from other parts of Europe and the rest of the world. Neither time nor distance erodes one's Germanness, with the result that 'ethnic' Germans from the former Soviet Union, regardless of their personal circumstances, or their numbers, were automatically entitled to entrance and citizenship, though from 1990, certain bureaucratic hurdles were introduced to slow their return to Germany (Thränhardt 1995: 29). Conversely, time spent or birth within the territory of the Federal Republic does not make one German, unless one is prepared to assimilate fully, though for some even this is not possible. Mattson (1995: 71) refers to an interview with Herbert Gruhl, a founder of the Greens, which he subsequently left, in which he claimed that 'most refugees are essentially biologically or organically incompatible with Germans'. While there are, it is to be hoped, few who would make so sharp a distinction between those belong and those who don't belong, between those who have a right to enter and those who don't, and those who have a right to stay and those who don't, nonetheless such sentiments or similar ones<sup>64</sup>, voiced in the media affect the attitudes of the public to refugees, and tempers the liberal commitment to admit refugees and asylum seekers. It is not expected that this group will stay or assimilate, and if they cannot become German, how is one to guarantee loyalty to the state - or gratitude to its citizens? Although in Germany, unlike Britain, asylum is, in theory at

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<sup>64</sup> Mattson (1995: 71) also cites Dieter Zimmer, who wrote in *Die Zeit* that a distrust or fear of foreigners is genetic, and while it might not justify violence, does engender 'friction' in a society.

least, a right not a gift, gratitude is considered the appropriate response of refugees, asylum seekers and foreigners in general.

### *The Election Campaign and the Search for a Solution*

The asylum debate in Germany exposed fundamental ideological differences both between and within the German parties, in distinction to the broad consensus found in Britain. Nonetheless, there was broad agreement on the source of the problem - the numbers, although the SPD insisted it was not only the numbers of asylum seekers that were a problem - they argued that the numbers of Aussiedlers should also be discussed<sup>65</sup>. Where the parties apparently differed was in their responses to that problem, and yet they all tended to favour a judicial solution in the short-term, although recognising that a long-term solution could not be found by changing the law of any single country.

The far right Republican party favoured the deletion of Art.16(2)2 and its replacement with the right of the Federal Republic to grant asylum to those who are 'really persecuted'. All others should be speedily deported. The borders should be closed and watched to prevent illegal immigration, because the nation must remain 'a community of Germans' (party pamphlet 1992). The Union parties picked up the tone from the Republicans, though the CSU in particular, as we have seen above, has traditionally favoured a much more restrictive asylum policy. However, this strategy misfired in the Land elections in March 1992, when the voters switched to the far right<sup>66</sup>. The response of the parties was to shift further to the right. Schäuble (CDU party chairman) and Seiters (Interior Minister) represented the right wing of their party, demanding deportation without access to judicial procedures, shortened procedures for those who came via 3rd countries, the use of 'white' lists, expulsion in manifestly unfounded cases (appeals only possible from outside Germany) and benefits in kind instead of cash. The amendment to Art.16 and the asylum regulations introduced at the same time fulfilled most of these wishes.

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<sup>65</sup> Prantl characterized the debate thus: 'Schlägst du meinen Asylbewerber, dann hau' ich deinen Aussiedler' (Prantl 1993: 305). Unfortunately, this loses in translation - 'Hit my asylum seeker and I'll wallop your ethnic German'

<sup>66</sup> The CDU lost 10% and the Republicans gained 9% from the previous elections in Baden-Württemberg, though in Schleswig-Holstein, the German People's Union picked up 6% from the SPD, while the CDU support remained the same.

Initially opposition to a change in the constitution was very broadly based, ranging from a few members of the CDU such as Heiner Geißler, to the PDS and the Greens, for whom Art.16(2)<sup>62</sup> was already too restrictive. In 1992, Sabine Leutheusser-Schnarrenberger, the FDP Minister for Justice, expressed herself reluctant to tamper with the German right to asylum (*Spiegel* 51/92) and her party colleague, Burkhardt Hirsch referred contemptuously to the ring of proposed safe third countries as a 'Kondom Sanitaire' (*Spiegel* 51/1992). In spite of these few voices, the coalition parties generally, including the FDP, were in favour of change.

For the SPD, the opposition party, the asylum issue served to heighten tensions within the party. Until November 1992, the party objected officially both to proposed changes in the Aliens' Law and the Constitution. Herta Däubler-Gmelin (deputy chair of the SPD) declared 'We will not give up Article 16 of the Basic Law' (cited in Prantl 1993: 303)<sup>67</sup> and Hans-Jochen Vogel (former SPD chairman) described the right to asylum as an inalienable piece (*unverzichtbares Stück*) of social democratic identity (*Spiegel*, No.42 1990: 32). The support of the SPD was unnecessary to change the Aliens' Law, as a simple majority sufficed. However, in order to amend certain articles in the constitution, a two-thirds majority in both the Bundestag and the Bundesrat was necessary. As Stoiber said:

The position of the FDP no longer interests me at all. I care only about the stance of the SPD, because I can only change the Basic Law with the support of the SPD (cited in Roos 1991: 88).

Therefore, the pressure on the SPD was escalated, until Kohl declared that the situation had become intolerable, and that without the co-operation of the SPD, he would be forced to declare a state of emergency. Bjorn Engholm, shortly before he left office as leader of the SPD, finally persuaded the party to agree that the constitutional provision would have to be amended.

It is unlikely that he would have managed this turn around (*Die Petersberger Wende*), if it had not been for the mounting tension due to the escalating violence directed at asylum

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<sup>67</sup> Däubler-Gmelin went on to say 'For forty years we have hidden behind the Iron Curtain. Now we are are face to face with our hypocrisy. The borders are, as we in the West demanded, open. Must we now to close them again, using judicial means? '(Prantl 1993: 304)

seekers, and arguments that by refusing to compromise, the SPD was fiddling while asylum hostels burned. Certain concessions, such as the removal of those fleeing war and civil war from the asylum process (aimed at the refugees from Yugoslavia) saved face, and the acceptance by elder statesmen of the party, such as Hans Ulrich Klose, that in the face of actual developments, they could see no other alternative. While arguing for the retention of the right to asylum, Klose warned that there was a danger ‘that it will finally be lost because of the enormity of migration, because it is neither legally nor actually equal to the demands placed on it’ (from the Bundestag debate 23 May 1993)<sup>68</sup>. However, the party did not unite around this issue during the final debate: it was not only the ‘reds’ in the party, such as Heidemarie Wieczorck-Zeul and Christoph Zöpel who objected to the amendment. Hans-Jochen Vogel, elder statesmen of the SPD, also expressed grave misgivings. Perhaps fortunately for the SPD, the whipping system is not used in Germany. Otherwise, the 100 who voted against the new Art.16(2)2 may have split the party.

The Greens too, found it difficult to achieve consensus within the party. Although the party rejected the Asylum Compromise, as the proposed amendment became known, and threatened to test the constitutionality of the new law in the Constitutional Court, within the party, tensions developed and not along traditional Fundi-Realo fault lines. Having consistently advocated ‘open borders’ and opposed the narrowness of Art.16(2)2, which excluded fugitives from civil war, they were forced to defend the article. Although they acknowledged that there were some who applied for asylum who did not meet the requirements for recognition as refugees, they were reluctant to label them as ‘economic migrants’. Initially, they rejected any suggestion of quotas because they ‘would be set according to Germany’s needs and not those of migrants or refugees’ and would specify which people - ‘strong young men would be given preference over elderly women, better qualified over unqualified’<sup>69</sup>. However, in the course of the debates the Greens were forced finally to abandon calls for open borders, to argue for the introduction of migration laws and to defend Art.16(2)2. They continued to argue for a broader definition of

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<sup>68</sup> daß es am Ende in der Massenheftigkeit der Zuwanderung verloren geht, weil es wegen Überlastung und Überförderung weder rechtlich noch tatsächlich gewährleistet werden.

<sup>69</sup> Petra Hanff of the Green party outlined the significance and challenges of the asylum debate for the party in an interview (26. March 1996 Bonn).

refugees, one which included civil war and persecution on the basis of gender, but once the SPD had bowed to pressure, they should little chance of affecting the final outcome.

#### *Extra-Parliamentary Opposition*

On the 8 November 1992, shortly after the attack on the hostel in Rostock 300,000 people marched through Berlin. This was publicised as an anti-racist demonstration, as a sign of solidarity with 'our foreign co-citizens' and as a means of demonstrating to the rest of world that Germany was not completely barbarous. This demonstration, the first of many, pulled together people from many different groups, from politicians such as Helmut Kohl and Richard von Weizsäcker (Federal President), to members of church groups, citizens' movements and radical left parties. The lack of support for the position of the political elites was demonstrated by the eggs and rotten fruit that were thrown at Kohl, who intended to lead one half of the march, but instead had to be escorted away by body guards. In the days that followed the demonstration, attention focused first on this attack and the one on the President, which forced him to cut short his address after the march, claiming that these 'linke Chaoten' had once again tarnished Germany's image. In response to objections from the many people who were there, who pointed out the marches had been peaceful and good humoured aside from these two incidents<sup>70</sup>, the events of the day were re-evaluated. What was missing from the coverage, however, were the sentiments expressed on the placards and banners, which carried slogans such as 'Hands off Art.16', 'The Right to Stay is a Human Right', 'Deportation is Murder'<sup>71</sup>. The marchers were not simply demonstrating against racism, they were supporting Art.16(2)2.

In contrast to the massive coverage of the anger and attacks against asylum seekers, those groups campaigning against the amendment found it very difficult to make themselves heard. Although the candle-lit marches, which occurred throughout Germany, were well supported and reported, they were consistently presented as anti-racist. And yet church groups visited asylum homes, and offered language classes to asylum seekers, other groups set up advice centres where refugees could come for information and help, and representatives of Pro Asyl, an umbrella organisation for refugee groups toured Germany,

<sup>70</sup> The good-humour was heavily and sometimes bitterly ironic. As people dispersed after the demonstration, the police, out in force, were taunted with chants of 'Where were you at Rostock?'.

<sup>71</sup> Had I not been on the march, I would have been unaware of the level of support for retaining Art.16 as it

visiting schools, churches and village halls, trying to explain to the general public what the changes would mean, and reinforce local campaigners in their work. Others set up vigils outside hostels, to protect them from attacks (though some of the inhabitants felt they would prefer not to have attention attracted to them). And ANTIFA supporters decided to give the Neo-Nazis a taste of their own medicine, hunting them through the streets and physically attacking them<sup>72</sup>.

#### *The Chosen Solution - Art.16a*

The new article, Art.16a, came into effect on 1 July 1993. Although the wording of Art.16(2)2 is retained, it is then followed by paragraphs specifying those who may not claim asylum, that is those entering from a 'safe' third country, or those from a state in which there is 'neither political persecution nor inhuman or degrading treatment or punishment'. The section of the new law which proved most effective was that which designated the nine countries with which Germany shares land borders as 'safe'. Consequently, the only way in which an asylum seeker can now legally enter Germany is by sea or air. As a result, in 1994, the numbers of asylum seekers entering fell to 127,210, rising only slightly the following year to 127,937. It was not the law alone that had caused this sudden reduction in the numbers. The war in Yugoslavia had ended, and with it the exodus of refugees. However, though this source had dried up, wars and oppression continue elsewhere, but now those who would seek asylum are forced to remain in the former transit states of Poland, the Czech Republic and Hungary.

#### **Conclusion**

It has been argued above that the campaign to change Art.16(2)2 of the Basic Law was carried out with an eye to the elections in 1994. Since the Coalition parties were again

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was.

<sup>72</sup> In Leipzig, on 1.7.1993, the day the law came into effect, a silent demonstration was organized to mourn those who, as a result of the amendment would not find refuge. The sombre mood was broken as the Autonomen spotted some skinheads in the distance, and took off after them leaving the less militant of us, still silent, standing in the square.

returned to power that year, it would seem that the strategy was successful. However, taking a closer look at party gains and losses, a slightly different picture emerges.

*Figure 5.4 Results of the 1990 and 1994 Elections*

Parties	1990 - Seats	1994 - Seats
CDU	268	244
SDP	239	252
CSU	51	50
FDP	79	47
Alliance 90/The Greens	8	49
PDS	17	30

The CDU/CSU/FDP alliance, which had insisted on the amendment lost a total of 57 seats. The PDS and the Greens, who had unequivocally supported the retention and expansion of Art.16(2)2 both made large gains. The SPD also gained seats. It would be naive to argue that the gains were all due to the parties' total or partial support for asylum seekers. The economic difficulties associated with reunification accounted for much of the loss of support for the coalition, and the gains of the PDS can be attributed to disillusionment in the East, but it would seem that neither the PDS nor Alliance 90/The Greens were penalised for their stand on the asylum issue and may demonstrate that those parties did represent the views of sections of the population who did not want to see their liberal constitution dismantled.

#### *Problem solved?*

In February 1996<sup>73</sup>, Volker Klepp, deputy Commissioner for Foreigners' Affairs, in response to a question on asylum seekers, said that 'asylum was no longer regarded as a problem - the situation had been dealt with' and that therefore, there were no plans to introduce anymore legislation. The Constitutional amendment and the accompanying changes to the asylum procedure regulation had had the desired effect, numbers had dropped dramatically and were continuing to fall. In other words, the problem had been correctly identified, the appropriate solution chosen and implemented, and the problem solved. However, in an information leaflet from the Ministry of the Interior dated the 5.

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<sup>73</sup> Personal interview.

February 1996, the Minister Manfred Kanther voiced his serious concern over the high numbers of those who apply for asylum in Germany each month, 'with approximately 128,000 asylum seekers per year and a recognition rate of around 9%, there is still a considerable amount of abuse'.

The numbers of refugees globally have not decreased, and refugees continue to seek asylum within Europe, though they have been contained within Eastern Europe. The fate of these people is however, no longer Germany's problem. What does this tell us about Germany today? During the asylum debate certain groups, the Autonomens, Pro Asyl, the Greens, the PDS, stressed the complicity of the German government with those governments, for example Turkey, who cause people to flee, and hence its responsibility to those people. Though they may not have articulated their 'consciousness of injustice' in the same way, this is the same argument employed by both Walzer and Carens (see Chapters 1 & 7), when arguing that there is a duty owed to those we have caused to flee. The government and sections of the opposition, on the other hand ignored those moral duties, and instead privileged other norms found in Walzer's work, arguing that the German state could not help everyone and its primary responsibility was to its own citizenry.

#### *Prospects for the Future*

Though the hysteria that surrounded the asylum question has abated, the issue has not gone away. 1998 is an election year in the Federal Republic, and at the end of 1997, politicians of all parties were once again raising the spectre of thousands of asylum seekers flooding northwards. The arrival in Italy of two and a half thousand Kurds in Italy created panic in Bonn. It was presumed (not without some justification) that these people would head north to join 500,000 Kurds already settled in Germany. Bonn continues to push for repatriation of the Bosnians, Croats and Serbs who remain in Germany. The main parties in July agreed to introduce an asylum law based on Britain's 1996 Asylum and Immigration Act, cutting welfare benefits to asylum seekers. The FDP did persuade its coalition parties to frame the law so that it will only affect asylum seekers, who, it is argued, deliberately exploit the welfare system. A clause cutting payments to asylum

seekers appealing against their deportation orders has been dropped. This would have effected many of the refugees from the former Yugoslavia.

Citizenship is also on the agenda. The Greens have proposed easier naturalisations and the introduction of immigration controls as part of their election manifesto, and the Union parties have replied by rejecting calls for further immigration. In the CSU election manifesto it states that 'Anyone who calls for immigration to our densely populated country endangers its inner peace'. So once again, the same issues have resurfaced - welfare, identity and the stability of the liberal state. However, when the attacks from the far right escalate once again, blame will be shared between the immigrants and those who support them.

## CHAPTER SIX

### BRITAIN AND GERMANY COMPARED

In this chapter, the development of asylum legislation, policy and practice in Britain and Germany are compared. This comparison enables us to see more clearly the impact and significance of certain factors for asylum policy-making. In the past decade there has been growing convergence of law, policy and practice between the two states, in spite of marked differences between the two. The very obvious dissimilarities between the two states serve to mask the growing parallels in policy and law that are explained by common features. The argument presented here is that it is those characteristics that the two states have in common that are most important for asylum policy – that they are states, that they are liberal representative democracies, that they are welfare states and that they are *nation* states. Comparing Britain and Germany also allows us to attempt a ranking of these different factors.

In the first section the differences between the states are outlined – physical position, history and political structure, and the consequences of these differences for the asylum and refugee issue explored. The similarities, perhaps less obvious but more potent, are then explored and explained by turning again to the features that these states have in common: borders, nationhood, democratic institutions, a commitment to liberal norms and the provision of welfare. The significance of each of these features in the construction of a refugee problem is discussed and evaluated. In the final section, a balance sheet is presented, in which the impact of the legislation introduced in Britain and Germany is compared, and potential future developments are considered. It is suggested that, for a variety of reasons, the process of convergence will inevitably continue, with similar effects in each country, that is, that asylum will continue to be granted, but only to a very select few, and that it will remain an electoral issue in both Britain and Germany.

#### **Britain and Germany: The Differences**

Of all the differences that separate Britain and Germany, three in particular serve to explain both the difference in the challenge facing the two states and their different routes to the same solution - the introduction of legislation. These differences are their geographical positions, their histories, and their political structures. The seas

surrounding Britain have acted as a natural barrier and fortification, while Germany's position in the middle of Europe has meant that its long land borders have shifted and changed, and that it has been the site of war and conflict throughout the centuries. Historically, both countries have been aggressors, but while Germany's overseas conquests were late in coming and few in number - the drive for colonial expansion did not really gain impetus until the end of the nineteenth century (Kennedy 1988) - Britain's conquests had taken off in the time of Elizabeth I. In the twentieth century, Germany has been twice defeated in wars it initiated, while in each case, Britain was part of a victorious alliance.

In spite of its history, Britain has escaped much of the fear and guilt that is still associated with Germany, and has neither apologised nor made reparations for its past. Germany, however, has reconstructed itself and its political system in opposition to its Nazi history, whereas Britain's political system is the product of tradition and precedent. Britain's system, as discussed in Chapter Four, is remarkable for its flexibility, the power of its executive and the lack of a written constitution and bill of rights. Germany, on the other hand, does have a written constitution that limits the power of government, specifies the rights of the citizens and can itself only be changed with the support of two thirds of the Bundestag and Bundesrat. These three, interrelated factors have meant that the numbers of applications received by each country, the countries of origin of the applicants, and each country's capacity to control entry have been different.

The most obvious impact the above differences have had is on the scale of the challenge facing Britain and Germany (see *table 6.1* and *figure 6.1* below). The number of people applying for asylum in Britain has never come close to the numbers applying in Germany. This difference is a function of the differences in Britain and Germany's capacity to control entry to their respective territories, which in turn is affected by their distinct geographical positions, their different histories and different constitutional arrangements. The impact of the events between 1989 and 1993/4 - the opening of the Berlin Wall, the collapse of the Soviet Union and war in Yugoslavia, which were responsible for the movement of large numbers of people - was very different in Britain and Germany because of these different factors. The following

table details the differences in numbers of asylum applicants arriving in each country in each year:

*Table 6.1 Number of Asylum Applications (in thousands).*

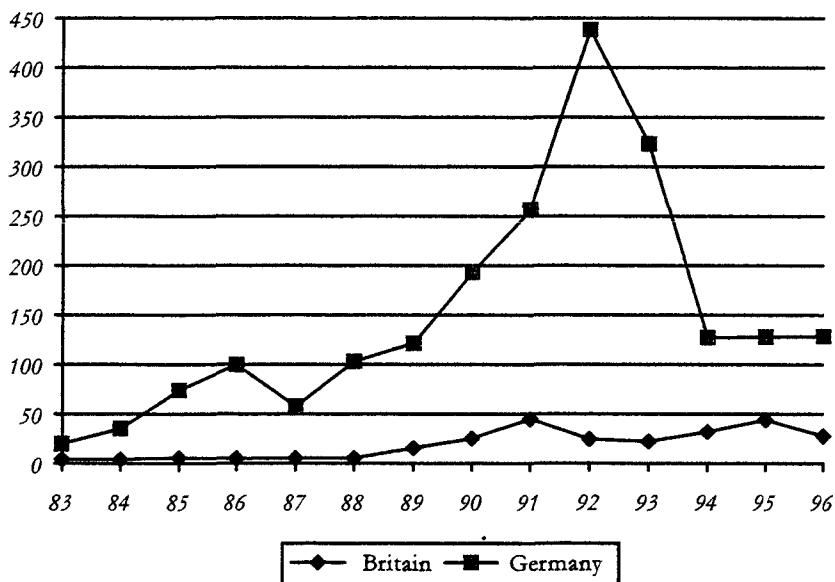
	83	84	85	86	87	88	89	90	91	92	93	94	95	96
B	4.3	3.9	5.5	4.8	5.2	5.3	15.6	25.3	44.8	24.5	22.4	32.0	43.9	27.9
G	19.7	35.3	73.9	99.7	57.4	103.1	121.3	193.1	256.1	438.1	322.8	127.2	127.9	128.5

(Source: British Home Office Statistical Bulletins & Bundes Ministerium des Innern)

Between 1983 and 1988, the number of applications in Britain hardly change, remaining between 4,300 and 5,500. During the same period in Germany, the numbers fluctuate dramatically, increasing fivefold to almost 100,000 between 1983 and 1986, dropping to 57,400 in 1987, and almost doubling again in 1988. The dramatic difference in scale is more obvious in *figure 6.1* below. Between 1983 and 1985, as the gap between British and German numbers increase, political upheavals in Sri Lanka cause thousands to flee. In Germany there are 2,645 applicants from Sri Lanka in 1983, more than 8,000 in 1984, and in 1985 17,380 (Mitteilungen der Beauftragten der Bundesregierung für die Belange der Ausländer, 14 Auflage, October 1994). However, in spite of the links between Sri Lanka and Britain (or because of them) the number of applications in Britain in 1985 is only 1,893 (Home Office Statistical Bulletin, Issue 17/94, Asylum Statistics United Kingdom 1993). In 1986, at the height of the Iran-Iraq war, the largest numbers claiming asylum in Germany are from Iran<sup>1</sup> - 21,700, while in Britain, the total number of asylum seekers actually decrease from 5,500 to 4,800, of which 897 are from Iran and 210 are from Iraq. As the numbers coming into Britain increase by 400 in 1987, in Germany they plummet from almost 100,000 to 57,400. This was a response both to a hiatus in those conflicts that had forced people to flee, and to the new legislation introduced in 1987.

<sup>1</sup>In 1984 and 1985, Iranians were respectively in fifth and second place in Germany.

Figure 6.1 Number of Asylum Applications (in thousands)



In 1988, numbers diverge dramatically once again. Applications into Britain hardly change remaining just over 5,000, while in Germany they shoot up over 100,000. Between 1987 and 1991, numbers increase in both countries, but while they continue to increase in Germany in 1992 (up to 438,191) and the first half of 1993 (224,099 Jan-June), in Britain the figures for 1992 and 1993 show a decrease, down from 44,800 in 1991, to 24,500 in 1992 and 22,400 in 1993. The British trend is particularly surprising given that this period marks the height of the Yugoslav conflict. The impact (or lack of it) of legislation on the figures is also surprising. Following the introduction of legislation, the figures drop sharply in Germany, but in Britain they increase, rising to 32,000 in 1994 and 43,900 in 1995. While the numbers and profile (see table 6.2) of the asylum applicants in Germany tend to reflect fairly accurately events abroad which cause refugee flows, the same cannot be said of Britain. This insulation from the effects of global conflict raises the question of how and why asylum got onto the British political agenda, but that will be dealt with in a later section of this chapter.

Table 6.2 Applications received for asylum into Germany and Britain by state of origin

Countries of Origin (into FRG)	Persons	Year	Countries of Origin (into UK)	Persons
Poland	26,092	1989	Turkey	2,415
Turkey	20,020		Somalia	1,850
Yugoslavia	19,423		Sri Lanka	1,790
Sri Lanka	7,758		Uganda	1,235
Lebanon	6,240		India	630
Iran	5,768		Ethiopia	560
Afghanistan	3,650		Zaire	525
Ghana	3,178		Iran	350
India	3,137		Ghana	330
Romania	3,121		Pakistan	250
Romania	35,345	1990	Sri Lanka	3,330
Yugoslavia	22,114		Zaire	2,590
Turkey	22,082		Ethiopia	2,340
Lebanon	16,229		Somalia	2,250
Vietnam	9,428		Uganda	2,125
Poland	9,155		Angola	1,685
Bulgaria	8,341		Turkey	1,590
Afghanistan	7,348		India	1,530
Iran	7,271		Pakistan	1,475
Palestine	5,728		Ghana	1,330
Sri Lanka	4,361		Lebanon	1,110
Yugoslavia	74,854	1991	Zaire	7,010
Romania	40,504		Angola	5,780
Turkey	23,877		Sri Lanka	3,765
Bulgaria	12,056		Pakistan	3,245
Iran	8,643		Ghana	2,405
Nigeria	8,358		Turkey	2,110
Vietnam	8,133		India	2,075
Afghanistan	7,337		Somalia	1,995
USSR	5,690		Ethiopia	1,685
Sri Lanka	5,623		Uganda	1,450
Ex Yugo.*	122,666	1992	Ex. Yugo.	5,635
Romania	103,787		Sri Lanka	2,085
Bulgaria	31,540		Turkey	1,865
Turkey	28,327		Pakistan	1,700
Vietnam	12,258		Ghana	1,600
Ex. USSR*	10,833		Somalia	1,575
Nigeria	10,486		India	1,450
Zaire	8,305		Zaire	880
Algeria	7,669		Iraq §	700
Ghana	6,994		Ethiopia	680
Afghanistan	6,351		Nigeria	615
Sri Lanka	5,303		Sudan §	560
Romania	73,717	1993	Sri Lanka	1,965
Yugoslavia*	72,476		Ex. Yugo.	1,830
Bulgaria	22,547		Ghana	1,785
Bosnia-H*	21,240		Nigeria	1,665
Turkey	19,104		Turkey	1,480
Algeria	11,262		Somalia	1,465
Vietnam	10,960		India	1,275
Armenia	6,469		Pakistan	1,125
Afghanistan	5,506		Sierra Leone	1,050
Russ. Fed.*	5,280		Zaire	635
Sri Lanka	3,280		Kenya	630
Yugoslavia	30,404	1994	Nigeria	4,340
Turkey	19,118		Sri Lanka	2,350
Romania	9,581		Turkey	2,045
Bosnia-H	7,297		Ghana	2,035
Afghanistan	5,642		India	2,030
Sri Lanka	4,813		Pakistan	1,810
Togo	3,488		Sierra Leone	1,810
Iran	3,445		Ex. Yugo.	1,385
Vietnam	3,427		Kenya	1,130
Bulgaria	3,367		Algeria	995

(Source: German Statistics - Bundesministerium des Innern; British Statistics - Home Office Statistical Bulletin Asylum Statistics United Kingdom 1995 9/96 [figures rounded to nearest 5])

\* The unrest in the region can be read from the changing names to describe the states, most obvious in the German sources, for example, Soviet Union, former Soviet Union, Russian Federation, or Yugoslavia, former Yugoslavia (Ex. Yugo. above), and in the German case again, 'Rest-Jugoslavia', as well as the arrival of new states such as Bosnia-Herzegovina.

§ The sudden appearance of Iraq or Sudan, for example, on a British list doesn't mean that more Iraqis or Sudanese came in 1992 than in previous years (in 1991 there were 915, in 1990 985 Iraqi asylum seekers into Britain and in 1991 there were 1,150

Sudanese), just that the numbers from other countries had dropped. The same 18 countries tend to feature on British lists, 19 on German lists, and 10 of them are the same: Algeria; Ghana; India; Iran; Lebanon; Nigeria; Sri Lanka; Turkey; Yugoslavia; and Zaire.

The geographical position of Britain, an island at the north-eastern corner of Europe and Germany's position at the centre of Europe, naturally accounts for some of the difference in numbers - Britain is simply not as easy to reach as Germany, and certainly the other European island states, Ireland and Iceland, also receive very few applications for asylum. Without this moat, Germany's long land borders are easy to cross. Although Britain's long coastline means that it should be possible for would-be asylum seekers to land unnoticed<sup>2</sup>, in practice very few do enter in this way, and so resources can be concentrated at the main air- and seaports. In Germany the case is quite different. Asylum seekers wishing to enter via the countries of the European Union, which account for six<sup>3</sup> of the nine states with which Germany shares borders, have only to drive across the frontiers<sup>4</sup>. Once the Iron Curtain had come down, Germany was physically open to the people of the former Soviet Bloc countries in a way that Britain was not. A glance at *table 6.2* reveals the different impact of events in south-eastern and eastern Europe on the numbers of asylum seekers applying to Britain and Germany during the period 1989-1994.

In 1989, 1990 and 1991, Turkey is the only European country to feature on the lists of the ten largest groups of applicants into Britain<sup>5</sup>, the others are drawn from Africa and Asia. In Germany, the spread is much more even, with asylum seekers coming from Europe (Poland, Turkey, Yugoslavia and Romania), and the Middle East (Lebanon, Iran, Afghanistan and Palestine), as well as Asia (Sri Lanka, India and Vietnam) and Africa (Ghana and Nigeria). The table reveals the extent to which Britain is insulated from refugee movements. Only 320 applications from the former Yugoslavia were made in Britain in 1991, the year the war starts. Of the different groups applying for asylum in Britain that year, Yugoslavia ranks 21st, while in Germany it provides the single largest group of asylum seekers, with 75,000 applications. It is not until 1992, that the former Yugoslavia appears on the list of largest groups with 5,635, though the

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<sup>2</sup>Italy is regarded as the vulnerable underbelly of Europe because its long coastline and its proximity to North Africa

<sup>3</sup>Denmark, Netherlands, Belgium, Luxemburg, France and Austria. The other three countries are Poland, the Czech Republic and Switzerland.

<sup>4</sup>Of course, if they then reveal their route, they will now be automatically returned to those countries.

<sup>5</sup>Like Germany, Britain classifies Turkey as European state.

numbers drop again in 1993 to 1,830 and to 1,385 in 1994, though fighting was still intense at this time.

In 1992-4, Turkey and the former Yugoslavia are still the only European states sending asylum seekers to Britain, but the numbers never approach anything like the number of Yugoslavian and Turkish asylum seekers applying to Germany, which also received Romanian and Bulgarian asylum seekers. Instead, asylum applicants entering Britain are coming from much further afield - mostly Africa and Asia, and especially from former colonies. As well as geography, history also accounts for some of the differences between the countries of origin listed above. In every year, Sri Lankans, Pakistanis and Indians have been among the ten largest groups arriving in Britain asking for asylum, joined in 1989, 1990 and 1991 by Ugandans, in 1993 and 1994 (and 1995) by Nigerians, and in 1994 by Kenyans. In 1994, 3,488 people from one of Germany's few former colonies, Togo, arrived in Germany requesting asylum. However, these colonial links don't bear stretching too far.

It should be noted that in each of the above years, more Sri Lankans requested asylum in Germany than in Britain. India only appears in the German top ten once in the years shown above, in 1989. In that year, however, there were more than three thousand applicants to Germany from India and only 630 to Britain. It would be a mistake to assume that Indian asylum seekers to Britain outnumber those to Germany in every other year, just because they are not among the groups listed since 1990. Even those groups in the tenth place in Germany usually outnumber those in first place in Britain<sup>6</sup>. Nonetheless, most asylum applicants into Britain have come from Commonwealth countries. History - colonial and commonwealth ties - does explain why certain asylum seekers head for Britain, why India, Pakistan and Sri Lanka are consistently at the head of these tables. In the case of Germany, the links that have evolved between those countries that have traditionally supplied guestworkers - such as Turkey and Yugoslavia, also explain why asylum seekers from those countries choose Germany as a destination. Furthermore, in both cases, it is likely that those

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<sup>6</sup>In 1983 asylum seekers to Germany from India and Sri Lanka alone were 4,193. Britain total number of applicants was 4,300. In 1984, Sri Lankan applicants to Germany were, at 8,063, more than double Britain's total intake. The total number of asylum seekers entering Britain in 1985 was 5,500, 25% more than the 4,471 Indian applicants entering Germany. In 1986, 6,554 Indian applicants to Germany heavily outnumbered all asylum seekers into Britain - 4,800.

who are forced to leave their home, family and friends will seek refuge where they might find, not just safety, but other members of their family and friends who have settled elsewhere.

There is another aspect to history as a factor in explaining why numbers applying to Germany are greater than those applying to Britain. In Germany, asylum provisions were formulated with reference to its recent past, creating a subjective right to asylum (Hans-Ulrich Klose Bundestag Debate 26.5.1993; Roos 1991). Britain felt no need to make reparation for recent misdeeds - indeed, members of parliament regularly gloried in Britain's allegedly unsullied record in relation to refugees, proud of a tradition of granting asylum, and little reference was made to Britain's less liberal tradition (Jeremy Corbyn, Hansard Col.1150: 13.11.1991). The British state had not been rebuilt and reinvented after the war by returning refugees, determined to make reparations for the past by making Germany a haven for future refugees, and to avoid a repetition of past mistakes by ensuring that individual rights could not be simply overridden or abolished by the government of the day in response to immediate political exigencies (Roos 1991:86). Decisions on whether, for what reason, and with what degree of force, someone can be refused entry at border by a representative of the state, are taken in the light of Germany's historical treatment of non-Germans<sup>7</sup>. Though Britain had historical responsibilities to citizens of the Commonwealth, it was able to shrug them off with extraordinary speed in the 1960s (see Chapter Four) and it recognised no specific obligations to non-Citizens wishing to enter Britain<sup>8</sup>.

In Chapters Four and Five, reference was made to the different basis of citizenship in each country. British citizenship has, until recently, been much less exclusive than German citizenship, and in spite of the introduction of the concept of patriality in 1981 is still based on *ius soli*. In Germany, *ius sanguinis*, the transmission of citizenship can only occur through bloodlines. As a result, the belief that one cannot become German, but can only be born German is still very strong, as is the idea of foreigners and asylum seekers as guests, people dependent on one's generosity as opposed to

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<sup>7</sup>Though the Jews were German, the Nazis withdrew nationality and statehood from them.

<sup>8</sup>Though people from the Republic of Ireland can enter Britain freely, this is still at the discretion of the British government, and legislation is already in place which could be used to exclude some, if not all Irish citizens.

individuals with rights. Unlike in Britain, it is difficult to find references to Black Germans in Germany. Though they are few in number, they do exist. There are much larger populations of Turks, Yugoslavs and Italians, for example, who have been born and spent all of their lives in Germany, but again little reference to Turkish-, Yugoslav- or Italian-Germans. In Britain, the classifications Black and Asian British are used both by the majority population and as self-descriptors, indicating a different attitude to the integration of 'foreigners'. However, in the section on similarities that follows, it will be argued that the difference in the German and British conception of citizenship is less important for asylum policy than the common attachment to the idea of a nation, whether of Germans or Britons.

The significance of Germany's constitutional provision for asylum has been discussed at length in Chapter Five, so the points will be only briefly referred to at this stage. Germany's constitution limits the power (sovereignty/autonomy) of the state in three ways that have had implications for asylum policy. First, articles 16 and 19 meant that, in theory at least, Germany could not refuse entry to someone requesting asylum, and so could not control how many or who might enter. In the case of Britain, however, there is no comparable limit on the state's right to refuse entry, since an appeal can always be made to the public good or national security (Asylum and Immigration Appeals Act 1993, Schedule 2(section 6)). Secondly, while British law is dualist, Germany's law is monist. That is, unlike in Germany, international commitments have no force in Britain, unless a law giving them force comes before parliament, such as when forty years after ratifying the 1951 Convention, Britain recognised its obligations under that Convention in the 1993 Act (see Chapter Four). In Germany, all international agreements entered into have the force of municipal law (Art.25), and, as referred to in Chapter Five, the granting of asylum was for a number of years governed not by constitutional provision, but by the 1951 Convention.

Thirdly, since the constitution ensured that the new Republic was to be Federal, and that the Länder would have a considerable degree of autonomy, it was difficult for the Bund to insist that the Länder either admit or reject would-be entrants. Tensions between a 'liberal' Federal SPD/FDP government and a conservative Land government such as Bavaria rumbled on through the 70s and 80s over just this issue

(see Chapter Five). Britain, as a unitary state, is not susceptible to these structural limitations on its sovereignty, though this may change in this parliamentary session, which has already seen a degree of devolution to Scotland and Wales.

Given these three factors: geography, history and constitutional arrangements, it is unsurprising that events in Eastern and South-Eastern Europe should impact differently on the two countries, and that Germany should perceive a problem, not only with numbers, but with control of entry. The problem seems to be one of control, because the complaints from the Union parties remain the same, regardless of whether the numbers increase or decrease. In Britain, too, there are complaints about the numbers, again irrespective of whether the numbers go up or down, and by comparison with Germany the numbers have been very low. Since control of entry is central to, if not synonymous with, the sovereignty of a state<sup>9</sup>, the German impulse to reassert control in this area is logical. While the actual regulation of numbers in Germany was difficult, Britain, on the other hand, had an extraordinary capacity to keep people out (Freeman 1994; Joppke 1998; Layton-Henry 1994). For example, although Britain was apparently 'threatened' with the prospect of millions of Hong Kong Chinese with British passports 'returning' to Britain before the handover to China in 1997, it successfully limited the numbers coming by granting the right to enter Britain to between 50,000 and 80,000 persons (1991 British Nationality (Hong Kong) Act). Besides, most preferred to go to Canada, the US and Australia<sup>10</sup>.

Though it will never be possible to completely control exactly who and how many enter, Britain probably gets as close as any liberal democracy can. Given Britain's almost perfect control of entry, the reassertion of sovereignty as a reason for introducing greater restrictions, has little explanatory value. Instead, Thränhardt (1997: 183) has suggested that the Conservative's introduction of the abortive 1991 Asylum Bill 'seemed to have refreshed the public awareness of the party's anti-immigration leanings without, however, alienating more liberal voters or inflaming the public climate'<sup>11</sup>. This was just as true of the debates leading up to the 1993 and 1996

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<sup>9</sup>And according to Walzer, to continuation as a political community.

<sup>10</sup>Britain ranked fifth in the list of preferred destinations.

<sup>11</sup>His comment at the end of that paragraph 'As a result, almost no asylum seekers entered Britain after this' is inaccurate (see Table 6.1 above).

Acts. The situation in Germany, however, was very different, and once again the explanation for the eruption of violence targeted at foreigners and, in particular asylum seekers, is complex. The fact that Germany was receiving 75% of all applications at the height of the Yugoslav war meant that many Germans felt they were carrying an unfair share of a financial and social burden. However, the most significant reason for the different reaction to asylum seekers in Britain and Germany, was not that the numbers were so much greater, though they were, but that in the newly reunified Germany - where old certainties had dissolved (Habermas 1992), and where the population was faced with political, social and economic challenges - asylum seekers were constructed as a scapegoat for all of these problems (Mattson 1995; see Chapter Five)<sup>12</sup>. Once they had been identified and targeted as a problem, and a constitutional amendment identified as the solution - the government had to win the debate, and at any cost.

There was also a significant difference, not in the solution to the problem of too many asylum applications, which in both cases was the introduction of new laws (see below), but in the national debates leading to the changes. In both countries the fight to get these changes onto the statute books took a number of years and attempts. The different tone and courses of the campaigns in each country were the result of their different political structures and a difference in the significance of the right to asylum in the two states. The debate in Britain was not marked by the same degree of anguish and soul-searching as it was in Germany. In the German case, in the months prior to the amendment to Art.16a, the government and media argued that the German state was in danger of being overwhelmed by asylum seekers (see Chapter Five). It was further argued that the opposition were preventing the government from dealing with this threat by refusing to work with the government to change Art.16(2)2 (Thränhardt 1995: 31).

The importance of Art.16(2)2 was not only that it granted a right *to* asylum, but that it could not be altered except by a two-thirds majority in both the Bundestag and Bundesrat. The German government needed the support of at least some of the opposition, and as a result, put a great deal of pressure on the waverers in the

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<sup>12</sup> Mattson explores the way in which 'the hegemonic culture [helped] to create "a refugee" unique to its

opposition party. In order to push it through, the CDU/CSU coalition had to, and did split the SPD. The means used included threatening a state of emergency. Those who opposed the amendment, especially, but not exclusively, those within the opposition parties - the Greens and the SPD - could therefore, not afford to be so restrained in their resistance, which meant that the debate could and did escalate and polarise. Had the SPD together with the Greens and the PDS held out, this article could not have been changed. It is therefore unsurprising that the battle over Art.16 was, literally and metaphorically, a bloody one. Again, as a result of the Nazi past, there is no whipping system in Germany. The first loyalty of Germans MPs, according to the constitution (Art.38(1))<sup>13</sup>, is to their conscience. Had there been a whipping system in Germany, one wonders whether the party would have split<sup>14</sup>. However, Engholm and others in the party believed that if they were to stand a chance of winning the 1994 Election that had to be seen to be addressing the problem. As it happened, backing the government was not enough, and they lost again.

Though there were demonstrations against and opposition to the Act in Britain, the state was not deemed to be facing a comparable crisis, so that there was never any question of, for example, declaring a state of emergency. While accepting 'that the pressures in Germany are much greater than our own, as are the difficulties', Kenneth Clarke (Home Secretary) did not 'however, believe that we should wait for the problem to assume German dimensions here before we take action to get rid of the manifest inefficiencies in our system' (Hansard 2.11.1992, Col.31). Furthermore, since all that was required to place the Act on the statute books was a simple majority, which the Conservative government had, it did not need Labour's support, and so did not need to exert as much pressure on the opposition as the CDU did in Germany. The power of the government of the day means, so long as it has even the smallest majority, that legislation can be pushed through without the support of the opposition, in and out of parliament.

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own socio-political and economic landscape' (1995: 62).

<sup>13</sup>Die Abgeordneten des Deutschen Bundestages...sind...nur ihrem Gewissen unterworfen.

<sup>14</sup>One should not assume from the absence of a whipping system, an absence of party discipline, however.

While British and German Home Affairs Ministers were individually and separately engaged in campaigning for the introduction of new legislation in relation to asylum, they were also meeting in the European Council of Ministers and a variety of other Intergovernmental fora to address the challenges of the Single European Act (1986). One of the most intractable challenges raised by the SEA has been the dismantling of barriers to the free movement of people as stipulated in Art.8a of the Act. In order to facilitate free movement within the single market, co-operation in a number of policy areas was required, including and especially those areas of policy which concerned the movement of non-EC nationals into and between the member states, such as asylum, immigration and visas. The necessity for harmonising legislation in these areas was obvious, but became more pressing after 1989, and provided convenient support for the restrictionists - entry policies had to be broadly the same, as one 'liberal state' could act as a conduit into all the other member states for asylum seekers - 'bogus' or otherwise - on this much British and German governments were agreed.

In 1985, Germany, France and the Benelux countries had signed the Schengen Agreement, declaring their intention to do away with all border formalities. The original Five members have since been joined by most other EU members - Ireland, Denmark and Britain being the exceptions<sup>15</sup>. So long as the EC's borders to the East were secure, and the numbers of non-nationals entering the European mainland manageable, the issue of border controls was sensitive, but not particularly contentious. However, differences between British and German goals were obvious, and these were exacerbated by the opening of the borders to the East. While Germany has remained a supporter of open borders *within* the Union (and of strengthening the external borders), Britain has remained steadfast in its refusal to sacrifice national control over who may or may not enter its territory. While both states assert the necessity of a harmonisation of asylum law and procedures within the Union, progress is slow. Karoline Kerber argued that 'the key to slow advance...lies in the legally weak

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<sup>15</sup>The Irish case is an interesting one, as there would seem to be little reason for Ireland to insist on remaining outside the Schengen Territories: until recently, migrants and asylum seekers arriving in Ireland never amounted to more than a thousand a year; immigration controls at the ports and airports are admirably lax; and the introduction of such control mechanisms must place a new and unwelcome financial burden on the state. However, it is possible that pressure from Ireland's nearest neighbour, with which it shares an open border, may account for this decision. Fears have been expressed that Ireland may prove to be an open back door into Britain for clandestine migrants, although I have only

structure of Title VI (article K) of the TEU<sup>16</sup> and pinned her hopes on the Treaty of Amsterdam (1997: 470). However, she overlooks the reason why Title VI (Provisions on Co-operation in the Fields of Justice and Home Affairs) is weak - and why the changes mooted in the 1996 IGC would do nothing to strengthen it. There are conflicting political goals and Germany and Britain represent the two different positions - while Germany looks to harmonisation as a means of sharing the burden of caring for asylum seekers, Britain rejects any suggestion that it should shoulder a greater share of the burden.

Britain and Germany, on the basis of very different evidence both decide there is a problem which must be addressed - 'the numbers of people seeking asylum pose major problems both in Britain and throughout the world' (Kenneth Baker, Hansard 13.11.1991)<sup>16</sup>. One possible response to a problem of large numbers of asylum seekers might have been to consider ways of easing or ending those circumstances that caused so many people to flee. The German government has been much more proactive in this regard than the British government. In June 1998, Volker Rühe (German Defence Minister) announced that the government would encourage other German companies to follow the example of VW and invest in Bosnia, so as to improve the economic conditions, thereby encouraging the civil war refugees to return to Bosnia (Reuters, Sarajevo: 2.6. 1998). This is only the latest in a series of such exercises<sup>17</sup>. However, Germany also chose to try and recreate the seas around Britain, turning the Republic into an island accessible only by air or sea. It attempted to seal itself off by completely

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heard of movements into Ireland from Britain by rejected asylum-seekers, hoping for a warmer welcome to the west.

<sup>16</sup>Mr Baker went on to exaggerate those numbers, claiming that they would exceed 50,000 in 1991 - in fact, they were 44,700 (the highest before or since) and they dropped the following year, before the bill was introduced.

<sup>17</sup>One of the most imaginative approaches to the question of return is that taken by Josef Vosen, mayor of Düren (North Rhine Westphalia). Determined to facilitate the return of the 800 refugees from Bosnia that were accommodated in his town, he travelled to Modrica, the home town of a quarter of the refugees, only to be told by Modrica's mayor - a Bosnian Serb - the Muslim refugees would not be allowed to return. Undeterred, he travelled to Gradacac, a town within the territory of the Bosnian Federation about eight kilometres from Modrica, and arranged for land to be made available. He then arranged, with financial assistance from the state of North Rhine Westphalia and the EU, to pay for the refugees to move to Gradacac, where he would build homes for them. Muslim leaders in Modrica did not want the refugees to be given fixed housing, lest the ethnic divisions become permanent - the refugees must be encouraged to return to Modrica one day. And so, Mr Vosen had his big idea - the houses would be movable, made of wooden panels - once it became possible to return to Modrica, the people would be able to take their houses home with them (Neil King, Wall Street Journal, 22 April 1998).

surrounding itself with a buffer zone of 'safe third countries' to which it could legally return anyone entering Germany for the purposes of claiming asylum.

Though not as effective as the sea, the changes to the constitution seemed to insulate Germany pretty effectively from the sources of its 'problem' - East European asylum seekers. The amendments to Art.16a came into force on 1 July 1993 in Germany, and subsequently the number of applicants dropped by more than half from 224,099 in the first six months of 1993 to 98,500 in the second six months. The following year the numbers were down to 127,210 and in 1995 they were 127,937. It seemed as though the 'problem' had been correctly identified, and an appropriate response formulated and implemented successfully. The case of Britain, as discussed in Chapter Four, was quite different. In that chapter, possible reasons were discussed for the unexpected increase in numbers after the legislation was introduced. Obviously, whatever effect the legislation had had, abolishing some rights to appeal had not reduced the numbers coming at all. Whereas after 1993, Volker Klepp (of the Berlin Commission for Foreigners' Affairs) could confidently assert that there would be no need for further legislation (Interview, February 1996), the situation in Britain was completely different.

While the numbers had dropped in the two years before the legislation, in 1994 and 1995, they increased by approximately 10,000 each year. Once again the response was new legislation, but access to Britain was already controlled about as tightly as it could be, without seriously affecting the movement of business visitors and tourists (important sources of revenue). In which case, the only remaining alternative would be to discourage those few who could not be turned away, by making life in Britain as difficult as possible for them, knowing that word would filter back to other potential asylum-seekers, that it would be better to try elsewhere. Following the 1993 Act, there were a number of attempts to restrict access to legal aid and benefits via the immigration rules, but following legal challenges, the government was forced to introduce a second bill in 1995, which received Royal Assent in July 1996.

The differences between these two states are immense, varied, and not to be underestimated. However, in spite of these differences, especially in terms of sheer

numbers, both countries simultaneously introduce legislation designed to deal with the same problem - too many asylum seekers. In the following section, the common features of the two states and the similar constructions of the problem in each country explain why two countries facing such different challenges and in such different circumstances should choose such similar means of addressing the issue.

### **The Similarities: Nation-States, Sozialmarktwirtschaften and Liberal Democracies**

Having discussed some of the differences between the two states, what do they have in common? Some of their common features include borders, the idea of a national identity, an attachment to liberal norms, an elected government, free markets and welfare systems. This thesis argues that, while these features are in tension with each other, in both Britain and Germany the same features are behind the drive for restrictions - the need to control entry at the border, the imperative to privilege the interests of the demos over wider humanity, the nationalist impulse to exclude those who are different, and belief in the importance of boundaries for welfare provision. However, asylum will also be retained in each state because of the attachment to liberal universal ideals and because of the demands of the free market for human mobility. Were it physically possible for Western states to create impregnable fortresses, there would be little support for them for a mixture of material and ideal reasons (Shacknove 1993: 517). In this section, the common pressures for restriction and for a continuing commitment to a generous asylum policy are examined.

#### *Nation-States*

Germany and Britain are both *nation-states*, though one is much older than the other.

Wolfgang Schäuble (CDU) was very clear about what this means:

We - the states of old Europe - are classic nation-states. We do not create our identity through belief in an idea, but through belonging to a particular people, as it is geographically bordered and as it has developed historically (Schäuble, 1989: 25).

This view informs and shapes German citizenship and Germany's receptiveness to 'foreigners'. The reference to 'belief in an idea' alludes to the Republican ideal that underpins French citizenship, and which makes assimilation within the French nation possible and desirable (Brubaker 1992). In Britain the situation appears to be

different from both. In Britain, there is less of an attachment to the idea of ethnic belonging or to a unifying political ideal. Instead there is a claim to multiculturalism (a claim that is contested and problematic), which permits the co-existence of Black, Asian and British identities. However, these differences in conceptions and understandings of citizenship can be overplayed. In each state, citizenship is about belonging – those who are citizens, who belong, have rights and privileges (and responsibilities) that must be protected, and citizenship continues to be a means of formally distinguishing who is or is not British.

However, there is an ongoing discussion in each country about what it means to be British or German. In Chapters 4 and 5, it was suggested that national identity was problematic for both states, and that in the process of renegotiating this identity, asylum seekers, one of only two groups of outsiders<sup>18</sup> with a 'right' to enter either state in any numbers, were being constructed as the threatening 'other'<sup>19</sup> (those entering for family reunification are the second group). Although membership of the German *Volk* is tightly and narrowly defined, there is also a debate in Britain about what makes someone British<sup>20</sup> (Cohen 1994). Nothing serves to create a sense of internal unity better than an external threat, and that sense of unity was and is missing from the reunified Germany. In the case of Britain, it has still not relinquished its delusions of being a world power - see its posturing over the Iraqi 'conflict' in February 1998. In each country, immigration controls are filters, designed to select those who belong, or who can be most easily assimilated to a particular British or German identity. Asylum legislation is part of that filtering process.

The introduction of lists of 'safe third countries' introduces buffer zones, which keep at a distance the most different, those most likely to change the nation into a 'durchrasste Gesellschaft' - *a mongrelised society* (Edmund Stoiber, *Die Zeit* 30 August 1991), a 'multikriminelle Gesellschaft' (Streibl, former Prime Minister of

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<sup>18</sup>...since ethnic Germans with a right to return are considered insiders.

<sup>19</sup>In the run up to the 1998 Federal Elections, the second group - family members - became a target. The CSU as proposed lowering the age limit for children wanting to join their family in Germany from sixteen years to eleven years.

<sup>20</sup>In its anxiety to prevent 'benefit tourism', to ensure that non-Britons could not avail themselves of social welfare benefits in Britain, a rule was introduced, according to which only those who could prove that their primary residence is in Britain are entitled to benefits. An unforeseen side-affect of this rule is that

Bavaria, cited in Knopp 1994: 125), or another Balkans (Norman Tebbit, 1998). While such crude formulations are not part of mainstream British politics, the emphasis in the British debates on the multicultural nature of British society and its good race relations was usually a prelude to the argument that these good relations between the different cultures were dependent on strict immigration controls (Hansard Michael Howard, 11 December 1995, Col.699 & 710; Kenneth Clarke, 2.11.1992, Col.21; Kenneth Baker, 13.11.1991, Col.1083). As Le Lohé says:

...the impression is that the legislation's ostensible purpose of dealing expeditiously with both genuine and bogus claims for political asylum had been transformed in the popular mind, to one of stopping a new flow of coloured immigrants (1992: 472)

In Germany, violence against those who obviously did not belong to the 'nation' was explained by the presence of too many foreigners, so that the solution was obviously to limit the numbers of them who could enter (see Chapter Five). However, the impact of immigration controls on societal harmony has been shown to be negative (Brochmann 1993; Miles & Thränhardt 1995). Steven Cohen has argued, 'It is illogical, nonsensical to think that we can take the racism out of immigration control' (1996: 7)<sup>21</sup>. In spite of the differences referred to in the first part of the chapter - differences in numbers, and in the states of origin of the people seeking asylum - Germany followed Britain's lead and linked asylum (immigration) control firmly to issues of race relations (Solomos 1993).

In the British debates, while some MPs claimed the legislation was necessary to maintain good race relations (Hansard 2.11.1992: Ken Clarke, Col.21; Ian Duncan-Smith, Col.53; Jacques Arnold, Col.70), others, especially those with a large ethnic minority in their constituency, voiced concern about the impact of the new legislation on their constituents: 'good race relations cannot be other than harmed when we pass legislation which in the main will adversely affect one part of our community only' (Tony Blair, Hansard 2.11.1992, Col.36)<sup>22</sup>. However, without wishing to be too

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Britons who have been travelling for extended periods, or working abroad, and who have not been resident in Britain are now finding it difficult to get benefits on their return

<sup>21</sup>The asylum debate shows that it is difficult to see how racism can be taken out of nationalism. Nationalism cannot be other than racist and exclusionary, as is very clear from the work of Spencer and Wollman (1997). A detailed discussion of the arguments, however, lies outside the framework of this thesis.

<sup>22</sup>See also during the same debate, Roy Hattersley, Col.50; Max Madden, Col.59-60; Jeremy Corbyn, Col.65; Piara Khabra, Col.79)

cynical, it could be argued that representatives of (sections of) the demos, were responding to the concerns of those they were representing in objecting to the bill. Some of the clauses in the asylum and immigration appeals bill, those dealing with immigration appeals, had direct consequences for British citizens and their families<sup>23</sup>, in particular black and Asian British citizens - it was criticised as an 'anti-black family' bill (Independent, 12. 1. 1993). While not disputing such a claim at all (especially given the treatment meted out to a group of Jamaicans attempting to spend Christmas with their families in Britain), one wonders whether, if the immigration appeals had been dealt with separately, opposition to the asylum bill might have been lessened because it would not be directly affecting members of the polity, if instead opposition would have been focused on the attacks on British citizens and their families.

Such an argument would, however, be too crude. There were those, in- and outside parliament who objected to the bill on grounds that were not narrow or self-interested, or at least only to the extent that they were concerned about the kind of polity in which they wished to live. Many private citizens individually, or through their support of campaigns and organisations such as amnesty international, Charter '87, A Charter for Refugees and the Asylum Rights Campaign, fought on behalf of unknown individuals<sup>24</sup>, who were not part of the demos and with whom they had no connection. Many backbenchers, and a few frontbenchers, primarily in the opposition parties, campaigned against the 1993 Act (Hattersley Hansard 2.11.1992). This was not only in response to pressure from their constituencies, but also because of a commitment to certain liberal (and/or socialist) values.

Such concerns also had an impact in Germany, where those who wished to retain the original Art.16(2)2 could point to a different kind of Germany, one to which they were not anxious to return. Nazi Germany was invoked as a warning to those who would tamper with the constitution (Prantl 1994: 156-7). The rise of the far right and their

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<sup>23</sup>The Act removed a right of appeal from certain categories of visitors.

<sup>24</sup>Mr Robert MacLennan, the member for Caithness and Sutherland, presented a petition 'on behalf of 16,300 concerned members of the public, registering protest at the Government's proposals to restrict the rights of asylum seekers-the proposed abolition of legal aid for asylum seekers, the extension of the restriction on airline carriers, and the suggestion that asylum seekers be fingerprinted in a discriminatory fashion' (Hansard, 13 November 1991, Col.1200)

attacks on foreigners and asylum hostels created a dilemma<sup>25</sup> for the opponents of the amendment. It *seemed* as though a large proportion of the population, including a violent and extremist minority wanted greater restrictions, though this was in part due to selective reporting, as in the coverage of the mass demonstration in Berlin (see previous chapter). During the asylum debates, many politicians spoke of their duty to respond to the wishes of those who had elected them:

90% of the population expect us to change the constitution. Failure to do so would have dramatic consequences. Faith in the politic process would be deeply shaken (Hermann Otto Solms, chairman of the liberal FDP, during the final debate in the Bundestag, 26.5.1993)<sup>26</sup>.

The choice discussed was stark - amend the constitution so as to restrict access to the asylum process or face the probability of a violent collapse of the state, or in the case of Britain, introduce the Asylum and Immigration Act or face Germany's problems.

Mattson argues that:

The solution to the crisis as it took shape in the early nineties was as constructed as the problem. At each and every step, certain rhetorical and political strategies determined the way the issue itself would evolve (Mattson 1995: 83).

Why was an asylum problem constructed? In both Britain and Germany there is a distinct correlation between economic security and xenophobia (Foot 1965; Thränhardt 1995). This is not a necessary correlation, as demonstrated by the response to refugees in the immediate aftermath of the Second World War (Chapter Five), but the temptation to blame 'foreigners' for economic problems is one too rarely resisted by governments. In the case studies on Britain and Germany, the economic difficulties facing the two states were offered as one explanation for the targeting of asylum seekers. Concerns about protecting the nation-state found common ground with worries about financing the welfare state. The debate surrounding the welfare state also revolves around issues of inclusion and exclusion, of belonging and entitlements.

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<sup>25</sup> An interesting difference between Britain and Germany is concern with the opinion of the rest of the world. While Britain remains secure with its self-image and either unconcerned by the opinion of non-Britons, or convinced that it is universally admired, in Germany, members of the public, of parliament and particularly of the business class expressed concern that the attacks on foreigners would seriously damage Germany's image abroad, and thus its international trade.

<sup>26</sup> 90% der Bevölkerung erwarten von uns eine Änderung des Grundgesetzes. Ein Scheitern an dieser Stelle hätte dramatische Auswirkungen. Das Vertrauen in die Politik würde dadurch tiefgreifend gestört.

## *Welfare*

At least in Western Europe, capitalist liberal democracies are not -yet- arenas for the untrammelled forces of the free market. In Chapter one, the argument that the existence of a *welfare state* necessitates restrictions on entry was considered, while Chapters Four and Five referred to the use of this argument to justify the 1993 Asylum and Immigration Appeals Act and the 1996 Asylum and Immigration Act in Britain and the 1993 change to Art.16 of the German constitution. Of all the arguments for restriction of entry, the protection of welfare provision is perhaps the most challenging, for it seems as though providing assistance to one vulnerable group – asylum seekers – must mean providing less to other needy groups – the unemployed, the disabled, the poor. These last groups have two advantages over asylum seekers: they are ‘our’ poor, and they are finite. Asylum seekers’ claims to assistance, on the other hand, are the claims of strangers, are probably, according to the dominant logic, fraudulent and, perhaps most importantly, are potentially infinite. To argue that the claims of asylum seekers are as valid as those of citizens would, it seems, place an intolerable economic burden on the state. There are two assumptions at work here: that the welfare state has finite capacity and is currently on the verge of collapse, and secondly, that lifting restrictions would mean that millions from around the globe would make their way to Europe, specifically to Britain and Germany.

It was this economic argument that formed the basis of the push to distinguish ‘genuine’ from ‘bogus’ refugees, to limit assistance to ‘deserving’ asylum seekers (Gerster 1993:169)<sup>27</sup>. The crisis of the welfare state in both Britain and Germany has provided the rationale for exclusion in each state, in spite of the difference between the two systems. Reference to the crisis offers convenient justification for making distinctions, and not just between ‘bogus’ and ‘genuine’ asylum seekers, but for choosing from among the ‘genuine’ (Ann Widdicombe Hansard 15.7.1996, Col.823). That there was a welfare crisis, and that it was due to a scarcity of resources (rather than decisions about how those resources are deployed) was treated as axiomatic, yet as was pointed out in Chapter One, the massive increase in the number of people claiming benefits in Germany after 1989 – people who had not previously contributed to the Federal Republic’s coffers – did not bankrupt the state. In Britain, the new

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<sup>27</sup>Johannes Gerster is a CDU MP

Government responded to the crisis in the NHS by reallocating funds from other departments. However, reducing costs cannot be the most important goal since both Britain and Germany have introduced more expensive ways of delivering benefits to asylum seekers – vouchers. While it is accepted that substituting vouchers or goods in kind for cash benefits is more expensive and less efficient<sup>28</sup>. The goal for both Britain and Germany is to dissuade potential asylum seekers from making their claim. This is considered a sensible investment, since it is assumed that it will lead to fewer claims and costs (HO Statistical Bulletin 15/97: para.1). While the reception policies of countries undoubtedly has an impact on an asylum seeker's choice of destination, it is only one factor influencing it (Koser 1997) – and is unlikely to be a major determinant in the actual decision to flee.

Supporters of new, more restrictive legislation pointed to the millions of 'genuine' refugees around the world, and in a strange leap of logic, went on to claim that Britain/Germany could not be expected to provide for *all* of them, and that to attempt to do so, would be to inflict terrible pressures on 'our poor, 'our homeless', 'our unemployed' (Edward Garnier, Hansard 2.11.1992 Col.61; Gerster 1993). This line of reasoning overlooks the difficulties most would-be refugees have in leaving their own country, as well as the fact that the overwhelming majority of refugees find asylum in neighbouring countries (Africa hosts 95% of all African refugees). The conclusion of this chain of illogic was that there was therefore a need to pick and choose from among these 'genuine asylum seekers', those who could contribute to the welfare of Britain and Germany, those who would most easily 'fit in' and to exclude those who would 'bleed Britain of £100 million through benefit fraud' (Tim Janman, Hansard 13.11.1991, Col.1087)<sup>29</sup>.

An attempt to disguise the racist nature of such concerns was made by appealing to the need to reduce the provocation to racist violence which the 'large' numbers of asylum seekers offered. In Britain, while home grown racist and fascist groups have not generally had the same influence as on the mainland (Solomos 1993: 244-5), asylum

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<sup>28</sup> Home Office White Paper Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum, July 1998: 39.

<sup>29</sup> Janman was citing an article in The Times, conveniently printed on the same day as the debate. The figure of £100 million cannot, of course, be verified.

policy in the 1990s was formulated in the shadow of potential far-right violence. The Conservative government in Britain used the events in Rostock and Hoyerswerda as a warning of what would happen if Britain did not reduce the numbers of asylum seekers who gained access to Britain (Bowen Wells, *Hansard* Col.78, 2.11.1992)<sup>30</sup>, while in Germany it was stressed that the ‘acceptance capacity’ (Schäuble 1989: 26), ‘threshold of tolerance’ and ‘the limits of endurance’ had been reached (Neusel 1993:153).

### *Multiparty Representative Democracies*

Given the electorate’s disillusionment with all of the parties, and the system as a whole; given the general acceptance by this time that the asylum seekers were responsible for the crisis that many Germans believed Germany was facing; and given the fear that the liberal, democratic state was threatened by internal extremist forces, it is perhaps unsurprising that liberal voices were drowned out by the shouts of a demos fed on a diet of tabloid prejudice and racism, and misled by their elected representatives (Kaye 1998). The arguments that the numbers of asylum seekers had to be restricted because of the threats they posed to the identity, welfare and stability of Germany and Britain were contrived. They were constructed with a particular goal in mind - the winning of elections. For the most part, it has been the parties of the right who have kept asylum and migration on the electoral and political agenda. Yet, as we have seen, the parties of the centre-left in both Britain and Germany have accepted this agenda.

Traditionally, Conservative parties have been in favour of economic protectionism and restrictive immigration policy, and in both Britain and Germany, it has been the Conservative parties who have been most active in demanding restrictions. The Liberals, ideologically wedded to free markets and (relatively) free movement reacted differently in each country - in Germany, where they formed part of the governing coalition, they strove to tone down the government proposals, but in the final vote supported their partners in government. In Britain, where the Liberals had little to lose, like the Labour party they could uphold their principles. Parties of the left have

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<sup>30</sup>Little reference was made to the actual, though unpublicised racial attacks that occur daily in Britain, of which the Lawrence and Menson cases are only the most well-known.

traditionally been torn between internationalism and the need to protect the national workforce from cheap foreign labour.

Although the Conservative governments had each (a few) individual members who expressed concern that the new legislation might be going too far - Emma Nicholson and Patrick Cormack in Britain and Heiner Geißler in Germany - on the whole, their members tended to support the party line. In Britain, where far less pressure had been placed on the opposition party, especially after the election, splits in the Labour Party were much less obvious, since the MPs could all oppose the bill. Different objections were raised, however, by different sections of the party. The 'old left' (Jeremy Corbyn, Max Madden, Robert Maclennan and Bernie Grant among others), to judge by their contributions to the debates, and their records as MPs, opposed the bill as a matter of principle and socialist principal at that, 'As a socialist, I believe that people who are fleeing war and persecution should be welcomed into this country as they have been so many times by past generations' (Dave Nellis, Hansard 21.1.1992, Col.275). In other cases, opposition seemed to reflect 'liberal' values such as due process, and fairness:

It is accepted that the issue between us concerns the due process of law-in other words, it is about fairness and whether our procedures conform to the rules of natural justice (Tony Blair, Hansard 2.11.1992, Col.36)<sup>31</sup>.

In Germany, the SPD's differences could not be avoided, and were revealed for all to see during the final debate, when just over half of the SPD MPs voted for the amendment. Again, as in the British case, motives were mixed, with some, such as Heidemarie Wieczorck-Zeul and Christoph Zöpel, taking the socialist internationalist position, and others, in particular that generation of SPD politicians who had experienced exile, concerned about the abandonment of a cornerstone of the liberal democratic state. However, because of its different voting system, Germany's ideological menu is more comprehensive than Britain's, offering, in addition to the Greens, the PDS (Democratic Socialists)<sup>32</sup>. These were the only parties in Germany that voted unanimously against the amendment. In both Britain and Germany, the same ideological positions are there if one looks for them. It would be interesting to

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<sup>31</sup> Mr Blair's focus on the legal aspects of the bill, was shared by other lawyer MPs, such as Paul Boateng (Hansard, 2 November 1992, Col.33).

see, if a two-thirds majority had been necessary in the House of Commons, whether Labour's unified stand against the Bill would have been maintained, if they might have launched a counter attack on Conservative claims about numbers and the abuse of the system. Given the acceptance in the Labour party that there was a problem of numbers and extensive abuse, such an outcome seems unlikely (see Chapter Four). To a greater or lesser degree, the debates on asylum in the early nineties revealed tensions and splits in the main political parties, especially in the parties of the centre left. It seems that, just like the borders of nations and states, the borders of parties and ideologies don't neatly coincide. Each of the four main parties - the Christian Democrats, the Conservatives, the Social Democrats and the Labour party - has its share of universalists and particularists, reflecting the rival tensions in liberal democracies.

#### *The Constraints Imposed by Democratic Elections*

The Elections in 1992 in Britain and 1994 in Germany were the first since the opening of the Berlin Wall, the reunification of Germany, the collapse of the Soviet Union and the outbreak of war in Yugoslavia. One consequence of these traumatic events in and around Europe was not so much the movement of large numbers of people from East to West, as the realisation by people in the East and the West that they *could* move. Although Britain's island status and its strict immigration controls insulated it to a great extent from these events, the media brought the events into our living rooms, and served to create a sense of vulnerability to the mass movements of the people displaced by those events<sup>32</sup>. In Germany, the presence of Roma and Sinti begging and inviting passers-by to play 'Find the Lady' on the streets of the cities, where they were concentrated, distorted perceptions of just how many people there were and created the same sense of loss of control. As the borders dissolved or became permeable, there were hundreds of thousands of refugees who could and did cross into Western Europe (though not the millions predicted). They presented a both a challenge and an opportunity to the incumbent governments of the European Union.

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<sup>32</sup>The far right find it difficult to overcome the 5% hurdle at federal elections. While Britain has its Scottish and Welsh national parties, the SNP and Plaid Cymru, they have not been as successful as the Bavarian CSU.

<sup>33</sup>See references to Kenneth Clarke's claims in chapter 4.

As representative democracies, regular elections are a feature of both states and entail particular dangers for vulnerable non-members such as asylum seekers, who can be exploited by those anxious to return to, or hold onto power. In 1992/3 the governing parties in each state were facing an electorate disenchanted with conservative governments that had each been in power for more than decade. The Conservatives in Britain and the Union parties in Germany had been in power thirteen and ten years respectively, and were quick to exploit this chance. Concern about *verdrossenheit* and voter apathy was being voiced in each country. An issue was needed which would bring the voters to the ballot box in order to legitimate the democratic process once again, but in setting the agenda, the incumbent government had to choose an issue that would highlight the weaknesses of the opposition parties. In Britain, the issue that actually won the 1992 Election for the Conservatives was tax, but Conservative candidates also played the race/immigration card: Maureen Hicks (Wolverhampton NE) warned of Labour's 'Open Door policy', Tim Janman (Thurrock) spoke of bogus refugees, and David Evans (Welwyn and Hatfield) demanded a 'moratorium on foreigners' (Le Lohe 1992: 472). The first reading of the Asylum Bill took place on 1 November 1991 and the second in January 1992, but although it fell because there was not enough parliamentary time before the approaching election, as suggested earlier it had already served its purpose (Thränhardt 1997). The introduction of this bill reinforced the traditional image of the Conservative party as the party that could be trusted to control immigration, that is, to put the interests of British citizens above those of non-citizens. As party strategists prepared for the next General Election, Mr Andrew Lansley, Conservative candidate for South Cambridgeshire, pointed out, immigration was an issue which still had potential to hurt the Labour party (Hansard 20.11.1995, Col.340).

In Germany, the government's post-unification honeymoon had been cut short by tax hikes, and Kohl's government was widely seen as responsible for the country's deepening economic crisis, therefore the government could not attack their opponents on tax issues. The asylum issue must have seemed an ideal opportunity both to deflect responsibility for the perceived crisis onto others - asylum seekers - and to wrong foot the opposition. The SPD mishandled the asylum debate badly. They accepted that something would have to be done, though this should not involve a constitutional

amendment. Their alternatives were either weak and hesitant, amendments to the laws and regulations governing the asylum procedures, or vague and general, fighting the causes of flight and increasing aid to developing countries and (Mattson 1995; Knopp 1994; Münch 1993, 1994). They were treated as risible by the Union parties. Throughout the autumn of 1992, pressure on the SPD mounted, until, in spite of fierce opposition from within the party, it was accepted that a compromise had to be made. The SPD leader, Bjorn Engholm, persuaded his party unless they accepted the necessity of a constitutional amendment they would be made responsible for obstructing a resolution to the crisis<sup>34</sup>.

Without disputing the demands that large numbers of asylum seekers (by comparison with other European countries) placed on the German people and state, it is nonetheless difficult to avoid the conclusion that asylum seekers also presented a political opportunity for German and British governments, which they exploited with alacrity (Münch 1994). Could they have behaved any differently? It was almost inevitable that asylum seekers would become an election issue. It was a chance for political opportunists to demonstrate that they were more responsive to the citizenry than their rivals. The strength of a democracy - its responsiveness to the demos - is also the source of one of its weaknesses. The interests of the demos - the electorate - will usually tend to be privileged, *even* over those whose needs are greater. However, a heterogeneous opposition in both countries indicated that there was a sizeable number of people who believed either that fairer methods of controlling entry could be found (Roos 1991; Rudge 1993), or that the German constitution should not be changed (including the Greens, the PDS, and organisations such as Pro Asyl) or that the Asylum and Immigration Appeals Act was unnecessary<sup>35</sup>, in other words that the actual measures chosen were wrong. Most of those who opposed the legislation in Britain and Germany were from the parties of the left, or the Greens or the Liberal Democratic parties (less so in Germany). And yet, migrant and refugee groups, and lawyers and campaigners acting on behalf of migrants, refugees and asylum seekers, seem to carry less weight than far right political parties and extra-parliamentary

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<sup>34</sup> Mattson suggests that the compromise involved a trade off, with the CDU promising to consider the introduction of an immigration law.

<sup>35</sup> Mr Robert MacLennan, the member for Caithness and Sutherland, referring to actual numbers which were far smaller than those predicated by Kenneth Baker twelve months earlier, questioned whether the bill was necessary (*Hansard* 2. November 1992, Col.55).

extremists. To a large extent, this is because the proposals from the Labour party and the SPD, from refugee groups, refugee lawyers, churches and other advocates leave unchallenged many features of the nation-state which actively militate against an adequate response to the needs of refugees and asylum seekers. These include the right to control entry at the border and to place 'interests of state' before universal commitments. By conceding that some restrictions are necessary, all these groups are put on the defensive.

### **A Balance Sheet**

This chapter has examined the differences and similarities between Britain and Germany. The differences are substantial - from the basis of citizenship and nationhood to geopolitical conditions and political structures. These differences account for the difference in the scale of the challenge that faced Britain and Germany at the start of the 1990s, and for very different debates leading up to their legislative and political responses to those challenges. And yet these responses were very similar - the construction of asylum seekers as a threat to the nation, to welfare provision, to political stability – because Britain and Germany are both politically stable, liberal-democratic, welfare-providing, nation-states. It is the similarities between these states that explain why the arrival of groups of people - very disparate in size and origin - could be constructed as exactly the same kind of threats necessitating the same legal solutions. The most important factor in the construction of the refugee problem is statehood. In chapter Three, the main attributes of states (according to the Montevideo Convention) - a permanent population, a defined territory, and a government capable of entering into relations with other governments – were shown to be crucial in the construction of the 'refugee'.

States create refugees, both by driving them from their states of origin, but also by definition. For political, as well as economic, reasons, outlined in previous chapters, states define refugees as those forced to flee for political reasons. More importantly, they are defined as people to whom states have particular obligations, unlike migrants. Because of their special status, they could, in theory, enter states like Britain and Germany whenever they needed to, though we have shown that this privilege was dependant on factors other than the individuals need. This meant that the numbers

(and kinds) of people who entered could not be so easily controlled. And yet as sovereign states - Britain and Germany had to be seen to control their borders. The relatively small numbers of asylum seekers reaching Britain in the early 1990s were an indication that access could be and was controlled, though the opposite case was made. Germany, through its constitutional amendment, which turned all neighbouring states into a buffer zone, hoped to make itself as difficult to reach as Britain. And yet, each country remains vulnerable. The arrival of boatloads of Kurds on Italian shores caused consternation in Germany, as did the arrival of 800 Czech and Slovak Roma and Sinti at the end of 1997, and increasing numbers of Kosovans in August and September 1998 in Britain.

Concerned that these Kurds would travel north in an attempt to join the 500,000 Kurds already in Germany, the government told Italy to refuse admittance to the Kurds or risk having its northern borders sealed. Italy's Interior Minister pointed out that between July 1997 and January 1998 exactly 2646 Kurds had landed in Italy, and that that could hardly be called an invasion (*Der Spiegel*, 3/1998: 117). Nonetheless, and it spite of Italy's much reported response to Germany's 'imperial arrogance' - that Italy welcomes refugees 'with open arms' - it has succumbed to pressure and introduced detention centres on Sicily and Lampedusa and ended the 15 grace period the people had had before they applied for asylum. Pressure was also put on Turkey by Germany to prevent the Kurds from leaving. This marks a development of the Safe Haven and Containment policies referred to in Chapter 3. Having done as much as possible within the state to control entry, reducing the number of people seeking asylum in Britain or Germany becomes a question of deterring them or containing them within those areas where they are oppressed (as are the Kurds in Turkey, and the Roma and Sinti in the Czech Republic and Slovakia). The oppressors are often happy to cooperate, recognising that refugees and asylum seekers are a weapon which they can use to exert pressure on receiving countries. Having been rejected by the European Union, Turkey punished the EU by driving out the Kurds referred to above. Then in February 1998, Turkey moved 30,000 troops across the Iraqi border, not only to punish Kurdish groups, but also to ensure that in the event of an Iraqi conflict, there would be no repeat of mass exodus across its borders occasioned by the Gulf war. The expulsion of the Kurds is a weapon, just as blackmail is, and it works because

the 'victim' is afraid. Turkey knows that controlling the flow of asylum seekers in Europe gives it leverage. Once again, the persecuting states impose their standard of values even upon their opponents and those whom the persecutor singles out as scum of the earth actually are received as scum of the earth everywhere (Arendt 1967: 269).

Second in importance as a factor dictating that asylum seekers will be construed as a threat is the fact that both countries are welfare states. Aside from the ongoing battle to secure the territorial state, Britain and Germany are also restricting access to the threatened welfare state<sup>36</sup>. Britain eventually, after a series of challenges in the High Court, pushed through the 1996 Asylum and Immigration Act, which deprives large numbers of asylum seekers of social services. The coalition parties in Germany have announced in the run up to the 1998 elections, their intention to follow suit. It is likely that the SPD, should they win in next month's election, will pursue the current government's plans and the Labour government in Britain have said that they will not repeal the 1996 Act or reintroduce cash payments, but will instead give out vouchers. The measures that have been introduced involve little or no savings to the taxpayer, but reassign financial responsibility from the central state to local authorities and the Kommune. Schemes such as vouchers and food parcels are expensive and inefficient methods of assisting asylum seekers. The conclusion must therefore be that reducing cost and increasing efficiency cannot be the goals of these two governments. Instead, the issue is one of deterrence and control - the need of states to control who and how many may enter the territory of the state and make demands upon it.

The third factor affecting the construction of the refugee problem is that Britain and Germany are representative democracies. In spite of the measures introduced by both Governments, asylum seekers remain vulnerable to exploitation for political ends. Although in Germany, unlike Britain, asylum disappeared from the political agenda after the implementation of the 1993 legislation, in the past year, both governments have once again sounded alarm bells, but this time, blame is being attached to other European countries as well as to the individuals who attempt to enter. British

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<sup>36</sup>An alternative solution to the funding crisis facing the welfare state in each of these countries might have been to reallocate government spending, however, it is easier to cut bills by limiting the number of people who have access to those benefits, especially the number of non-citizens. After all, if one is already cutting benefits to single mothers and the unemployed, justifying cuts to asylum seekers, most of whom, so the propaganda goes, shouldn't be here anyway, isn't that difficult.

politicians flew to the Czech Republic and Slovakia to urge the Roma to stay where they were and their governments to 'encourage' them to stay. Britain has just had an election in 1997 and Germany is facing Federal Elections in 1998. In spite of recommendations from certain parts of the British Conservative Party, there seemed to be a general consensus among the three main parties that immigration and asylum (and race relations) should be kept off the political agenda. In part, as suggested in Chapter Four, this may have been because both parties felt vulnerable on this issue - Labour has traditionally been seen as weak on immigration controls, and for the Conservatives to call for yet more immigration controls would be tantamount to accepting that the 1993 and 1996 Acts had failed. The German elections are, however, running true to form. The Union parties are once again bemoaning the costs borne by Germany, and insisting that the return of civil war refugees from the former Yugoslavia accelerate. With the Federal and Land elections due in the autumn, it is more than likely that the Union parties, widely credited with the successful resolution of the last asylum crisis, and faced with an electorate wanting change, will exploit this new opportunity as a weapon in the battle to stay in power. These three factors combine to ensure that the interests of a particular group - constructed as a nation - will take precedence over non-citizens, who do not have the protection of the states of which they are citizens.

Gerhard Schröder, the new leader of the SPD, has launched an attack on foreign criminals (Wall Street Journal Europe 23.9.1998). War in Iraq, or Kosovo would inevitably give rise to refugee flows again, and will probably provide convenient increases in the numbers of asylum applicants to Germany. Since the new Art.16a absolves Germany of any obligation to admit those who try to reach Germany overland, new legislation should not be necessary - just a promise to increase the number of border patrols to the East and West, to spend more on technology such as computerising the fingerprints of applicants, night vision equipment and helicopters equipped with searchlights. Certainly, it seems as though the public is already being prepared for such an eventuality. Although, the border guards are already armed, it is nonetheless unlikely that the public is ready just yet for shots to be fired, although the Austrian Minister did suggest that the Italian coastguards fire across the bows of ships carrying Kurdish refugees in the Mediterranean!

What has been learnt from a comparison of these two states and their asylum policy? Firstly, that, even in the age of Globalisation, control of territorial boundaries is central to these states' understanding of themselves as states. Secondly, the welfare state presents a challenge to those who argue for the abandonment of restrictions, but it is a challenge that needs to be answered. Those who use the welfare state as grounds for restrictions are usually those who attack it most vociferously. Thirdly, that representative democracies remain vulnerable to populist appeals to exclusivity, to short-termism and to the manipulation of fear and anxiety to create scapegoats to distract the demos from the failings of their representatives. Fourthly, however vulnerable universal values have become, however often they are trumped by the particular demands of the demos, they still have a significant role to play in ameliorating the worst affects of state's narrow interests, because they act as a scale against which states' behaviour can be measured. How many more restrictions can be placed on asylum seekers and refugees within Britain and Germany before the liberal demos objects to the illiberal practices of its government? How much further can governments go along that particular road before a majority of their citizens object to the treatment of needy strangers in their midst? It is certainly difficult to see what further restrictions on entry, or on access to welfare could be introduced, while continuing to claim to be liberal, whatever about democratic. Does this account for the increasing reliance on measures which are not so visible to the citizenry, such as deterrence and containment? What might the consequences of these policies be? In the following and final Chapter, an examination is made of three possible routes into the future, and depending on which route is taken, what that future might look like for asylum seekers.

## CHAPTER 7

### RETHINKING THE POLITICS OF ASYLUM AND REFUGE

This thesis has combined an analysis of asylum from a historical and conceptual perspective with a comparative study of British and German asylum and refugee policies. The first part explored conceptual distinctions between migrants and refugees, examined the different moral and political obligations that are owed to each depending on one's theoretical position, traced the historical development of asylum and finally outlined the international context within which national asylum and refugee policies are framed. The second part looked at the asylum practice of two liberal democratic states in some detail. By exploring changing policy and practice in Britain and Germany we seek to explain the gap between the normative rhetoric of these states and their actual behaviour.

This, the last chapter of the thesis, falls into four sections: a review of the thesis so far; highlighting the arguments of each chapter; a critique of the dominant analytical frameworks; an assessment of where each of these positions might lead; and finally, an outline of the alternative argument running through the thesis, which calls for a rethinking of current strategies towards asylum and refuge. It is here that we want to suggest that a rounded analysis of the current situation is not possible unless we take into account the role of the current international system of states in the creation of asylum seekers and refugees and its inability to respond to them.

#### **A Summary of the Themes**

The starting point of the thesis is the distinction still maintained by European states between migrants and asylum seekers. Chapter One begins by disputing the conceptual basis of this distinction, and it questions the arguments used to justify differentiating between migrant and refugee. Nonetheless, it can be accepted that, however artificial and fragile, at the moment there is a difference between the two groups: states acknowledge obligations to refugees that they do not concede to migrants. States must accept these obligations because doing so defines these states as liberal. Part of the argument we outline in this part of the thesis is that this difference works to the advantage of the receiving states, which use migrants for economic

purposes and refugees primarily for political purposes, though it is only (comparatively) recently that states have separated out their economic and political needs. The most important political function that asylum has served is that of legitimating the state – of confirming, both to other states and to its own population, that it is liberal and democratic.

It is clear from both historical and contemporary experiences that the liberalness of states and of their asylum practice is limited by the concept of particular or special duties owed to one's fellow citizens. This is exemplified by the debate between the *universalist* and the *particularist* theorists, that is, between those who deny the validity of those special duties, and those who defend them. And yet, despite the significant differences between the theoretical positions outlined, when it comes to the practical application of those theories there are certain common assumptions that limit the possible responses to asylum seekers. These are that the goods conferred by the state, whether welfare, identity or security, are all somehow finite: they cannot be provided to all; and furthermore that those who are citizens of the state have the right, through their representatives, to stipulate who else is to enjoy those goods. If this is conceded - if it is accepted that the national interest outweighs the interests of non-citizens, and that states have the right to exclude (Plender 1988: Chapter Two; Dummett 1992) - then the liberal norms of liberal democracies will count as nothing more than rhetorical flourishes. This would be a grave loss for asylum seekers, since as the experience of Britain and Germany has shown, it is liberal universal values that have tempered the restrictive practice of representative democracies.

Bearing this key point in mind, it is also important to emphasise that asylum is not dependent on the existence of states, or liberal democracies for its existence. As argued in Chapter Two, the development of asylum from the beginning involved a struggle over jurisdictions, a struggle that offered a space for those fleeing from one jurisdiction to another. Fugitives could take advantage of the competition between rival powers to find sanctuary. This competition created the conditions necessary for the granting of asylum: separate jurisdictions, parity of power (or at least formal equality), and a benefit (material or ideal) to the asylum granting body. Chapter Two outlined the various purposes that asylum has served and demonstrated the flexibility

of asylum as an instrument of state. It also examined the development of the practice of granting asylum as a defining feature of liberal states - just as modern states adopted and monopolised the practice of asylum from their inception, once liberal states appear, they too claim exclusive use of asylum. The identification of asylum with liberal states was completed in the immediate post Second World War period, when the construction of the 'refugee problem' occurs.

In Chapter Three, it is argued that the particular construction of refugees and asylum that occurred after the Second World War limited the range of responses to the needs of refugees and asylum seekers and cemented the division between migrant and asylum seeker. Although it was recognised that the 'problem' was international, and even though responsibility for the refugees was given to an international organisation - the UNHCR - the international system of states, and the norms that underlay it, ensured that any international response would be severely limited and subordinate to national interests. This system is premised on the fiction of juridically equal, sovereign states, with fixed territories, distinct, sedentary populations, and controllable borders. Within such a system, asylum is one strategy for dealing with the anomaly of large numbers of people who move between states, crossing international borders<sup>1</sup>. However, though asylum serves a purpose for the system as a whole, it is granted at the discretion of individual states. Individual states grant asylum for reasons of state, and *raison d'état* can and does include maintaining at least the appearance of liberalism, even, or especially, when engaged in restrictive practices. Within Europe, this contradiction can be clearly seen in the simultaneous drive to open borders for goods, capital, services and certain groups of people, while closing them to drugs, criminals and migrants, including asylum seekers.

In the case studies of Britain and Germany the analysis of the debates found that when asylum was discussed the granting of asylum was spoken of as a defining characteristic of a liberal state. At the same time the story told in each of these chapters highlights the pressures to limit the rights of asylum seekers (where they had any) and the costs to the two states, and of an effort to strengthen control of admissions. However, it was important to insist that the practice of granting asylum

would continue, so that while there were many arguing in favour of restrictions, no-one suggested that asylum be abandoned altogether.

In Chapter Four, British asylum practice offered a very clear example of the discretionary and contingent nature of a state's asylum policy. The analysis revealed a variety of factors at work governing the decision-making process, including domestic and foreign policy considerations that are both economic and political. Because there is no right to claim asylum in Britain, granting asylum and granting someone permission to submit an application for asylum are *ex gratia* acts - depending on the goodwill or indifference of the Home Office. Because legislation governing migration and asylum can be passed with only a simple majority, the executive has a degree of freedom or power unmatched today by its European partners. Nonetheless, the government of the day does not have a completely free hand. Occasionally it misjudges the mood of its electorate - as in the case of Al Masari, when political (liberal) principles trumped economic considerations. The democratic process in Britain can sometimes be tempered by liberal values, so that the importance of continuing to fight within that process should not be lightly dismissed.

Chapter Five demonstrated the importance of internal constraints, which held at bay more restrictive asylum practice. In the German case, these are the attachment to liberal norms enshrined in a rigid (though not wholly inflexible) constitution (Joppke 1998). In spite of pressures to alter the constitution that had been building since the early 1980s, the anchoring of Germany's asylum provision in its constitution meant that an amendment was only possible after an exhausting battle. Nonetheless, eventually these liberal norms were trumped by the exigencies of statehood and the subjective right to asylum contained in the German constitution was neatly caged by the addition of a list of exceptions to the principle that anyone who was political persecuted enjoyed a right to asylum. By declaring all states with which it shared borders to be 'safe third countries' and 'safe countries of origin', Germany redistributed its asylum burden elsewhere - to Poland and the Czech Republic in particular. In the case of Germany, liberalism was fettered by democracy.

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<sup>1</sup> Others are containment, refugee camps and repatriation.

In Chapter Six, it was argued that the shared facts of statehood, nationhood, representative democracy and capitalism meant that the differences between the two states, though initially significant, have become less so in relation to asylum policy in recent years. In spite of a great difference in scale, it was actually the inability to *control* numbers, rather than the numbers themselves, which was seen as the root of the problem. The apparently uncontrollable number of asylum seekers was constructed as a multiple threat to the main features of the state. The reasons why states grant asylum have more to do with protecting or promoting the well-being of states and less with promoting or protecting the well-being of asylum-seekers and refugees. Although trends and developments in these two states are affected and distinguished by particular features of those states, for example, whether there is a strong constitution, whether they are welfare providers, and if so what kind, the significance of liberal norms, the history of the state, as well as the role and power of interest groups within the states, there has been a notable convergence of policy and practice driven primarily by the demands of statehood, but also by the perceived constraints of providing welfare and preserving the nation.

In Chapters Four and Five, the asylum practice of both Britain and Germany were assessed according to their claims to be liberal and democratic. It is argued that it has been the liberal values of liberal democratic states that have protected asylum seekers from the inherent exclusiveness of representative democracies, but this has usually been when other – state - interests have also been served. The requirements of liberal universalism - that everyone is treated as of equal moral worth - are balanced against the particular interests of states, which must be prioritised<sup>2</sup>. This balancing act involves deconstructing the refugee as victim, and reconstructing her as a threat (Cohen 1994). This is done by the selective use of statistics, such as recognition rates (only initial decisions are referred to), estimates of how many might come (yet to be realised), and how much these people cost the ‘taxpayer’, as well as stories referring to the criminal activities of a small number of the applicants. In a recent article in the

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<sup>2</sup> This takes place within the context of a global system, which is itself influenced by the tension between the liberal ideology that underpins international law and international organisations such as UNHCR, and the interests of the states that make up the international system, and which through the principle of sovereignty and non-intervention, reject the enforcement of universal liberal norms. This occurs at the same time that pressure is being put on non-liberal-democratic states to conform to these norms.

Evening Standard (17.9.98), all three strategies were used. The article warned that the numbers coming would exceed the record of 44,000 in 1995, although by the end of July only 18,500 had arrived. It warned that 'hundreds of asylum-seekers from Kosovo to Kurdistan were flooding into the capital to be received into council care at the taxpayers' expense'. However, the bulk of the articles concentrated on the 'aggressive begging tactics and pickpocketing' of the asylum seekers. In the post-Cold-War era, asylum-seekers provide the sense of threat that underscores the protective function of the state - in relation to their *citizens*, as well as proof that these states are liberal and deserving of their citizens' loyalty. This tension between states' particular duties to their citizens and their duty to uphold universal human rights reflects two contending positions within the theoretical debate surrounding asylum practice.

Taking these three elements shared by the British and German states - the nation, a welfare state and a multi-party representative democracy - we have shown that each is used as a basis for exclusion. One of the arguments running through this thesis is that a state that defines itself in relation to a nation cannot but be exclusionary. The German case is an extreme example - where those born in Germany, but not into the *Volk* are excluded from the political life of the state (contrary to the arguments of Soysal 1994 and Jacobson 1996). Britain too, is subject to exclusionary nationalist forces that through legislation construct a particular and exclusive national identity (Cohen 1994; Dummett and Nicol 1990; Joppke 1998). With Spencer and Wollman (1997), we cannot conceive of a nation-state that is anything but exclusive and particular. While the argument that welfare states can be open may not yet have been won, the battle is not yet lost. The counter-arguments - moral, theoretical and empirical - that welfare states must be closed are not convincing. The most that can be argued is that given states as they are currently constructed, and the system of which they are part - providing welfare to any non-citizen who might enter a state and claim it would be challenging. In part this is because, as representative democracies, political representatives are convinced that the electorate's votes can only be purchased by direct appeals to their particular interests. Few are prepared to risk those votes by appeals on behalf of those who are not considered to have contributed to the nation, the welfare state or the polity. These difficulties are compounded by the

coincidence of the boundaries of these different entities at the borders of the state. *Condition d'Etat* dictates that states must constantly battle to control these multiple boundaries and so it is the condition of statehood that is most significant in the construction of asylum seekers as a multi-faceted threat.

### **Particularist and Universalist Perspectives**

This dominant *particularist* position is currently being challenged by the global liberals - the *universalists*. For *universalists* (or idealists, or global liberals), such as Jacobson (1996) and Soysal (1994), the emphasis is on the strength of the International Human Rights regime, which they argue is expanding to provide greater protection from the arbitrary power of individual states. They argue that internal and external constraints mean that other actors - IGOs (such as the UN) and NGOs (such as Oxfam, Médecins sans Frontiers and Amnesty International) have become powerful checks on states. Other globalisation theorists speak of post-national states, and the European Union is offered as an example of a potential, post-modern, post-national polity (Diez 1996, 1997). These different positions do contribute new perspectives to the debate and act as a counterweight to the essentially pessimistic and inflexible view of the particularists and/or realists. However, the liberal universalists overstate their case and either argue from limited evidence, that the state is not really a problem - that it can be rescued and reformed (Jacobson 1996, Soysal 1994), or that we are already in the process of moving beyond the state (Diez 1996).

The first position, that of liberals like Jacobson (1996), in arguing that universal human rights can and do affect the behaviour of states positively, naturally promotes human rights as a means of reforming the current system, making it more responsive to the needs of all individuals, including asylum seekers and refugees. One could use Canada as an example of this process at work. Canada has begun to interpret 'membership of a social group' (Art.1, 1951 Convention) more broadly, using it to enable the recognition of persecution because of sexual preferences or the insistence on the right to a second child or fear of genital mutilation. Extending the definition in this way constitutes a step forward in asylum practice. However, it is not a practice

that Britain or Germany, or any other EU state is likely to introduce<sup>3</sup>. If one contrasts this development, from which a very small number of people benefit, with the more restrictive measures being introduced in Britain and Germany, measures that ensure the numbers who can actually make a claim remain small, then Jacobson's contention that 'States must increasingly take account of persons *qua* persons as opposed to limiting state responsibilities to its own citizens' (1996: 9) seems overly optimistic. This is not to deny that there are those non-citizens within states who do exercise certain rights, so long as they are legally resident, that is so long as they are in employment and contributing to the welfare of the state and its inhabitants. But they do not have the whole range of rights available to citizens, and if they are asylum seekers whatever 'rights' they may have, they exercise only with the acquiescence of the host state. As was shown in the chapters on Britain and Germany, it is still the state that makes the decision on whether, for example, the criteria of membership of a social group is applicable in a particular case and on whether an individual will actually be permitted to make an application in the first place. There is little evidence to support the argument that 'human rights transcend, adapt and transform the nation-state' (Jacobson 1996: 3; Joppke 1998a see Chapter One). States, including representative democracies, and despite the liberal constraints that Jacobson (1996), Joppke (1998a, 1998b), Hollifield (1992) and (Soysal 1994) place so much faith in, must be exclusionary, must maintain a distinction between outsiders and insiders, in particular at the border, and must insist on their right to privilege their citizens, those whose vote legitimises the continuation of the state. For this reason, human rights, including the right to seek asylum, will remain dependent on the discretion and interest of states.

The argument that the European Union offers an alternative to the modern territorial nation-state is also untenable, not because there is no such alternative, but because the EU is not an alternative. The EU is very much an intergovernmental organisation, in

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<sup>3</sup> Following Ireland's introduction of primary legislation in relation to refugees in 1994, consultations were held with academics in the departments of Sociology and Law and Trinity College, Dublin, as to the kind of regulations that should be introduced to regulate the processing of applications. During those consultations, it was agreed that women fleeing domestic violence and genital mutilation should be granted asylum. However, UNHCR stepped in to inform the Irish government that the introduction of such liberal measures would create difficulties for Ireland's EU partners and ultimately for Ireland itself (conversation with Ann Owers, JUSTICE 5.9.1998)

spite of the Commission and the European Parliament. As discussed in Chapter Three, while the Schengen states considered the creation of a frontier-free Europe, many are now backing away from surrendering control of a key aspect of sovereignty - the admission of non-EU citizens. Of the three pillars of the EU, those that deal most explicitly with areas of national sovereignty - Justice and Home Affairs and the Common Foreign and Defence Policy - remain firmly intergovernmental. While European states seek to assert control more strongly in areas such as admission policy, and recognise the need for co-operation, talk of co-operation and harmonisation should not be mistaken for a pooling of sovereignty: it is simply a necessary strategy - the opening of the Iron Curtain revealed that restrictions on exit are as important to controlling borders as restrictions on entry. European co-operation is simply mutual support for each other's sovereignty of the kind advocated by nineteenth century German states (see Chapter Two), and confined to borrowing each other's most restrictive measures. In Chapter Two, the Roman Empire was used to show that, in order for asylum to exist, there must be separate jurisdiction. To an extent, the Dublin Convention (1990), which marks the high point of European co-operation on asylum issues, might be seen as recreating the Roman Empire, at least for asylum seekers. A rejection by one member state equals rejection by all fifteen member states, and either expulsion from the Union, or an existence in limbo - geduldet, permitted to remain until conditions change, but without rights or security. That is the limit of European co-operation from the perspective of the asylum seeker. The continuing power of states, and the conditional nature of their commitment to liberal norms, highlights the weakness of a universalist view that assumes we can reform the current flawed state system, to create a state system that is more just, more respectful of individual rights, more liberal. As Matthew Gibney has argued 'the modern state is an intractably particularistic agent'<sup>4</sup>.

The particularists (Freeman 1986; Miller 1994; Walzer 1983) emphasise that the state is still the most significant political actor. It is therefore unsurprising that the state is the final arbiter of who may or may not enter, and that while decisions might be influenced by international law, there is no absolute obligation for the state to accept

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<sup>4</sup> Unpublished thesis *Political Theory and the International Refugee Crisis*, Cambridge 1995: 57. Gibney concludes that we will have to live with the limitations of the state.

asylum seekers. It is conceded that some movement of people across borders is inevitable and, when selective, beneficial to the state. States have the right to select from, and to rank those who enter. Those who bring obvious, particularly economic, benefits (foreign investors, businessmen, and tourists) are especially welcomed. From among the ranks of asylum seekers are chosen those who can confer less obvious benefits - the refugees. These are carefully defined and chosen by the host state to cement its legitimacy, and to vitiate that of its rivals. This position is conceptually dominant and is also the predominant position in public policy. Those who hold this position, including politicians of the left and right, or theorists such as Freeman (1986) or Walzer (1983) would suggest that the present situation is inevitable, that asylum seekers will and do benefit from current practice in liberal democracies, but only opportunistically since the primary interest of states must and can only be served by giving priority to its members. The benefits accruing to asylum-seekers, while good in themselves, must be evaluated in relation to the host population.

Furthermore, it is only by privileging the interests of citizens that one is in a position to help those in need. Unless the interests of the members of a particular community are considered above those of non-members, then the existence of that community - the state - would have no special significance and would be undeserving of loyalty from its members, who would be indistinguishable from non-members. There would then be little reason for it to continue to exist. If the state did not exist, who could protect the refugee or asylum seeker? This position was criticised in Chapter One because it made certain assumptions about our capacity to accept obligations to those beyond the borders of our state that were as binding as those to our fellow citizens. The arguments of the particularists (such as Brown 1997; Freeman 1994; Walzer 1983) that restrictions on entry were necessary for the provision of welfare and other social goods, such as political stability, arguments that were accepted by the universalists surveyed in that chapter, were found unproven. In the next section, however, we accept the arguments and ask what the future might look like if the particularists/realists continue to dominate the arguments.

### A 'Particularist' Future

The particularist approach exerts a powerful influence on practice and policy, as was seen in the case studies on Britain and Germany. At the moment, within those two states, it seems that the universalists are having little success in reining in the restrictionists (who include, however reluctantly, some liberals - especially in Germany, see Chapter Five). What consequences follow from unrestrained particularism? It is possible to pick up some of the trends that are already taking shape. It cannot be expected that those events and circumstances that lead to the mass displacement of populations will cease (or that Britain and Germany will stop trading with them or end their support of persecuting regimes), and so it is unlikely that the numbers of asylum seekers applying to enter these states will diminish. Instead ever greater numbers will push up against borders that states will attempt to make more and more impermeable. As inequality grows internationally, so the pressure on borders will increase. In response, the state will seek to find ways to control these illegal entrants. If increased mobility occurs within the European Union for European Union citizens, external borders will have to be more heavily policed. Already, there is massive investment along Germany's eastern and southern borders, and into helping Polish and Czech authorities train and equip their frontier guards. Increasingly, former transit countries have to bare the burden of accommodating asylum seekers. This will have enormous implications for countries less able to accommodate, support and integrate the new arrivals, giving rise to tensions within those countries. Britain and Germany will continue to attract those with family connections or who speak English or German. This means that new, more ingenious and more expensive ways of smuggling people into Britain and Germany will be found. Those with money will pay, those without will continue to trade their future into a kind of slavery for the chance to help those who remain behind or just to escape.

However, these difficulties will not only affect the asylum seekers who make it to the British and German borders. If Britain continues to hold itself aloof from the mainland, checks at ports will have to become more stringent. In Britain, and increasingly in Germany, it is not possible to distinguish citizens from non-citizens by sight, with the result that passport and immigration control will become hurdles even for returning citizens. The possession of a British or German passport is not a

guarantee that returning home will be an easy affair. Carriers' Liability Sanctions mean that if one is Black or Asian the scrutiny of one's British or German passport is more intense than if one is white. However, this is not a simple issue of black and white racism. Other traditional scapegoats, such as Slavs and Gypsies are targets of discrimination. The campaign launched in Britain against Roma from the Czech Republic and Slovakia resulted in October 1998 in the introduction of visas for people from Slovakia (the poorer of the two states) and the threat of visas for Czech travellers, in spite of the acknowledged persecution of Roma in both states. Travellers from Albania, Bulgaria and Romania, the poorest of the European states, are also subject to intense and particular scrutiny at borders<sup>5</sup>.

The myth that good race relations depend on not too many foreigners (especially visibly different or poor ones) will be exploded as visibly different *citizens* are subjected to more checks to ensure that they *are* citizens and have a right to enter, to work or to claim welfare assistance. Such changes are already taking place, with employers, educational institutions and social welfare services obliged to check the status of prospective employees, students and claimants. They have an impact not only on non-citizens, they are imperceptibly chipping away at the rights and liberties of minorities within Britain and Germany. The increasing division within society will parallel the growing division globally between the included and excluded, leading to increasingly instability both within the state and within the state system. The policy of containment in particular will lead to increased instability in the refugee-producing regions, while both containment and temporary asylum will undermine, rather than strengthen the legitimacy of states and the state system.

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<sup>5</sup>The list of states whose nationals require visas to enter Britain is a catalogue of poor and/or oppressive states: Afghanistan; Albania; Algeria; Angola; Armenia; Azerbaijan; Bangladesh; Bahrain; Belarus; Benin; Bhutan; Bosnia-Herzegovina; Bulgaria; Burkina; Burundi; Cambodia; Cameroon; Cape Verde; Central African Republic; Chad; China; Colombia; Comoros; Congo (Republic); Congo (Democratic Republic); Cuba; the so-called 'Turkish Republic of Northern Cyprus'; Djibouti; Dominican Republic; Ecuador; Egypt; Equatorial Guinea; Eritrea; Ethiopia; Fiji; Gabon; The Gambia; Georgia; Ghana; Guinea; Guinea Bissau; Guyana; Haiti; India; Indonesia; Iran; Iraq; Ivory Coast; Jordan; Kazakhstan; Kenya; Kirgizstan; Korea (North); Kuwait; Laos; Lebanon; Liberia; Libya; Macedonia; Malagasy (Madagascar); Maldives; Mali; Mauritania; Mauritius; Moldova; Mongolia; Morocco; Mozambique; Myanmar; Nepal; Niger; Nigeria; Oman; Pakistan; Papua New Guinea; Peru; Philippines; Qatar; Romania; Russia; Rwanda; Sao Tome & Principe; Saudi Arabia; Senegal; Sierra Leone; Slovak Republic; Somalia; Sri Lanka; Sudan; Surinam; Syria; Taiwan; Tajikistan; Tanzania; Thailand; Togo; Tunisia; Turkey; Turkmenistan; Uganda; Ukraine; United Arab Emirates; Uzbekistan; Vietnam; Yemen; Yugoslavia (Documents issued by former SFR of Yugoslavia or by present Yugoslav Authorities); Zambia (Source: Foreign & Commonwealth Office).

In the absence of the Soviet Union, it would seem that in a realist future, refugees from extant ideological competitors such as China, Vietnam, Korea and Cuba might still find sanctuary in the West. However, political ideology is losing out to the forces of economic ideology. All of the above states are increasingly accepting liberal economic policies, and by opening up their markets, however slowly and painfully, are providing the economies of the West with new markets<sup>6</sup>. Such possibilities for economic co-operation will inevitably be balanced against the implied criticism of the persecuting state that the granting of political asylum entails<sup>7</sup>. Where, as in the case of Algeria, economic interests severely limit the willingness of the state to grant asylum, but public opinion would not permit the return of asylum-seekers to obvious dangers, the response is to offer temporary admission or temporary asylum. While economic interests may militate against granting asylum to those from countries with developing markets, what of asylum seekers from states who are of less interest economically to liberal democracies? The African continent produces more than fifty per cent of the world's refugees, only a tiny minority of whom find their way to Europe, of whom very few are granted refugee status. They cannot compete with those who have stronger claims based either on ethnic ties, ideological affinity or the contribution they might make to the host society. And so they will be contained within their own region.

The policy of containment, seen also in Iraq and Yugoslavia, is the preferred response to the African refugee crisis and can be seen as part of a pattern, which includes the shift from development aid to emergency aid. Emergency aid continues the fiction that the West is concerned with the fate of African refugees (safely so-called when still in Africa), and is a lot cheaper than the massive long-term costs entailed in development. Duffield (1991) has described this as the emergence of a two-tier international welfare system, mirroring the emergence of such a system within the Western states.

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<sup>6</sup>It remains to be seen whether the incursions of multinationals into formerly closed economies will have benefits for the Western states in which they are based, in other words, whether such companies have state loyalties.

<sup>7</sup>Perhaps there will come a time when realists decide that instead it would make better sense to privilege economic refugees over political refugees, and choose those who come from states with alternative economic ideologies in order to legitimate the neo-liberal economic policies of for example Britain, and demonstrate the illegitimacy of state controlled economies such as China, or even France!

Economically viable groups are expected to seek social and welfare services in the market place. For the remainder, a safety net of basic support, partly constructed from care contracts between local authorities [governments], voluntary and private agencies [NGOs/charities], is being put in place (Duffield 1991:27).

Economic cost is a certainly a driving factor for policy makers. Containment is justified by pointing out that, realistically, more people can be assisted in situ than by helping them to move, and by stressing that people would be less alienated and find it easier to repatriate and reintegrate if they stay close to home. Such arguments are largely based on fact - Western money does go further in poorer countries. While containment and temporary admission ignore the role of the industrialised states in causing flight and creating refugees and asylum seekers, these policies also assume that it is possible to contain and control large movements of people, and that European states can be shielded from the consequences of conflict. As the situation in Kosovo worsens, and Kosovans, and perhaps Macedonians, more Serbs and perhaps Greeks flee northwards and are met by frontier guards at the border, and violence in Britain and Germany, it is unlikely that control will be maintained without recourse to naked oppression. However, it is unlikely that this unmitigated realist scenario will be allowed to develop.

### **Limited Universalism?**

The possibility of some limited reform remains. But the limits of reform in Britain are also evident. The Labour government, elected in May 1997, is unlikely to repeal any of the asylum legislation introduced in the 1990s. In Germany, the SPD party has made a tougher stance on foreigners part of their 1998 election programme. Yet each country promises to develop 'fairer' policies. In Britain, Amnesty International has noted an increase in recognition rates, and looks forward to seeing them continue to rise<sup>8</sup>. In Germany, it is likely that the Greens demand for easier naturalisations will be met in part, and there may be some extension of voting rights for those with certain kinds of residence permits. Such an approach seeks to find a middle way, which, without abandoning the state system, increases the stability, legitimacy and, occasionally the justice of such a system. The criticisms of the realist approach are

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<sup>8</sup> Interview with Jan Shaw, 27 May 1998. Ms Shaw said that Amnesty believed that about 50% of applications were entitled to recognition, and that once the rate of recognition reflected this, they had no objection to the rest of the applicants being deported as quickly as possible.

acknowledged - that it is too static, that it operates in the interest of small, but dominant groups and that it contains the seeds of its own destruction. The realist approach modified by the demands of idealists gains from its greater correspondence to reality, its higher normative content, and, perhaps most importantly, its greater feasibility. It is an increasingly popular position for the reasons just outlined, and is the most likely to gain favour in the future, given that while it may rock the boat, it promises not to overturn it. What will this future look like?

The particularist (realist) agenda combined with growing inequality is likely to result in ever more explosive situations. Individual nation states, using the lessons of the past, may act to diffuse the situation by making concessions, as they did when extending the franchise, introducing welfare benefits etc. They may be forced to listen to their critics, and to adopt and adapt their policies. They have a range of options to choose from. One strategy, advocated by Hathaway (and Shacknove 1993), is that, given that states act in their own interest, reforms should be constructed so as to appeal to the interests of states. Since states are unwilling to commit themselves to permanent asylum, which is seen as costly, a more temporary alternative - temporary asylum - would be easier to sell to states (Hathaway 1990; see Chapter Three). Naturally, since such a policy effectively hollows out any substantive notion of protection, leaving states in control, enabling them to avoid long-term commitments. Other options include strengthening the remit of the UNHCR, increasing development assistance, promoting greater equality by encouraging free trade, monitoring arms sales to repressive governments etc. The World Bank and the IMF are already shifting their rhetoric to talk of the necessity for 'inclusiveness'. However, it seems logical to assume that states will choose those policies that gain them maximum respite and credit, but entail minimal costs and loss of control, and which reinforce, rather than challenge the domination of the nation-state system.

For example, the strategy suggested by Hathaway and others, of playing by the rules, has backfired in recent months, leading to consequences they are unlikely to welcome - concerned as they are to improve conditions for refugees and asylum seekers. In its capacity as President of the European Union, Austria is currently promoting a 4-step plan to remove the right of refugees to settle in Europe (*Guardian* 4.9.1998). The

cornerstone of this proposal is the promotion of temporary asylum at the expense of permanent refuge, but it incorporates many of the newer solutions that have been criticised in earlier chapters of this thesis. The first step is to pre-empt refugee flows by peacekeeping, and by creating 'Safe Zones'. Where this fails, step two envisages the creation of temporary camps in the region (perhaps along the lines of Sabra and Shatila?). Should the containment of the problem prove impossible, temporary sanctuary would be offered in European Union countries, while those not acting as 'hosts' would share the financial burdens. The final step would be the mandatory repatriation of all refugees as soon as circumstances permit. Though some of these measures are already in place, the document itself shows the trajectory of strategies that make concessions to realist logic.

This approach then is riven with problems. In tactically accepting the constraints of the realist position, or in Carens words, promoting a lesser evil, idealists such as Carens (1994), Hathaway (1991), Jacobson (1996), Soysal (1994) accept the lack of any viable alternative to the state system, and so from the outset the possibility of evolving a strategy for achieving an ideal is undermined. The ideal is offered as a standard against which one can measure behaviour, but it is not something that one can hope to achieve. It offers strategies for improving but not overcoming the current situation. As a result, state practice will improve, blunting the attacks of the state's critics<sup>9</sup>. The reformist approach will ensure that explosiveness of the realist position is avoided, but at a cost. These costs will, however, be borne by those without power, and without access to liberal democracies. Inequality and injustice will continue, but at 'sustainable' levels. This raises two questions: what alternative is there to either accepting the status quo or attempting to reform the current system, and, if all attempts to reform the system serve only to prolong the misery and suffering of a large proportion of the global population, should one engage in such attempts?

### **The Need for a Radical Alternative?**

That there must be an alternative to the status quo arises not solely from the moral necessity for such an alternative - liberals are right to argue that it is unacceptable that

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<sup>9</sup>This formula can be seen at work in environmental issues, where the main parties appropriate certain policies from Green parties, taking care to draw their teeth first.

one's life chances are limited by where and to whom one is born (Bader 1995; Carens 1987; Dummett 1992; O'Neill 1994) - but also from the likelihood that this current system will implode. It does not seem credible that the many millions so seriously disadvantaged by the status quo will continue to accept their lot and remain outside the borders of the industrialised states. As those states continue to try and seal themselves off from the pressures and conflicts in the poorer parts of the world, just as the wealthy within those states hide behind concierges and automatic gates, those pressures will build until, fuelled by frustration, they force the barriers to give way. What follows is unlikely to be a peaceful renegotiation of power or redistribution of resources. Barbarism will probably precede any new world order. In which case, as a means of relieving that pressure, and of making visible to the industrialised states the real consequences of their foreign, domestic and economic policies, the possibility of opening the borders, not just to asylum seekers, but to all who might wish to migrate should be argued for.

It is not my intention to offer a prescription for a new world order, only to argue that such a (dis)order will occur. To attempt to offer an alternative vision would be foolhardy in the extreme, given the likelihood of massive upheavals, the consequences of which are impossible to predict. The purpose of this thesis has been instead to argue against accepting the limited range of alternatives on offer, and to suggest that in the light of the enormous human costs of the current system, there is an obligation to search for radical alternatives to the current system that insists on seeing the world as divided into parcels of land and tribes of peoples, each distinct and separate from the other. The prospect of a world without borders, or of borders that are open, existing only as administrative conceits, can be exhilarating rather than frightening, and will not be that new - the seeds are there already. Onora O'Neill argues that while certain functions of government need to be exercised within demarcated territories, there is no reason:

why all demarcations should coincide for a vast range of distinct functions - for it is only by superimposing the demarcations for many intrinsically distinguishable matters that we arrive at a world of bounded states (1994: 72)

Already this is an inaccurate description of the world, as we know it - O'Neill points out that the airwaves and air traffic are globally co-ordinated. Other services are

provided and controlled at local levels, and Albert and Brock have written of communities that have developed across borders (Albert & Brock 1995, 1997). Though the nature of the state means that it must continue to fight for control of borders (Chapter One), there are always counter forces working from inside and outside the state, including those opposition groups discussed in Chapters Four and Five, as well as the migrants who insist on crossing international frontiers. The dreams of world that is no longer divided into exclusionary and chauvinistic states are unlikely to come to fruition in the immediate future, but they are evidence that it is at least possible to conceive of alternatives to a world of bounded states with sedentary populations.

To return to the second question posed at the end of the last section - does the fact that reforms enable the current system to survive, mean that one should not try to improve the asylum practice of states such as Britain and Germany? So long as large numbers of people continue to be uprooted from their homes by states and prevented from making new ones by states, then the answer must be that the battle for those who are excluded must be fought on all fronts, especially when those who advocate a radical alternative can offer no guarantee of or timetable for success. The dangers of legitimating the system by working within it should not be used as an excuse for not getting one's hands dirty in the daily struggle to improve the situation for those suffering now. This thesis has shown that state practice can and does change, though only in response to threats to the survival or stability of the state. States are not monolithic or totalitarian, there remains a space for struggle and concessions have been and can be wrung from states, concessions from which people benefit.

And so idealists will attempt to work within the system, bending the rules where they can to allow those the system would otherwise reject, to enter. Within government agencies are those who will advise applicants they are concerned about how to present their stories, or who will pass information to campaigners and sympathetic MPs so that protests against individual deportations can be organised<sup>10</sup>. Others will continue to oppose the introduction of exclusionary and restrictive legislation, and will lobby

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<sup>10</sup>Members of Amnesty International, Pro Asyl and the Greens all spoke of individuals, who could not be named, who provided information and assistance .

for fairer rules, joining campaign groups, writing letters, and organising protests. Still others will continue to work within marginalised groups for more radical solutions, fighting to change the game completely in the belief that in a brave new world order, the disappearance of the state system as we know it, will herald the demise of the main cause of involuntary flight.

What seems clear from the analysis of asylum and refuge in this thesis is that the terms of public debate and policy evident from the Second World War onwards are at a point of crisis. The limits of the main approaches in theory and practice outlined above suggest that current agendas are far too limited to deal with the underlying problems. There is a clear need for a radical rethinking of the agenda as we near the next century.

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