Asylum as Reparation

Thesis submitted in partial fulfilment of the requirements for the Degree of Doctor of Philosophy

by

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Abstract

In this thesis, I examine the theoretical and practical implications of understanding asylum as a form of reparation. My basic contention is that offers of asylum potentially constitute a means through which states can discharge their special obligations towards refugees for whose flight they are responsible. Asylum, on my account, is an institution that can contribute to the rectification of the unjustified harms that states may have caused refugees by forcing them to flee.

The thesis is divided into three main parts. In Part I, I lay out a basic theory of asylum as reparation, explaining my conception of asylum and its potential moral functions in Chapter 1, and demonstrating the ways in which asylum may act reparatively in Chapter 2. In Part II, I seek to identify the conditions under which states owe asylum as reparation to refugees. Over the following three chapters, I argue that states have such an obligation when they bear outcome responsibility for unjustified harms experienced by refugees as a result of their flight, and when asylum is the most fitting form of reparation for those harms that is available.

In Part III, I apply my theory to the case of Iraqi refugees generated since the invasion of Iraq in 2003, and explore some of the practical implications of my approach. In Chapter 6, I argue that the US and UK owe asylum as reparation to large numbers of Iraqi refugees. In Chapter 7, I examine the implications of my approach for domestic asylum politics, questioning how states should prioritise refugees to whom they owe reparation vis-à-vis other refugees, and exploring its potential impact on debates over asylum. In Chapter 8, I identify its implications for the international politics of refugee protection, anticipating some of the incentives that it might create for states. *(298 words.)*

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(2014b) 'Durable Solutions as Reparation for the Unjust Harms of Displacement: Who Owes What to Refugees?', *Journal of Refugee Studies* **27**(2): 171-190.

List of Abbreviations

CEAS	Common European Asylum System
CPA	Coalition Provisional Authority
DIDR	Development-Induced Displacement and Resettlement
DRC	Democratic Republic of Congo
HP	Harm Principle
IAC	Independent Asylum Commission
ICG	International Crisis Group
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Person
IRIN	Integrated Regional Information Network
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
RSD	Refugee Status Determination
SIV	Special Immigrant Visa
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UKBA	United Kingdom Border Agency

Introduction

Refugees face the stark threat of severe and unjustified harm. Whether driven from their homes by violence, persecution, or other human rights violations, their flight frequently stems from forces within their states of origin, but may also be prompted by the interventions and policies of external states. While the majority of the 45.2 million people estimated to have been forcibly displaced by the end of 2012 have remained in their regions of origin (UNHCR 2013b: 3), a far smaller number flee to states in the developed world. Nevertheless, asylum has become a highly charged political issue in such states, as their governments have sought to restrict both the entry of asylum seekers and the numbers granted asylum (Gibney 2004: 2).

The sheer magnitude of modern refugee crises, alongside the ongoing political controversy surrounding asylum, raises pressing moral questions. How should the institution of asylum function? Who, of the many millions who live with their basic needs unfulfilled in their states of origin, should be granted asylum? Should the question of who caused refugees' flight have any bearing on the question of who is obliged to protect them? Debates over asylum are strongly enmeshed with moral arguments, and politicians, publics and academics have recognised, either implicitly or explicitly, that asylum may assume a number of moral roles. Indeed, asylum is viewed variously as a response to the fundamental humanitarian imperative to protect refugees from serious harm (e.g. Gibney 2004: ch. 8); as a means of communicating moral condemnation of the illegitimate actions of refugee-producing states (Price 2009); as an expression of solidarity with refugees with whom the state of asylum shares affinities of different kinds (Walzer 1983: 49); and even as a means of repairing the legitimacy of the international

system of states, which is arguably broken by the creation of refugees (Carens 2013: 196).

My basic contention in this thesis is that, in addition to these functions, asylum should at times assume another important moral role: as a form of reparation for the unjustified harms of displacement. This potential reparative function, I will argue, stems from a special obligation on the part of states to offer asylum to refugees for whose flight they are responsible, whether through their military interventions, support for oppressive regimes, or imposition of damaging economic policies. Asylum needs to be partly re-conceptualised in order to reflect fully the range of moral obligations which states bear towards refugees; it should be conceived not only as playing humanitarian, condemnatory, solidarist and legitimacy-repair roles, but also as potentially offering a means by which states that have caused or contributed to refugees' flight can rectify the unjustified harms that they may have imposed on them.

I also contend that this argument does not hold only in the abstract, but that it is potentially applicable to various refugee crises, both past and present. Beginning with the observation that many refugees seek asylum in states which are implicated, albeit to varying degrees and in different ways, in the creation of the very situations that originally caused them to flee, I hold that asylum is far from invariably being a matter of third-party states nobly responding to the human consequences of other states' dysfunctions, for states of asylum often bear outcome and moral responsibility for the flight of refugees to whom they subsequently may or may not provide protection. Indeed, as I shall explore, the creation of refugees is often a predictable consequence not only of states' military interventions and foreign policies but, more broadly, of the workings of the global political economy in which they participate.

This reparative approach to asylum has been reflected, in different ways and to various extents**,** in responses to certain refugee crises in recent history, such as displacement resulting from the Vietnam War (Gibney 1986: 117), NATO's bombing of Kosovo in 1999 (Gibney 1999) and, as I explore later, the mass exodus in the wake of the Iraq War from 2003 onwards. In response to these cases, politicians, publics and academics have asserted, either explicitly or implicitly, that the intervening powers bore a special obligation to protect the refugees whom they generated. In perhaps its most famous philosophical expression, Michael Walzer (1983: 49) wrote

> Toward some refugees, we may well have obligations of the same sort that we have toward fellow nationals. This is obviously the case with regard to any group of people whom we have helped turn into refugees. The injury we have done them makes for an affinity between us: thus Vietnamese refugees had, in a moral sense, been effectively Americanized even before they arrived on these shores.

Although the basic notion that states may bear this kind of special obligation towards refugees is highly intuitive and fairly straightforward, or so I shall argue, the normative presuppositions, background commitments, practical implications and underlying complexities of this approach have nevertheless suffered from a relative scholarly neglect.[1] Theorists have tended to engage with the idea only in passing, at times treating it as almost self-evident. For instance, in his discussion of states' responsibilities to refugees, Mark Gibney (1986: 80) sees the 'harm principle' as being 'such an intuitive concept that it nearly defies justification'. The notion has been briefly viewed either as a potential voluntary motivation for states to offer asylum to certain refugees (Carens 1992b: 34; 2003: 100; 2013: 195; 2014: 17; Hathaway and Neve 1997: 195; Miller 2007: 227) or as one consideration that should be taken into account when designing so-called

[1] As Andrew Hurrell (2011: 103) has recognised, 'duties that are owed by virtue of historic and uncompensated injustice' are among the 'aspects of contemporary normative theory whose implications for refugees and people movement…have been under-explored'.

refugee 'burden-sharing' schemes among states (Carens 2013: 213; Gibney 2007: 66; Schuck 1997: 273).[2]

Scholars have also been inclined to make this kind of argument in the service of a broader theoretical project, rather than treating it as an idea that is ripe for dissection in its own right. For instance, while Walzer (1983: 49) sees this special obligation as a fairly narrow exception to what he sees as national communities' right to control their borders, Mark Gibney (1986: ch. 7) and Andrew Shacknove (1988: 140-141) elaborate it when attempting to develop a series of prescriptions for US admissions policy. In contrast, Matthew Gibney (2004: 48-57) uses the notion to critique communitarian approaches to asylum, whereas Shelley Wilcox (2007) draws upon it in order to criticise proponents of open borders for failing to provide any basis for prioritising admissions in non-ideal circumstances. In contrast, academic attention in this area has instead focused more readily on moral claims open to migrants more generally, such as the notion of a human right to international freedom of movement (e.g. Carens 1987; 2013: ch. 11; Dummett 2001; Miller 2007: ch. 8) or the illegitimacy of immigration controls (e.g. Abizadeh 2008), as well as the need to adjudicate between the rights of refugees and migrants and those of the communities receiving them (e.g. Benhabib 2004; Walzer 1983: ch. 2).

Upon closer inspection, I shall argue, the various assertions of states' special obligations to the refugees they have created contain subtle, yet significant differences, suggesting that in fact they form a collection of closely related, yet ultimately distinct,

[2] Other brief discussions include: Veit Bader (2005: 346-347); Michael Barutciski and Astri Suhrke (2001: 109-110); Michael Blake (2013: 114-119); Joseph Carens (1991: 34; 2014: 17); Luara Ferracioli (2014: 141); Mark Gibney (1986: 79-108; 1991); Matthew Gibney (1999; 2004: 48-57); David Hollenbach (2011: 811); Tally Kritzman-Amir (2009: 374); Malissia Lennox (1993); Matthew Price (2009: 3); Shacknove (1988: 140-141); Souter (2014a); Walzer (1983: 48-51), Wilcox (2007) and Aristide R. Zolberg, Astri Suhrke and Sergio Aguayo (1989: 40). The idea has received more sustained attention in relation to environmental displacement, with some academic consideration of the argument that developed states bear a special obligation towards present and future environmentally displaced persons on account of their role in causing climate change (e.g. Bradley 2012a; Byravan and Rajan 2010; Penz 2010: 162-167; Zetter 2010: 144-148).

moral claims. For instance, while some contend that a state's mere involvement in, or causal responsibility for, refugees' flight is sufficient to generate a special obligation towards them (e.g. Carens 2013: 195), others have argued that this special obligation only obtains when a state has created refugees unjustly (Blake 2013: 114-119). Moreover, articulations of this idea have often been imprecise, by sliding between different senses of the term 'responsibility' and oscillating between references to asylum's various moral functions.[3] Given that a state can bear a variety of special obligations towards refugees – whether based on solidarity, affinity, communal connection or gratitude for services rendered – simply asserting that a state bears a special obligation to refugees, without specifying what it is that grounds this special obligation, is highly ambiguous. For instance, as I explore in Chapter 6, the claims made on behalf of Iraqis employed by the US-led coalition during its occupation of Iraq have melded together reparative, associative and desert-based notions, with commentators arguing not only that Iraqi employees have a special claim to asylum because of the harm posed to them as a result of their employment, but also as a reward for their assistance to the war effort, which some consider to have forged a strong tie between them and the US polity.

Taking the claim that a state bears a special obligation to offer asylum to refugees whom it has caused to flee as my starting point, I characterise it as an obligation to offer 'asylum as reparation' to those refugees. The principal contribution I seek to make in this thesis is to offer a precise, thorough and systematic treatment of a collection of closely related moral ideas which have at times been readily invoked, yet seldom scrutinised in any detail. As I aim to demonstrate, underlying such invocations a host of complex moral ideas concerning causality, outcome and moral responsibility, justice, harm and

[3] Indeed, Walzer's contention, quoted above, in effect links a reparative argument with a solidaristic one, by claiming that 'the injury we have done them makes for an affinity between us' (Walzer 1983: 49).

capability can be found, which all require careful unpacking. I undertake this task by forging a novel theoretical link between two concepts – asylum and reparation – that are generally discussed in isolation from one another.[4] I develop the notion of asylum as reparation in an attempt not only to pin down what is at stake when these assertions of a special obligation to refugees are made, but also to see more clearly what moral work they can do, both philosophically and practically. While invocations of this special obligation have not, to my knowledge, used the term 'reparations', I aim to show that the forging of this theoretical link can not only convincingly characterise the obligation in question, but can also be normatively plausible in its own right.[5]

The Importance of the Argument

I consider the argument that I advance in this thesis to be important for a number of reasons, which straddle the scholarly and the practical. First, to the extent that scholars working on the ethics of asylum aim to capture the full range of both asylum's moral functions and of states' moral obligations towards refugees, and to understand the relationships between them, they must engage fully with asylum's potentially reparative function. Given that the principle of reparation is, in common moral thought, equally, if not more, compelling than the principles of humanitarianism, solidarity and state

[4] On the one hand, the voluminous literature on reparations focuses on the pursuit of redress for crimes such as slavery, genocide, colonialism, the destruction of indigenous peoples' ways of life, racist policies such as the Jim Crow laws of the US, and so-called 'comfort women' exploited in the Second World War, focusing especially on transitional justice (see e.g. Barkan 2000; Brooks 1999; Brophy 2008; Crocker 1999; de Grieff 2006; Miller and Kumar 2007; Thompson 2002; Torpey 2006). On the other hand, work on reparations within refugee and forced migration studies has focused strongly on reparation within refugees' states of origin (see e.g. Bradley 2005; 2007a; 2007b: 10-12; 2008; 2009; 2013; Ludwig 2013), and has recently extended to explorations of refugee reparation in transitional justice initiatives (e.g. Bradley 2012b; Duthie 2012a; see also Cantor 2011). If, as Megan Bradley (2006: 4) argues, '[r]efugees have long been intertwined with the law and politics of redress', then the lack of attention paid to the links between asylum and reparation is striking.

[5] To my knowledge, Lennox (1993) is the only author who explicitly makes a connection between asylum and reparation, and she proceeds in her discussion with no discernible theoretical framework.

legitimacy, it would seem somewhat arbitrary to limit our attention to these potential functions of asylum, while at the same time ignoring asylum's latent reparative capacity.

Second, an exploration of asylum's ability to offer reparation to refugees is important as part of a burgeoning, broader effort to identify the reparative potential of the various forms of refugee protection.[6] Whereas Megan Bradley (2013: 61-64) has already convincingly argued that the voluntary repatriation of refugees can at times act as a form of redress, and recent work has sought to extend her insights to the other so-called 'durable solutions' of local integration and third-country resettlement pursued by the United Nations High Commissioner for Refugees (UNHCR) (Souter 2014b), asylum's reparative potential has gone largely unrecognised.[7] Given the central place of asylum in the 'refugee policy toolkit' (Price 2009: 12), any account of the ability of the various forms of refugee protection to offer reparation to refugees will be incomplete without discussion of asylum's reparative potential.

Third, the theoretical implications of conceptualising asylum as a form of reparation are not limited to the topic of asylum alone. If, as Katy Long (2013: 2) has suggested, refugees are 'the canary in the political theory mine', then it would be unsurprising if my argument turned out to have significant implications for important broader questions on the various ways in which injustices can potentially be remedied, and on the operation of various forms of reparation. Indeed, this thesis can be seen as something of a test-case, in which to ascertain whether or not the principle of reparation

[6] Indeed, a recent Special Edition of the *Journal of Refugee Studies* on 'Accountability and Redress for the Injustices of Displacement' has pointed to the 'potential contribution of applying a reparative justice lens to the harms associated with displacement' (Bradley and Duthie 2014: 162).

[7] In some ways, Bradley's work on refugee reparation, its focus on repatriation notwithstanding, provides a fruitful starting point for the development of a theory of asylum as reparation. Indeed, many of Bradley's arguments are as applicable to asylum as they are to repatriation, and she herself notes that her 'model can be used as a starting point to elucidate the responsibilities states may hold towards non-citizens whom they have displaced' (Bradley 2008: 287). Bradley and I both hold, for instance, that 'reparations are a critical expression of accountability for forced migration' (Bradley 2013: 2), but differ only in our respective focus on who should be held accountable.

can be successfully brought to bear on an area of moral and political practice to which it has not hitherto been applied. Explicitly connecting asylum with the notion of reparation allows for an application of the highly developed moral, political and legal discourses surrounding reparation to asylum, thereby potentially deepening our understanding of both phenomena. For instance, although I start by elaborating a general principle of reparation, I hope to develop a more nuanced picture of reparative justice by showing that the context in which reparative claims arise can significantly affect their validity and, more specifically, that reparative claims which would hold on an interpersonal, domestic level may not do so in the context of international refugee protection.

Fourth, the notion of asylum as reparation has potentially significant implications for the politics surrounding asylum and refugee protection. If it were to enter the political sphere, the notion of asylum as reparation would offer a far more explicit articulation of a moral idea that is, as I observed above, often only unreflectively invoked. The notion may also, to varying degrees according to the circumstances, be of significant instrumental value to advocates who call for a strengthening of refugees' rights. Recognition of asylum's reparative capacity has, in an era of strong political and popular hostility towards asylum seekers, the potential to remobilise support for asylum to at least some extent. As a matter of moral psychology, reparative arguments often exert a more powerful influence than humanitarian considerations (Butt 2009: 16), such that concern for refugees is more easily generated when individuals feel somehow connected to the plight of those refugees.[8] As Kok-Chor Tan (2007: 286) has put it, the principle of reparation may '[speak] more immediately to the moral sensibility of most

[8] There is some evidence to support this point in past responses to refugees. Matthew Gibney (1999: 29-30), for instance, has shown how the relative popularity in Western Europe of Kosovan refugees during the late 1990s can be partially explained by a sense of being implicated in their situation. To be sure, as I briefly discuss below, this response is variable and cannot necessarily be assumed to occur following the arrival of all refugees fleeing from situations caused by a receiving state's actions. Empirical research would be required in order to identify the precise conditions under which such a positive response is generated.

individuals…than the claim that one has positive duties of justice to assist strangers'. In a time in which asylum is often seen as an 'ex gratia' act of charity rather than justice (Singer and Singer 1988: 116), the notion of asylum as reparation has the potential to generate a novel form of asylum politics, which has greater political resonance by allowing certain refugees to mount a strong claim that they are *owed* asylum reparatively. In this respect, my argument aims to do for our understanding of asylum what Thomas Pogge has sought to achieve for our understanding of world poverty, who grounds obligations to the world's poor in terms of negative rather than positive duties, while acknowledging that this choice is partly pragmatic (see Butt 2009: 28; Pogge 2002a). I also share Daniel Butt's aim of achieving 'double practicality', in that this thesis not only 'addresses a contemporary political debate', but given that I aim to elaborate reparative arguments which 'can realistically be employed by the protagonists in…real world debate' (Butt 2009: 8).

A final reason behind the importance of my argument in this thesis lies in the fact that, despite the force of the principle of reparation in everyday moral thought, its application to asylum in any given case by politicians, publics or scholars is somewhat more variable and unpredictable. For instance, as I discuss in Chapter 6, while the US eventually came to accept a special obligation towards Iraqi refugees generated since 2003, official recognition by its principal military partner, the UK, has been practically non-existent. As I aim to show throughout Parts I and II, the assertion of a special obligation on the part of a particular state to offer asylum as reparation to certain refugees is vulnerable to a variety of counterclaims, concerning issues of causality, justice, state capability and fittingness, which may defeat it in certain circumstances. As we shall see, in some cases a state's putative obligation to offer asylum as reparation to certain refugees may be resisted, whether convincingly or unconvincingly, on the grounds that

the causal links between a state's actions and a refugee's flight are too tenuous; that the intervention which created the refugees was morally justified and that therefore no reparation is owed to them; that the responsible state lacks the capacity to offer an adequate form of asylum; or that another form of reparation is more fitting than asylum. Arguably, the normative force of the principle of reparation itself notwithstanding, it is due to the very *instability* and *defeasibility* of our intuitions concerning states' reparative obligations to refugees in any given case that they need bolstering by an explicit account of asylum as reparation that brings our semi-conscious beliefs and presuppositions into the open, and clearly defends them.[9]

The Structure of the Thesis

This thesis is divided into three main parts. In Parts I and II, I lay out a theory of asylum as reparation, aiming to identify the presuppositions which underlie the notion, and to characterise it in as normatively compelling a manner as possible. This is by far the most abstract part of the thesis, with empirical examples and social scientific concepts only peppered throughout in order to illustrate specific theoretical points. In Chapter 1, I outline my conception of asylum and its potential moral functions. In Chapter 2, I make a basic case for understanding asylum as a form of reparation, arguing that asylum may, in different ways and to different extents, constitute forms of restitution, compensation and satisfaction. I argue that asylum, while capable of offering only a weak form of restitution, has a strong compensatory function. I also argue that the reparative ability of grants of asylum may be maximised when they form part of a broader process of reparation for refugees. Throughout Part I, I take particular note of a

[9] I am grateful to Blair Peruniak for suggesting this point.

potential tension between states' humanitarian duties and reparative obligations towards refugees, which will have significant implications for later discussion.

In Part II, I aim to identify the main conditions under which asylum should function as a form of reparation. Over the course of the following three chapters, I apply the principle of reparation to the case of a refugee seeking asylum in another state, arguing that a state owes asylum as reparation to refugees when it bears outcome responsibility for unjustified harms experienced by those refugees as a result of their flight, and when asylum is the most fitting form of reparation that is available to those states. Working through and defending each of the elements of this formulation, I discuss the variety of ways in which external states may bear outcome responsibility for refugee movements in Chapter 3; draw on just war theory in order to explore the conditions under which the act of causing displacement may conceivably be morally justified in Chapter 4; and seek to identify some of the considerations that need to be taken into account when determining whether it is asylum or another form of refugee protection that is the most fitting form of reparation that is available to states, and examine some of the ways in which states' limited capability might legitimately prevent them from fulfilling their reparative obligations to refugees in Chapter 5. Laying out certain specific conditions, and sub-conditions, which must obtain in order for a state to owe asylum as reparation to a refugee allows for the clear concession that there are some cases in which states do *not* bear an obligation to offer asylum as reparation to those whom they have displaced, and that I am by no means seeking to argue that asylum should *invariably* function as a form of reparation. Instead, I seek to embed this account of asylum as reparation into a pluralist conception of justice, which recognises that the principle of reparation is not absolute, and that reparative justice is only one element of justice as a whole, and can be outweighed in various circumstances by other moral considerations.

In Part III, I temper the abstraction of the first two parts by entering the realm of politics and practice, applying my approach to a recent refugee crisis, and seeking to ascertain some of its implications for the politics of asylum and refugee protection. In Chapter 6, I apply my theoretical framework to the case of Iraqi refugees generated since the invasion of Iraq in 2003. Using the frequent claims of activists, international organisations, politicians, commentators and academics that the US and UK bear a special obligation towards Iraqi refugees as a starting point, I ask whether these two states owe asylum as reparation to Iraqi refugees generated since 2003. My aim in undertaking this case study is provisionally to ascertain the applicability of my theoretical framework to a recent refugee crisis that has been hugely significant both in terms of its numbers and human costs, and in terms of the political fall-out that has ensued as its result. I argue that the case of Iraq meets the conditions of my theory, that the US and UK do indeed bear outcome and moral responsibility for causing unjustified harm to Iraqi refugees, and that, for many of those refugees, asylum in one of those two states is the most fitting form of reparation that can be offered to them.

In making this case, I examine the ways in which the US and UK have directly caused, contributed to, facilitated or worsened patterns of mass displacement in and from Iraq since 2003 in a manner that was both reasonably foreseeable and the result of negligence. I also outline some of the severe and unjustified harms suffered by Iraqi refugees, and explore their preferences for protection in order to provisionally ascertain the fittingness of asylum as a form of reparation for them. I then conclude this part of the thesis by observing the extent to which the actual response of the US and the UK to Iraqi refugees falls far short of the demands of my theory, with recognition of responsibility by the US and admissions only beginning belatedly and, in the case of the UK, practically not at all.

In Chapters 7 and 8, I shift to explore some of the implications of my reparative approach to asylum for the ways in which the politics of refugee protection is conducted on the domestic and international levels. Beginning with the domestic level, in Chapter 7 I return to the notion of a hierarchy between the principle of reparation and that of humanitarianism which I touch upon in Part I, and examine the question of how, if the principle of asylum as reparation were to be implemented by states, refugees could be justly prioritised in a climate of scarce resources. I seek to navigate the tension between the principles of reparation and humanitarianism, exploring some of the ways in which one might trump the other in different cases in which refugees seek asylum. I then explore some of the possible effects of the introduction of the notion of asylum as reparation into domestic political debates over asylum. Examining how the notion compares and fits with existing claims made in favour of refugees' rights, I identify several advantages of the notion for the articulation of refugees' rights, in addition to certain limitations.

In Chapter 8, in contrast, I shift to the international level and seek to anticipate the possible effects of the incorporation of a principle of asylum as reparation for the international politics of refugee protection, and in particular its implications for international responsibility-sharing among states. I speculate as to the nature of the incentives that might be set up through such an incorporation, identifying certain perverse or invidious incentives which could potentially undermine, rather than strengthen, refugee protection. Finally, I conclude the thesis by recapitulating its main arguments and identifying broader questions raised by my approach, such as its applicability to wider ethical issues concerning immigration and citizenship.

Methodology

In making my argument in this thesis, I draw predominantly, although not exclusively, on the tools of normative, analytic political theory. Indeed, throughout Parts I and II I make particular use of the theories of responsibility developed by Tony Honoré (1999) and David Miller (2001; 2007), the tenets of just war theory (e.g. Lee 2012; Walzer 1977) and recent normative work on asylum and states' responsibilities for refugees (Bradley 2013; Gibney 2004; Long 2013; Price 2009).[10] In contrast to much recent political theory, which has tended to proceed without detailed consideration of its own implicit methodological commitments (see Leopold and Stears 2008: 1), in this section I explicitly situate this thesis within three approaches, demonstrating the ways in which my methodology can be said to be *contextualist*, *diachronic* and broadly *non-ideal* in character.

A Contextualist Approach

My approach can be classified as contextualist in several interrelated ways. First and foremost, I take a contextualist approach in that I do not seek to base my argument on any putatively foundational, objective or metaphysical moral truth, but rather take one principle that is already widely accepted and deeply embedded in common moral, political and legal thought and practice as my starting point. Indeed, the principle of reparation is firmly rooted in most domestic legal systems, playing a key role in tort law, and featuring prominently on the international level in documents such as the

[10] I also draw on concepts closely related to that of reparation which are used by philosophers in relation to other issue areas – such as Pogge's discussion of negative duties concerning the alleviation of world poverty (Pogge 2002a), and Simon Caney's notion of 'the polluter pays principle' in relation to responsibility for climate change (Caney 2005a: 752), and identify parallels with philosophical discussions of partiality and special obligations more broadly (e.g. Goodin 1985; Nagel 1991; Scheffler 2001).

Reparations Guidelines adopted by the United Nations General Assembly (UNGA 2005). Equally, what John Torpey (2006) has described as 'reparations politics' has become a staple of modern political life, as demands for redress for past injustices such as slavery and colonialism have gained political currency and grown ever more vociferous (see e.g. Barkan 2000: 2).[11] The principle also has a long pedigree in the history of moral and political thought, with Hugo Grotius, for instance, claiming that every 'fault creates the obligation to make good the loss' (quoted in Lee 1986: 536).

Rather than seeking to defend the principle of reparation fully – which would constitute a full philosophical project in itself – here I take its moral force for granted, and seek to put it to work in a context to which it has not been explicitly applied to date. My approach therefore corresponds to a mode of argumentation in world politics identified by Neta C. Crawford (2002: 7) which seeks to 'extend normative beliefs to new areas of practice'. My argument can also be said to have a 'conditional character' (Butt 2009: 14), by suggesting that "*if* one believes in the principle of reparation, *then* one has good grounds for also believing that states at times bear a special obligation to offer asylum as reparation to certain refugees".[12] Consequently, any thoroughgoing sceptic of the principle of reparation would simply not be persuaded by the argument that I advance in this thesis.[13]

[11] More broadly, as Bukovansky *et al.* (2012: 1) have observed, 'the language of world politics has become thoroughly suffused' with 'special responsibility talk'.

[12] The same can be said of the principles and arguments in favour of refugees' right to redress for the injustices of displacement that have emerged in recent years which, as I commented above, have tended to focus on repatriation and transitional justice within refugees' states of origin. I argue that, *if* there are grounds for asserting refugees' right to reparation in their states of origin, then there are *also* strong grounds for asserting a right to reparation specifically in the form of asylum under certain circumstances.

[13] My approach also shares similarities with the method of 'immanent critique' in which, as Marit Hovdal Moan (2008: 205) has put it, 'one uses what one perceives to be the unfulfilled normative criteria that an institution formulates and judges itself by as the basis for prescribing how that institution should be organized in order to qualify as just'. For other work which evaluates states' policies towards refugees and migrants against liberal principles to which states already subscribe see, for instance, Matthew Gibney (2011) and Nina Perkowski (2012: 6).

Second, my approach is contextualist in the sense used by Joseph Carens (2004: 118), as 'it entails the normative exploration of actual cases where the fundamental concerns addressed by the theory are in play', through my application of my account to the case of Iraqi refugees since 2003, and also includes 'cases that are especially challenging to the theorist's own theoretical position', such as contested cases of environmental displacement and refugee movements arguably stemming from the legacy of colonial rule.

Finally, my approach can be understood as contextualist in the sense proposed by David Miller (2013a: 43) who sees it as the view that 'principles of justice are context specific rather than invariant across contexts'. Although I argue that the general principle of reparation has significant implications for states' obligations towards refugees, I also recognise that the ways in which it should be applied will depend in part on the context in which the application is taking place. Thus, as I argue in Chapter 4, given the collective responsibility to protect human rights that is shared among the world's states, there are potential occasions in which states do not bear a reparative obligation towards refugees they have created, if those refugees were produced as part of a fully just humanitarian intervention.

Taking Account of Past Relationships

The relative scholarly neglect of the ideas that animate this thesis, which I identified above, may stem from the fact that much academic work on the ethics of asylum and migration (e.g. Boswell 2005; Dummett 2001; Gibney 2004; Price 2009) is in one respect strongly *synchronic* in character, insofar as it largely focuses on the rights and duties of refugees and states which stem from the *current* situations of both parties,

rather than from pre-existing relationships among them.[14] Studies in this area have tended to work within the framework of mainstream moral theories, such as utilitarianism and liberalism, which arguably have difficulty in accommodating the inherently diachronic notion of reparation adequately (see Kagan 1988: 294; O'Neill 1987: 85).[15] For instance, in their explicitly utilitarian treatment of the ethics of asylum, Peter and Renata Singer (1988: 121) recommend weighing up the current interests of all those affected by asylum policy, whereas Carens (1992a: 25) takes a self-consciously liberal approach, evaluating admissions policies in light of whether they treat all concerned as 'free and equal moral persons', or in terms of preferences behind the Rawlsian veil of ignorance (Carens 1987: 255).[16] Those drawing on the broadly humanitarian tradition have seen states as obliged to provide asylum given the *current* needs of refugees, provided that the costs to those states of providing such asylum are low (see Altman and Wellman 2009: 181; Gibney 2004: 231; Kant 2006 [1795]: 82; Walzer 1983: 45). Although communitarians and liberal nationalists take account of pre-existing relationships among members of particular communities and nations, they tend to ignore the ethical relevance of harmful past relationships between the state and outsiders (Gibney 2004: 51).[17]

[14] For a contrast between synchronic and diachronic theories of justice regarding reparation, see Janna Thompson (2002: 149).

[15] That being said, I recognise that these theories, taken as a whole, are not purely synchronic in character, given that, for instance, liberalism gives prominence to diachronic concepts such as equality of opportunity (e.g. Rawls 1999 [1971]: ch. 2), and variants of utilitarianism such as rule consequentialism take into account the utility of internalising moral norms over time (e.g. Hooker 2000). Nor is it to deny that, in other respects, accounts of asylum are likely to include other diachronic elements, such as discussion of asylum's duration, or attention to any past harms suffered by refugees in their states of origin as an indication of their future risk on return. My point here is rather that the application of these theories specifically to the ethics of asylum by scholars has tended to be synchronic in character, and has not generally drawn on their other diachronic elements.

[16] For a critique, in the context of the ethics of immigration, of liberalism as ahistorical and proceeding as if 'colonial exploitation never occurred', see Phillip Cole (2000: 14). In his discussion of reparations, Jeff Spinner-Halev (2012: 14), moreover, discerns a 'presentist bias' within liberal theory, which he sees as facing difficulties in accounting for the 'collective narrative and history of a group' and 'an exiled people's attachment to land'. Spinner-Halev (2012: ch. 7) argues that this limited ability of liberal theory and practice to tackle what he calls 'enduring injustices' should lead us to adopt what he calls a 'chastened liberalism'.

[17] However, Walzer's brief discussion, quoted earlier, is a notable exception to this trend (Walzer 1983: 49).

From this perspective, the idea that asylum should act as a form of reparation makes little sense, for it focuses largely on the fact of the refugee's current plight, rather than its provenance. This can lead to analysis of asylum claims being undertaken in isolation from historical considerations.[18] Given that the notion of reparation presupposes a past harm that stands in need of remedy, the development of an account of asylum as reparation requires an approach to asylum that is in one important respect *diachronic*, in that it takes past relationships of harm between states and refugees into account in a manner which has been rare in existing scholarly discussion to date.

Ideal and Non-Ideal Political Theory

There has been much recent debate among theorists concerning the relative merits of what has become widely known as 'ideal' and 'non-ideal' political theory. Although detailed engagement with this debate lies beyond the scope of this thesis, it is important to situate my argument within these two modes of political theory, given the extent to which my choice between them will determine the applicability of the resulting theory to the real world. Before seeking to categorise my argument in this way, it should be noted that theorists have used the distinction for different purposes. As Alan Hamlin and Zofia Stemplowska (2012: 48-49) have shown, it has been used to identify the extent to which theories assume full compliance with the demands of a theory; abstract from, or even falsify, aspects of the real world; or are insensitive to facts. Thus, a political theory which assumes full compliance with moral norms and abstracts from the conditions of the real world will be 'ideal' in character, whereas one which does not will be better seen as being 'non-ideal'. Given that such theories can be ideal or non-ideal to varying degrees,

[18] A similar tendency towards 'ahistoricism' has characterised refugee and forced migration studies (Long 2013: 6; see also Marfleet 2007a).

Carens (2013: 300) invites us to '[i]magine a continuum of possible presuppositions that stretches from the way things are now to the way things ought to be' (see also Hamlin and Stemplowska 2012: 8).

Once this variety of uses is clear, it becomes apparent that my argument contains both ideal and non-ideal elements, although it is the latter which appear to predominate, and so this enquiry is best seen as lying towards the non-ideal end of Carens' continuum. First, the basic scenario which I analyse – the generation of refugees by external states – renders my argument clearly non-ideal in certain respects. It does not assume full compliance with the moral demands of my theory, part of which is that states are obliged not to create refugees when doing so causes them unjustified harm, and that states owe reparation to those refugees if they do so. It also takes many non-ideal features of the world as a starting point, especially the fact that there are refugees in the first place who, arguably almost 'by definition, are a product of injustice' (Carens 1996: 168).

Moreover, the theory applies the principle of reparation specifically to states, thereby ensuring that the theory remains anchored to current political realities. Indeed, my account does not fundamentally challenge the deep character of the modern state as a 'particularistic agent', which inevitably constrains its ability to respond inclusively to all who seek to enter it (Gibney 2004: 196). Taking full account of the thoroughly non-ideal and gross socio-economic disparities that currently characterise the international system of states, the theory recognises that the incapacity of states to offer a minimally decent quality of asylum as reparation to refugees can at times render it more justifiable to allocate responsibility for protecting refugees on the basis of states' capability instead of the principle of reparation. Rather than disputing the legitimacy of immigration controls as a whole, moreover, I presuppose what Carens (2013: 10) has dubbed 'the conventional moral view on immigration' that states are entitled to control their borders, and will argue

that – given the current operation of asylum as a 'loophole in otherwise restrictive immigration policies' (Price 2009: 3-4) – the responsibility of external states for certain refugees' flight can provide those refugees with one specific ground for passing through this loophole.[19] Nor do I endorse the conventional view, however, for one could support open borders on an ideal level at the same time as advocating asylum as reparation given current political constraints.

Furthermore, in Part III I enter yet more non-ideal territory, by looking at political and practical obstacles to the realisation and implementation of asylum as reparation. I explore the possibility of whether, despite what I see as its soundness at the level of theory, the incentives it could set up for states are sufficiently perverse or damaging for it to be concluded that my reparative approach to asylum ought to be jettisoned in practice.

Nevertheless, in other, albeit fewer, respects, my argument fits squarely within ideal political theory. First, its specification of states' reparative obligations is ideal insofar as it does not modify or adapt the principle of reparation in light of factors such as states' willingness to comply or publics' frequent hostility towards refugees in liberal democratic states. Furthermore, my preferred definition of the refugee, which I discuss in Chapter 1, goes well beyond current refugee law, is far broader than that accepted by most states and, as such, may appear patently unrealistic. Despite its practical potential as a novel means of articulating refugees' claims for both asylum and reparation, I also intend my argument to be conceptually and normatively valid from an ideal standpoint,

[19] Indeed, Jonathan Seglow (2013: 2550) presents the notion that states bear a special obligation to non-citizens they have harmed as a middle-ground between those who defend 'sovereign borders' at the one extreme, and proponents of 'open borders' on the other, arguing that it amounts to a 'just borders' view, which contends that 'principles of justice should determine what migrants should be permitted to move to what states under what circumstances'. This is so, according to Seglow (2013: 2556), given that this kind of implicitly reparative argument 'does not call for open borders when no harm has occurred or when compensation in the migrants' country of origin is the better response'. For arguments in favour of open borders, see e.g. Carens (1987; 2013: ch. 11); Michael Dummett (2001: ch. 3); and Teresa Hayter (2000).

regardless of whether in fact it ultimately gains any traction in political debates over asylum.

In combining both ideal and non-ideal elements in my theory, I aim to avoid the pitfalls of over-reliance on either element. As Carens (1996) has argued regarding the ethics of migration, while idealistic theories risk becoming utopian and practically irrelevant, realistic theories may concede principle to reality, thereby legitimising an unjust status quo. Arguably, both ideal and non-ideal theory need to be run on parallel tracks, so to speak; ensuring that we simultaneously have both an ideal to which to aspire and a 'theory of the second best' (see Butt 2009: 8).

Empirical Methodology

Although this thesis is predominantly rooted in normative political theory, it is by no means limited to it, and also draws on the tools and insights offered by other disciplines within the social sciences. First, in order to illustrate theoretical points and to offer empirical context throughout Parts I and II of this thesis, I not only use the analogies and thought experiments that are characteristic of analytic political theory, but also draw on examples of recent refugee crises, which are discussed in academic literature found within political science, international relations and refugee and forced migration studies; attending to their causes, consequences, and the responses they have prompted.

Second, I also occasionally import legal concepts and arguments proposed by legal scholars into the discussion in order to help build my moral argument, such as the notion of a 'right not to be displaced' (Stavropoulou 1994), the contention that refugees' states of origin owe compensation to the states which protect those refugees (Lee 1986)

and elements of 'soft law' such as the UN's 1998 *Guiding Principles on Internal Displacement*.[20] In order to provide empirical context, I occasionally identify parallels with, and draw comparisons between, my normative points and elements of international law found in instruments such as the 1951 Refugee Convention and the 1949 Geneva Conventions and Protocols. I use these legal concepts, however, because I consider them potentially to have normative plausibility in their own right, rather than ascribing any independent moral weight to their legal foundations, and because of the possibility that practice can at times be ahead of theory. Indeed, as Carens (2004: 121) has observed, '[s]ocieties may come over time to do the right thing in response to concrete problems without managing to articulate in theoretical terms why it is the right thing'.

Third, in Part III I move into empirical terrain, applying my theory to the case of Iraqi refugees generated since 2003 in Chapter 6, by engaging in a critical reading of secondary literature on modern Iraq and Iraqi politics before and after its invasion in 2003 (e.g. Dodge 2012; Stansfield 2007; Tripp 2007). I also engage with a wide range of primary sources on Iraq and its refugee movements – such as policy documents, reports of non-governmental organisations (NGOs), congressional hearings, pieces of national legislation, media reports, op-eds, and political speeches – and use popular and political views on obligations to Iraqi refugees as a starting point for my analysis.[21]

However, my case study of Iraqi refugees differs from case studies often used in the social sciences insofar as its purpose is not to generate or test empirical hypotheses or to 'shed light on a larger class of cases' (Gerring 2007: 20), but is rather designed partly

[20] For commentary on the status of the doctrine of state responsibility for creating refugees in international law, see Guy Goodwin-Gill and Jane McAdam (2007: 2-3).

[21] While I recognise that research reports produced by NGOs often do not meet academic standards of rigour, and that their findings may be shaped in part by a desire for advocacy impact, I cite them in Chapter 6 either as examples of the recent discourse over states' special obligations to Iraqi refugees, or as a means of filling factual lacunae that appear to be left by the academic literature on Iraqi refugees that I have consulted.

as a means of ascertaining the normative adequacy of my theoretical framework. While my case study of course cannot falsify or refute this framework, during the process of completing this thesis it has, on occasion, pointed to the need for refinements in order for the framework to yield concrete moral judgements in different cases (see Bradley 2009: 30). As an extension of John Rawls' method of 'reflective equilibrium' (Rawls 1999 [1971]: 48), I have sought to treat the application of my theory to a particular case as an integral part of the process of building my theory, viewing the relationship between my framework and case study as a reciprocal interaction (see Carens 2004: 123).[22] My discussion of Iraqi refugees is not a case study in the sense that it is a case in which the concept or practice of 'asylum as reparation' has actually been deployed (although closely related moral claims have been made without using this term), but is rather a case whose moral dimensions can be illuminated by it.[23]

In a further difference from empirical case studies often employed in the social sciences, a lack of generalisability does not pose a methodological problem in this thesis. The fact that I have chosen to apply my theory to only one case study is similarly unproblematic, for my aim is not to achieve comparability across cases, but rather to make an initial assessment of the applicability of my framework to an empirical case, which could then also be applied to additional cases in future work. If Chapter 6 has pointed to any normative theoretical refinements which need to be made, then it will have served its intended purpose.

[22] In this way, my methodology bears similarities with that of Nicholas Wheeler (2000) and Megan Bradley (2013), who have applied their normative frameworks for understanding humanitarian intervention and just refugee returns respectively to various case studies. Bradley (2013: Part III), in particular, tackles what she dubs 'hard cases', explicitly using them as a means of challenging and refining her theory.

[23] Moreover, the aim of the case study is to *explore* whether or not my theory is applicable to a contemporary refugee crisis, in what ways and to what extent, rather than being motivated by a desire to *prove* that it is in fact applicable. If it became apparent that the theory were *not* applicable to the Iraqi case, or that it had only very limited applicability, that result could still nevertheless be instructive and, in any case, would not invalidate the theory itself.

In Chapters 7 and 8, although remaining within the ambit of normative political theory, I again engage with literature within political science and international relations in order to explore the possible impacts of the implementation of asylum as reparation on both the domestic and international levels. In Chapter 8 in particular, I draw on literature by scholars working within law and international relations, particularly works on so-called refugee 'burden-sharing' (e.g. Hathaway and Neve 1997; Schuck 1997; Thielemann 2003b). Although I draw on works which correspond, to varying degrees, to the mainstream theories of international relations – such as neo-realism, liberal institutionalism and constructivism (see Betts 2009a: ch. 1) – my discussion is not in itself wedded to any of these theories, and I assume that states' behaviour is motivated by a complex mixture of self-interest (as neo-realism would have it) and socialisation into the acceptance of norms (as constructivists emphasise). Bringing together such literature with work within moral and political theory on incentives, such as that by Pogge (2002b), I view this combination of an empirical focus on the actual politics of refugee protection and a moral concern for states' obligations towards refugees to be crucial for achieving an account of asylum which possesses both 'ethical force' and 'practical relevance' (Gibney 2004: 15).[24]

[24] See also Bradley (2013: 17) for a discussion of the importance of integrating moral, legal and political analysis when discussing states' reparative responsibilities towards refugees.

PART I: A BASIC THEORY OF ASYLUM AS REPARATION

Introduction to Part I

The first main step in elaborating a theory of asylum as reparation is clearly to show that asylum can act as a form of reparation in the first place. This might be seen as basic, uncontroversial, or even obvious for, as I commented earlier, the brevity of some scholars' treatments of the idea that states bear a special obligation to protect refugees they have created suggests they may find arguments of this sort almost self-evident. If this is the case, it might be thought that the relative neglect by scholars of the idea that underlies the argument of this thesis is due simply to the fact that it does not merit close attention in the first place. On the contrary, however, I aim to show that beneath what may for some be a veneer of self-evidence lies a range of complex moral ideas which require elaboration and defence. Although a theory of asylum as reparation that stopped short of offering anything more than a basic case that asylum can act as a form of reparation at all would be limited indeed, it is necessary if only as a first main step in the argument to make such a basic case, in order to lay out the logic underlying this approach, and to provide a basis on which to explore its more controversial theoretical and practical implications, which have been largely ignored by scholars.

As I hope to show throughout Part I, moreover, the devil lies in the details, so to speak. While a basic case that asylum should at times act as a form of reparation may seem highly intuitive, there is likely to be (and already has been) disagreement among scholars concerning the details of such an account; for instance, as I observed earlier, concerning whether a state's causal responsibility for a refugee movement is sufficient to generate a special obligation towards them, or whether it must have been the case that they acted unjustly. Moreover, given the ease with which one can slide inadvertently between assertions of different types of special obligation towards refugees, a reparative

approach to asylum needs to be carefully differentiated from, and situated alongside, other kinds of special obligation that a state may bear towards refugees. In short, if scholars want the idea that animates this thesis to do the moral work that they appear to assume that it can do, then theoretical issues such as these need to be addressed.

Although the overall idea of asylum as reparation may seem clear and intuitive, then, this supposed self-evidence looks far shakier, and may even fall apart, if closer attention is given to the details which make up the notion than scholars have undertaken to date.[25] It is when we attend to these details that matters start to become considerably more interesting. There are many possible variants of a theory of asylum as reparation, some more plausible than others, and there is nothing to stop the *particular* theory presented here from being disputed or even replaced by a different variant by other scholars in future work.

While recognising that there are many possible variants of a theory of asylum as reparation, the elaboration of my particular theory requires that my own chosen conceptions of asylum and reparation be laid out. This is because the precise nature of any theory of asylum as reparation will depend on the conceptions of both asylum and reparation that are being presupposed throughout, and because it is possible that an 'overlapping consensus' (Rawls 1999 [1971]: 388) that asylum can constitute a form of reparation might co-exist with divergent understandings of the nature of both asylum and reparation.[26] Although I believe that my chosen conceptions of asylum, the refugee and

[25] It may also be that the principle of reparation is in itself not nearly as philosophically self-evident as the scholars who have applied it to the ethics of asylum have taken it to be. For instance, Shelly Kagan (1988: 293) shows that justifying the notion of a special obligation towards those one has harmed is more philosophically challenging than it might first be thought, and that the principle, when viewed in this light, may end up seeming positively 'baffling' rather than self-evident. However, as I explained earlier, in this thesis I restrict myself to the task of applying the principle of reparation to the realm of asylum, rather than questioning its philosophical foundations.

[26] For instance, one adherent to the notion of asylum as reparation might wish, following Price (2009), to restrict asylum to the persecuted, while another might argue that asylum can offer reparation of some sorts, such as compensation, but not others.

reparation are the most plausible, my intent in Part I is more expository than it is justificatory, to the point of being even stipulative, and it would take far more space than I have here in order to defend them fully and to attempt to resolve all of the terminological controversies surrounding asylum, refugeehood and reparation in anything even approaching a conclusive manner. In Chapter 1, I begin by laying out my particular understandings of asylum and reparation and their moral functions, before seeking to demonstrate how the former may act as a form of the latter in Chapter 2. This task is also important because it allows the two concepts to be situated within broader moral thought, thereby laying the ground for discussion of possible circumstances in which the principle of reparation might be outweighed by other moral considerations.

Chapter 1: Asylum and its Moral Functions

Minimally, modern asylum can be seen as 'the sanctuary or refuge given to foreigners, usually refugees, by any sovereign state' (Gibney 2005: 23). Any fully adequate conception of asylum, however, will also comprise a more detailed position on the proper *content*, *site* and *duration* of asylum, as well as *how* it may be accessed, and *who* bears the right to 'enjoy' it.[27] When seeking to flesh out this rather spare initial definition, what becomes striking is the extent to which it is difficult, or even impossible, to develop a theoretical account of what asylum *is* without also going at least some way towards specifying what it *ought* to be. This is because asylum is an inextricably value-laden concept. As Emma Haddad (2008: 25) has observed in a closely related vein, '[i]n talking of the "refugee" we need an appreciation of the fact that the concept is both descriptive and normative. To employ the term "refugee" is both to describe it and ascribe a value to it'.[28]

What is Asylum?

The task of stipulating what form asylum should take – that is, what content it should have – proves difficult without recourse to moral concepts such as serious harm, basic needs, and human rights.[29] Etymologically, asylum is derived from the Greek word *asylos*, meaning 'that which may not be seized or violated' (Schuster 2003: 64). That

[27] This is the language of Article 14 of the Universal Declaration on Human Rights (UDHR), which provides a right 'to seek and enjoy asylum' (see Edwards 2005). Nevertheless, I leave aside the question of what the right to asylum should *legally* consist of.

[28] For an attempt to show that 'the question of who are refugees is not analytically distinct from the question of what we owe to refugees and how we can help them', see Matthew Lister (2013: 648).

[29] It might be objected here that concepts such as 'human rights' can be defined in positivist terms; that is, solely with reference to current international or domestic law. However, such human rights law draws on and codifies a tradition of pre-existing moral and philosophical concepts such as those of 'natural rights' and 'the rights of man' (see Freeman 2002: ch. 2).

which may not be violated in this context has come to be the basic human rights of individuals who have been forced to flee. Given that refugeehood entails a lack of these basic rights – that is, a lack of basic state protection or 'effective citizenship' (see Batchelor 1998: 159) and even of the 'right to have rights' (Arendt 1986 [1951]: 293) – asylum consists of either the *restoration* of such rights in another state, if a refugee lost them through his or her flight, or the *establishment* of them for the first time, if that refugee never enjoyed their secure protection before fleeing.[30]

This stipulation of asylum's content is self-consciously minimalist. Basic human rights, after all, are minimum standards, whether defined as the protection of basic needs (see Miller 2007: 178-185), of 'normative agency' (Griffin 2008: 2), or whether they are conceived as being grounded in human vulnerability (Turner 2006), 'legitimacy' (Price 2009: 117-120) or as providing the preconditions of a 'minimally good life' (Nickel 1987: 51).[31] As Henry Shue (1996: 9) has argued, 'rights to three particular substances – subsistence, security, and liberty – are basic rights', the exercise of which is a precondition for the enjoyment of all other rights.[32] Basic human rights, far from covering the entire of morality, form only one, albeit fundamental, part of it.

On an everyday, local level, however, asylum may not be only experienced by refugees as access to a set of abstract rights, but as inclusion within a community and the

[30] For the same point in relation to durable solutions such as voluntary repatriation, see Long (2008: 35-36). I engage with the issue of which basic human rights violations should ground a right to asylum in more detail below, when discussing how the concept of refugeehood should be understood.

[31] Indeed, this minimalism is reflected in my overall theory of asylum as reparation, in that I am aiming to ascertain a state's minimal duties to offer asylum as reparation, recognising that offers of both asylum and reparations, whether offered together or separately, can have varying degrees of 'munificence' (de Greiff 2006: 12), which at some point cease to be obligatory and enter the realm of the supererogatory.

[32] For the argument that there are a 'limited number of "priority" rights for asylum seekers which ought to command more conviction and acknowledgement from duty-holders' than other rights, see John Edwards (2001: 161). While the question of exactly which human rights from the list within international agreements should be seen as basic rights falls outside the scope of this thesis, it seems clear that, whereas the rights to life and freedom from torture are basic, other rights within the UDHR, such as the right to 'periodic holidays with pay' seem to be far less plausible candidates (see Griffin 2008: 16; see also Price 2009: 116).

sense of belonging that such inclusion may foster. Asylum, after all, does not *purely* concern the protection of refugees' basic rights, but is also something that is actively fashioned by refugees themselves, involving the 'reconstruction of their social world' (Gibney 2013b) through the development of a new web of interpersonal relations and social support mechanisms. Upon this minimum of basic human rights protection, therefore, asylum may be given additional content by states, the communities within them and through the agency of refugees themselves. The protection of basic human rights is the bedrock, so to speak, upon which these more extensive forms of asylum may develop.

The Sites of Asylum

If the content of asylum is the protection of basic human rights, then the *location*, or *site*, of asylum can be any place outside refugees' states of origin in which their basic rights can be securely protected. While it is true that many refugees, especially those in weak states throughout the developing world, secure *de facto* protection beneath the radar of the states in which they reside (see Meyer 2008: 9), and depend to a far greater extent on the protection of sub-state social structures than that of the state itself, it is also often the case that asylum can be offered most robustly by a state. While asylum could conceivably be offered by any social structure – and indeed has its historical origins in the sanctuary offered in the temples of ancient Greece (Price 2009: 26) – in a world in which the modern state remains the ultimate guarantor of rights, it is the central guardian of the right to asylum.[33]

[33] For the contention that the figure of the refugee is only intelligible within the context of an international society of states, see Haddad (2008: ch. 3).

Given that the content of asylum is the protection of human rights, certain ways in which refugees are often accommodated – such as in refugee camps across the developing world, reception and detention centres in the developed world, and 'safe havens' such as that created for Kurdish refugees in northern Iraq in 1991 – cannot plausibly be seen as forms of asylum, or at least not as adequate forms of it. In-region protection in refugee camps, at least as they are currently operated, does not constitute a proper form of asylum, given that the situations of many of their inhabitants – characterised often by the overall absence of rights, dependence on humanitarian aid, and lack of employment and freedom of movement (Crisp 2003: 11-12) – fall short of basic human rights protection.[34] A distinction could thus be drawn between *refuge*, say, in camps, in which refugees are offered only basic necessities, and the secure protection of their basic human rights through *asylum*.[35]

The Duration of Asylum

If asylum consists of the protection of refugees' basic human rights on a site outside of their states of origin that is fully conducive to that protection, then the duration of asylum should correspond to the length of time that the refugees in question lack protection within their states of origin. In other words, asylum provides sanctuary from a threat that is *ongoing*, at least at the time when it is granted. Without risk on return and lack of state protection from their states of origin, the refugees in question are not, or are no longer, refugees, properly understood. This is implicit in the 'cessation clause' within

[34] The coercive environment of Western immigration detention centres also clearly disqualifies them as potential sites in which asylum can be adequately offered. Admittedly, however, Western states, such as the UK, do not view such centres as sites of asylum, but rather see them as mechanisms for curbing what they see as the abuse of their asylum systems and immigration laws by ineligible applicants; incarcerating refused asylum seekers pending their deportation, detaining asylum applicants if it is feared that they would abscond while their claims are being decided, while releasing formerly detained applicants if they are eventually granted asylum or another form of leave to remain.

[35] For an alternative way of drawing a distinction between refuge and asylum, see Adelman (1990).

the 1951 Refugee Convention, which allows for the cessation of refugee status when the refugee in question is in a position to '[re-avail] himself of the protection of the country of his nationality' (cited in Ghandhi 2006: 31).

Nevertheless, during their period of asylum, refugees may develop rights that would render their removal from the state unjust, and even a violation of human rights in itself. This may be the case, for instance, if their deportation would, given their establishment of strong social ties within their state of asylum (see Carens 2009) violate their right to a private and family life. If certain refugees remain traumatised by the events that caused them to flee, moreover, then involuntarily returning refugees to the site of their displacement may amount to a form of cruelty.[36] Given these considerations, it is often morally desirable for states to allow for the continued residence and naturalisation of refugees even after their risk on return has lapsed.[37]

Accessing Asylum

It might be thought that, strictly speaking, the question of how asylum should be accessed is a separate question from what asylum actually *is*. This appears to be true when one considers the ways in which refugees may access asylum once they have entered another state, for the question of whether states choose to put refugees through an individualised refugee status determination (RSD) procedure, or to grant *prima facie* refugee status, does not seem to be intrinsic to the character of asylum.[38]

[36] This is implicitly recognised in Article 1(C), paragraph 6 of the Refugee Convention, which identifies 'compelling reasons arising out of past persecution for refusing to return to the country of…habitual former residence' (cited in Ghandhi 2006: 31). For a moral rendering of this provision, see Price (2009: 168).

[37] This point about the time-limited nature of asylum can be accepted even by proponents of open borders. For such proponents, once the refugees' risk on return had lapsed, they could simply switch from enjoying asylum in a state to being non-refugee migrants, rather than being deported or being offered assisted voluntary return.

[38] For a conception of asylum that emphasises asylum seekers' procedural rights, see Andy Lamey (2011).

Nevertheless, the question of access is the partial basis for the widespread distinction drawn by states and UNHCR between 'asylum' and third-country 'resettlement', with the former being accessed through spontaneous arrival to a state under the refugees' own steam, and the latter being accessed through an effective invitation to permanent residence by a third-party state to a refugee already residing in a state of first asylum which is unable to offer adequate protection to that refugee.[39] On this distinction, in both cases the right to asylum is only triggered when a refugee, as the 1951 Refugee Convention also has it, is located outside his or her country of origin.

Morally speaking, however, leaving one's country is only *one* way through which asylum may be accessed. Indeed, there appears to be no reason in principle why we should limit ourselves to this prevailing Western image of asylum as encompassing only those who have already fled to another state, or why we should endorse the commonplace distinction between asylum and resettlement at the level of theory.[40] If asylum fundamentally consists of the surrogate protection of basic human rights, then it is the lack of protection within refugees' states of origin, rather than the fact of their flight across a border *per se*, which grounds their moral entitlement to asylum. Rather than limiting asylum to those who have managed to reach another state's territory, asylum should be conceived as also extending to those whose basic rights are unfulfilled and to whom, despite being located outside its territory, a state might offer residence. This might take the form of current resettlement programmes, but could also potentially be broadened so as to include refugees remaining within their states of origin who require

[39] Publics and politicians in states such as Australia have seen this distinction as being morally significant in itself, arguing that those who arrive spontaneously to claim asylum, mostly by boat, act wrongly by 'queue jumping' and seeking to circumvent the proper resettlement process (see Gibney 2004: 193).

[40] It is this distinction that has motivated criticism of asylum's 'proximity' and 'expatriate' biases (Price 2009: 164); that is, the fact that asylum is biased towards those who have the wherewithal to leave their states of origin, and excludes those who do not. If the distinction were collapsed by states in practice, however, then these biases would no longer exist. For a conception of resettlement as a 'strict duty', see Carens (2013: 213).

evacuation.[41] Resettlement, on this broader conception, can justifiably be seen as a form of asylum itself.[42]

The Bearers of the Right to Asylum

The question of *who* should be entitled to asylum is the dimension of asylum that has appeared to court the most controversy and to generate the most scholarly debate (see e.g. Gibney 2004: 5-11; Haddad 2008: ch. 2; Hathaway 2007; Lister 2013; Martin 1991; Price 2009; Shacknove 1985). This is due to a sharp divergence between the narrow legal definition of the refugee enshrined in the 1951 Refugee Convention as an individual with a 'well-founded fear of persecution' on various grounds, and the broader, quotidian understanding of the refugee as roughly 'someone in flight, who seeks to escape conditions…found to be intolerable' (Goodwin-Gill and McAdam 2007: 15).[43]

Proponents of the legal definition, if they do not take a positivist approach and simply appeal to existing refugee law (e.g. Feller 2005), have sought to justify it by attempting to identify some morally relevant quality that differentiates persecution from other forms of serious harm, and which renders asylum an appropriate remedy for the

[41] The Humanitarian Evacuation Programme of refugees from the Balkans to other European states and further afield during the 1990s is an example of such a process. For analysis of reactions to Kosovan refugees in EU states, see Joanne van Selm (2000).

[42] In their current operation, asylum and third-country resettlement do not differ only in the respective ways in which they may be accessed by refugees, however, for, while resettlement operates as a permanent durable solution, asylum is seen by states and UNHCR as an interim measure pending the attainment of such a solution, either through voluntary repatriation or eventual naturalisation in the state of asylum.

[43] Many scholars appear to derive their conception of asylum from their understanding of the refugee, with Jean-François Durieux (2013: 149) arguing that there is a 'symbiotic relationship' between asylum and the refugee, given simply that 'asylum is what refugees need'. However, it is possible to define asylum independently from the concept of the refugee. Price is, to my knowledge, the only author to take this tack. Price (2009: 17) defines the refugee far more broadly than is the case within the 1951 Convention, as referring to 'all people who are forced to leave their homes because of a threat to their well-being or freedom, whether due to persecution, famine, extreme poverty, generalised violence, or any other of a number of reasons', yet insists that asylum be restricted to a sub-class of refugees – the persecuted – and that other refugees should be assisted by alternative means.

persecuted, but not other non-citizens in need.[44] For instance, the legal scholar, James C. Hathaway (2007: 350), claims that refugees are distinct from other categories of vulnerable individual given what he describes as their shared experience of 'social disenfranchisement', which he claims that internally displaced persons (IDPs) lack. Along broadly similar lines, Price (2009: 16) argues that persecution embodies a distinct form of harm, contending that, while the persecuted 'have been expelled from their political communities', non-persecuted refugees 'retain political standing in their states of origin despite their displacement' and are best helped *in situ*. This type of argument is often deployed alongside concerns that attempts to reform, or even transform, the current refugee definition would weaken refugee protection in practice, by risking a popular and political backlash to the introduction of an expansive definition that would make many more outsiders eligible for asylum (Martin 1991: 37; Price 2009: 10; see also Lister 2013: 660).

On the other hand, others argue for the 'moral equivalence' of persecution and other forms of serious harm from which individuals may flee (Zolberg *et al.* 1989: 269-270).[45] In a highly influential and oft-cited article, Shacknove (1985: 277-278) characterises the refugee broadly as an individual whose protective link with his or her state of origin has been severed, and 'whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs'. Shacknove (1985: 279) further argues that such persecution is merely one 'manifestation' of a lack of protection of one's basic needs by a state. The suggestion by such scholars is that the privileging of certain 'proximate causes' of flight over a

[44] Here I focus on *moral* arguments for adopting one or other definition of the refugee. For arguments in favour of a particular refugee definition based on more sociological or analytical considerations, see David Turton (2003: 1), who has convincingly argued that legal definitions of the refugee are 'artefacts of political and policy concerns' which do not reflect realities on the ground.

[45] For similar sentiments, see also Carens (2013: 201), Gibney (2013b), Long (2013: 13) and Pogge (1997: 15).

threshold of basic rights is, ultimately, morally 'arbitrary' (see Betts 2013: 5), and that protection against serious harm is a far sounder moral basis for the institution of asylum to rest upon.[46]

What both camps are likely to agree on, however, is that the concept of asylum presupposes some threshold of severity of harm, below which an individual is not entitled to asylum.[47] It also presupposes some conception of justice and legitimacy, for deprivations of liberty by states of origin are only taken to be grounds for asylum if they are persecutory, or the result of an unfair trial, and not if they are the result of a fair and just criminal conviction (Price 2009: 108).[48] Thus, fear of persecution is a good moral reason for a grant of asylum, whereas the desire to escape a minimally decent, yet unsatisfying life in one's state of origin, or the desire to uproot oneself in order to start afresh after a deep personal setback, is not.[49]

Although the task of seeking to settle this terminological controversy goes well beyond the scope of this thesis, it is clear that a theory of asylum as reparation is amenable to either a restrictive or an expansive definition of the refugee. However, it is important to note that the conception which one adopts will have highly significant

[46] Whereas authors such as Shacknove favour a strategy of conceptual *expansion*, other scholars have gone down the route of conceptual *proliferation*. For instance, Alexander Betts (2013: 4-5) has recently proposed the term 'survival migrants' to describe 'people who are outside their country of origin because of an existential threat for which they have no access to a domestic remedy or resolution' who are often not covered by the 1951 Refugee Convention.

[47] As Price (2009: 107) has put it, 'asylum policy is not designed to remedy every injustice or injury. Minor harms or inconveniences, even if carried out for illegitimate reasons, do not call for international condemnation and interference'. Applications of such a threshold are a routine part of the RSD procedures of states in liberal democracies such as the UK, which often refuse asylum applicants on the basis that the harm they face is not sufficiently severe as to warrant international protection (Souter 2011b).

[48] This notion is reflected in the frequent claim made by the UK Home Office when refusing asylum applicants that the individual in question faces only 'prosecution, not persecution' (see Souter 2011a: 54). Moreover, the question of whether whistle-blowers, such as Julian Assange and Edward Snowden, who at the time of writing were sheltering in the Ecuadorean embassy in London and Russia respectively, should be extradited to the US in order to face trial turns on the question of whether they acted justly or not, with some arguing that Snowden should be pardoned by the US government, given the moral importance of his actions (e.g. Guardian 2014).

[49] For the view that 'the "ordinary inequalities of the modern world" do not give rise to a moral claim to admission as a refugee', see Carens (2013: 194-195).

implications for any theory of asylum as reparation. This is, in large part, a matter of numbers, for the potential pool of beneficiaries of the right to asylum will expand exponentially if a Shacknovian conception of asylum is adopted in practice in place of the existing legal definition.[50] This will have particularly significant implications for the question of how refugees should be prioritised for asylum in a climate of scarce resources, which I explore in Chapter 7. If the legal definition of the refugee is adhered to, then it may well be that states of asylum can meet both their humanitarian duties and their reparative obligations to refugees simultaneously, meaning that the conflict between them is only hypothetical and of theoretical interest. If, however, Shacknove's approach is favoured in practice, then the likelihood that the number of refugees entitled to asylum on either humanitarian or reparative grounds will outstrip the absorptive capacities of states of asylum is significantly higher, thereby rendering an account of how states should prioritise refugees for asylum a matter of potentially practical, and not merely theoretical, relevance.

Asylum's Moral Functions

Asylum, then, can be said to consist of the protection of refugees' basic human rights in a state other than their own, for as long as they remain at risk of serious harm on return to that state – whether in the form of persecution or the threat of other serious harm – and which they may access through either their spontaneous arrival, or through conventional resettlement or evacuation undertaken by states of asylum. As I noted in the introduction to this thesis, asylum can assume a variety of different functions, both moral

[50] Something similar can be said of the question of how asylum should be accessed. If states only have obligations to refugees who are outside their states of origin, then states of asylum will have duties to considerably fewer refugees than if states have obligations to offer asylum to refugees who still remain in their states of origin, given that only a highly limited number of refugees have the wherewithal to enter another state without assistance.

and non-moral. Grants of asylum have, for instance, provided states with 'a means of undermining one's enemies, gaining skills and labour, augmenting a declining population or legitimating one regime over another' (Schuster 2003: 63). As I briefly outlined at the opening of this thesis, asylum can potentially assume humanitarian, condemnatory, solidaristic, legitimacy-repair, desert-based and, as I shall argue shortly, reparative moral roles.[51]

Some of these functions are *universalist*, in the sense that they can be fulfilled in theory by any state and correspond to a *general* duty towards *all* refugees, whereas others are *particularist* – or apply to what Miller (2013b: 31) has dubbed as 'particularity claimants', who are 'the class of immigrants whose claim is that they already have a particular relationship with the receiving state that justifies their request to be admitted' – in that they can only properly be fulfilled by *certain* states, and correspond to various special obligations that particular states may bear towards *particular* refugees. These different functions of asylum, as we shall see, embody the tensions between what Thomas Nagel (1991: ch. 2) has posited as two fundamental moral standpoints: the *impartial* perspective, from which everybody is of equal moral importance; and the *partial* perspective, from which we give greater weight to the interests of ourselves and those with whom we are associated.[52] I also distinguish between asylum's *primary* and *secondary* moral functions, viewing the former as those functions which asylum

[51] There are, however, other ways of classifying asylum's potential functions. For instance, Carens (2013: 195) identifies only 'three kinds of reasons that can generate a duty to admit refugees: causal connection, humanitarian concern, and the normative presuppositions of the state system'. Whereas 'causal connection' broadly corresponds to what I call asylum's reparative function, and the latter maps onto its 'legitimacy-repair' function, I go further by also identifying asylum's potentially *condemnatory, solidarist* and *desert-based* moral functions. Durieux (2013), in contrast, discerns in current refugee law and state practice, three 'asylum paradigms': that based on *admission* (linked to the protection of the persecuted); *rescue* (based on the urgent relief of suffering); and *non-return* (when the principle of *non-refoulement* is extended even to those whom we cannot welcome given the danger they pose to our states).

[52] For an application of Nagel's distinction to the ethics of asylum, see Matthew Gibney (2004: 77-82). For doubts as to the utility of this distinction in this context, see Chris Brown (2011: 153).

invariably possesses given its character, and the latter as those functions which it only contingently assumes under certain circumstances.

Both the primary and secondary moral functions of asylum should be understood as ideal types, which may (and often do) significantly overlap in practice, and which can be difficult to disentangle from one another straightforwardly. They are also far from mutually exclusive for, as I shall argue, there is no reason in principle why asylum cannot relieve suffering, express condemnation, and offer a form of reparation simultaneously. In the sections that follow, I outline each of what I see as asylum's potential moral functions, in order to situate my reparative conception of asylum within a broader account of its full range of moral functions. This task is important given that, as I explore in Chapters 7 and 8, the relationship between these various forms of asylum cannot be assumed to be necessarily harmonious, and there may have to be trade-offs and compromises among these various functions in practice by states when they fashion their asylum policies.

Asylum's Humanitarian Function

Whether or not one adopts the current refugee definition within international law or favours a broader definition, one of asylum's primary moral functions is clearly humanitarian in nature.[53] Humanitarian duty is a duty to relieve the suffering which typically stems from the experience of serious harm and unmet basic needs. A humanitarian approach to asylum has become widespread in the academic literature in

[53] Although Price (2009) distinguishes his preferred 'political' approach to asylum, in which it expresses condemnation of the illegitimate behaviour of refugees' states of origin from a 'humanitarian' approach, asylum nevertheless retains a humanitarian *dimension* even if it is restricted to the persecuted, given that it provides protection from the serious harm and suffering caused by persecution or the risk of it. However, Price's discussion is correct insofar as it recognises that, once asylum is viewed in humanitarian terms, it is difficult to draw a principled moral distinction between the serious harms of persecution and other serious harms which befall refugees.

this area, whether this is expressed explicitly in terms of 'humanitarian concern' (Carens 2013: 195), or as a 'right of hospitality' (Kant 2006 [1795]: 82); 'the principle of mutual aid' (Walzer 1983: 45); 'the principle of humanitarianism' (Gibney 2004: 231); or as a 'samaritan duty' (Altman and Wellman 2009: 181).[54] It also has some reflection in existing refugee law, as the preamble to the 1951 Refugee Convention speaks to the 'social and humanitarian nature of the problem of refugees' (cited in Ghandhi 2006: 30).

The humanitarian duty to relieve suffering, upon which asylum's humanitarian function is based, can be characterised as *impartial* and *general.* It is *impartial* in the sense that it is not concerned with the identity of the intended beneficiary, but rather heeds only the severity or urgency of his or her need, suffering or vulnerability.[55] It is *general* in that it is directed at any individual in need, regardless of any past interaction or relationship between the benefactor and the intended beneficiary, whether that be a promise, contract, bond or shared membership in a group, which would give rise to a special obligation towards that particular person.[56]

Humanitarian duty is also often thought of as being *politically neutral*, in the sense that its existence does not necessarily depend on allegiance to any political side. Indeed, the contrast made by Price (2009) between 'humanitarian' and 'political' conceptions of asylum tacitly assumes that humanitarianism is not political. This assumption is highly questionable, however, given the extent to which humanitarian action inevitably interacts with, and is constituted and constrained by, politics (see Long

[54] However, Christopher Heath Wellman (2008: 128) would only interpret this duty to assist refugees as a duty specifically to provide asylum if no other means of assistance were feasible.
[55] Humanitarian actors, exemplified by aid organisations such as the International Committee of the Red Cross (ICRC) take impartiality to be one of their fundamental and guiding principles, which requires that 'assistance be based on need and not on the basis of nationality, race, religion, gender, or political opinion' (Barnett and Weiss 2008: 3).
[56] It might also be characterised as an *imperfect* duty, given that a right to humanitarian assistance may be indeterminate in some respects, in that it amounts to a right to assistance from *some state* in *some form*. For a discussion of perfect and imperfect duties in relation to the right to asylum, see Jaakko Kuosmanen (2013a).

2013: 21). Moreover, Price makes no distinction between humanitarianism's *classical* rationale, in which it does indeed aspire to political neutrality, and its *solidarist*, more politically-engaged alternative, which actively condemns rights-violators as part of an overall effort to relieve suffering (see Weiss 1999: 3).[57] If humanitarianism's fundamental concern is the alleviation of human suffering, then the aspiration to, or repudiation of, political neutrality by particular humanitarian actors in any given case will be adopted as different means to this ultimate end, rather than political neutrality being constitutive of humanitarianism itself (Forsythe 2001: 17). A state which seeks to base its asylum policy on humanitarian principles, then, may *intend* for that policy to be politically neutral and not to express condemnation, but this is by no means inevitable. It may not even be fully possible, given that – as I also observe below – any grant of asylum makes at least an implicit judgement about the conditions in refugees' states of origin, and therefore on those states' legitimacy, which depends on such conditions.

In characterising this humanitarian function of asylum, and situating it within an account of asylum's other moral functions, it is also important to address the question of the principle's moral strength. Some theorists have assigned a relatively modest moral weight to the principle of humanitarianism in this context. Matthew Gibney (2004: 230-231) views it as a 'conservative principle' that enjoins states only to 'assist refugees when the costs of doing so are low', whereas Shacknove (1988: 141) has gone as far as characterising humanitarian duties to refugees as supererogatory, by claiming that

> where no special or contextual relation exists, no duty to protect or to aid is incurred. Acting may be laudable, but it is not mandatory. Thus, whereas the United States was obligated to assist refugees from Vietnam, Norway and Nigeria were not.

[57] In the contemporary humanitarian field, the ICRC represents the humanitarian aspiration to political neutrality, whereas *Médecins Sans Frontières* embodies the solidarist alternative (Weiss 1999: 2-3).

I believe that these characterisations of humanitarian duty do not give it the moral weight it deserves: given the sheer severity of the suffering that is typically entailed by displacement, the moral need to offer protection to refugees still persists even when the costs enter a middle range for a receiving state. While there is a point at which the principle of humanitarianism could be legitimately resisted on the grounds of being excessively demanding of states, this point is arguably not reached when the costs cease to be low. However, as I discuss in the next chapter, the principle of humanitarianism is, in some respects, weaker than the principle of reparation.[58]

Although this characterisation of asylum's humanitarian function has been rather abstract in character, it is necessary given that, as I explore in Chapter 7, its *impartialist* and *general* nature means that it may enter into tension or conflict with states' reparative obligations to refugees which, in contrast, have – as I outline later in this chapter – a *partialist* and *particular* character.

Asylum as an International 'Legitimacy-Repair' Mechanism

A further function that asylum can arguably assume is not concerned fundamentally with individual refugees or with individual states, but pertains to the international system of states itself. The rudiments of this view can be summarised in the following way. First, states bear a collective responsibility to maintain the legitimacy of the international state system. Second, if refugees are created, this legitimacy is ruptured.

[58] It might be thought that giving significant weight to the principle of humanitarianism will limit the significance of my account of asylum as reparation, for states which have not caused refugees to flee will still bear strong humanitarian obligations towards them. If I had chosen to follow Shacknove in viewing humanitarian asylum as supererogatory, then my notion of asylum as reparation would take on a more central role in refugee protection. Nevertheless, the notion of asylum as reparation still retains significance even if humanitarian duties are seen as possessing considerable force given that, as I shall argue, reparative obligations have *even greater* force.

Third, the provision of asylum to those refugees in other states is a means through which this ruptured legitimacy can be re-established.[59] Carens (2013: 196) articulates this idea as one that 'emerges from the normative presuppositions of the modern state system':

> Because the state system assigns people to states, states collectively have a responsibility to help those for whom this assignment is disastrous. The duty to admit refugees can thus be seen as an obligation that emerges from the responsibility to make some provision to correct for the foreseeable failures of a social institution.[60]

This legitimacy-repair role, if accepted, is a primary function of asylum, which is universalist in character, in that *any* grant of asylum by *any* state can help re-establish the legitimacy of the international state system as a whole. Although a detailed engagement with this position lies beyond the scope of this thesis,[61] if it is assumed to be basically sound, then a few clarifications are in order so as to situate it vis-à-vis the other moral functions of asylum outlined in this section. First, it is important to distinguish clearly, for the sake of analytical clarity, between this legitimacy-repair role and asylum's alternative reparative function that I am highlighting in this thesis. The former view is reparative, albeit in a *broader* sense, in that it sees grants of asylum as repairing the legitimacy of the state system. It is distinct from the latter view insofar as it carries with it no suggestion that the state of asylum in question bears any outcome or moral responsibility towards certain refugees: a state may be obliged to offer asylum to a refugee partly for the sake of the repair of the legitimacy of the international state system, but this will be so irrespective of whether that state bears any outcome or moral

[59] I have borrowed the term 'legitimacy-repair' from David Owen (2011).
[60] Similarly, as Betts (2013: 11) has put it, '[b]y ensuring that everyone in the world has membership in a state that guarantees his or her access to these rights, the state system represents a legitimate and valid way of ensuring human welfare'.
[61] See, for instance, Carens (1991: 24) for an engagement with some potential objections that could be brought against this approach; for instance, the issue of whether it is fair that the obligations of legitimate states towards refugees should be dictated by the illegitimate actions of non-conforming or rogue states.

responsibility for causing their flight.[62] Whereas asylum's legitimacy-repair role is concerned with repairing the legitimacy of the international state system, my reparative account of asylum is concerned instead with the repair of the unjustified harms so often involved in the creation of refugees. Therefore, I henceforth restrict the term 'reparative' for the theory presented in this thesis, referring to this approach instead as a 'legitimacy-repair mechanism' (Owen 2011).

This, however, is not to say that these two potential functions of asylum are incompatible. This is because, if the existence of a *collective* responsibility to maintain the legitimacy of the international state system is asserted, then there is a further question of how this collective responsibility can be translated into a *particular* responsibility incumbent on any particular state to offer asylum to any given set of refugees. While David Owen (2011) has briefly outlined the implications of his legitimacy-repair view of asylum for the criteria on which a refugee burden-sharing scheme should be based, my reparative approach to asylum suggests one additional allocational criterion for sharing the burdens associated with refugee protection: that, under certain circumstances, if an external state bears outcome or moral responsibility for the creation of refugees, then it should be the one to offer asylum to those particular refugees.

Condemnatory Asylum

Given that grants of asylum are often made in response to egregious injustices suffered by refugees at the hands of their states of origin, asylum can also function as a strong statement of disapproval of the behaviour of such states. In what is perhaps the

[62] In an even broader way, *every* grant of asylum is reparative, insofar as the state of asylum recognises an injustice, or at least refugees' unmet needs, and seeks to repair those through offers of asylum. However, in this thesis I employ the notion of asylum as reparation more narrowly, to denote the repair of a harm specifically caused by the state of asylum to the refugee through the provision of asylum to them.

most systematic exploration of asylum's ability to express such condemnation, Price (2009: 14) shows how this function is historically rooted in a 'legal defense to extradition', which then went on to play a central role in asylum policy during the Cold War, during which time dissidents from Communist states were welcomed into Western countries such as the US. He contends that this condemnatory approach to asylum can act as 'one element of a strategy to reform the abusive practices of the state of origin', alongside others such as sanctions and even military intervention (Price 2009: 75).[63]

Although, as Price (2009: 7) has argued, asylum's condemnatory function may currently lie 'in disfavor' in the post-Cold War era, a similar logic of condemnation can be discerned in the recent decision of states to offer asylum to high-profile individual activists, such as the diplomatic asylum granted to the Wikileaks founder, Julian Assange, in the Ecuadorean embassy in London, and the temporary asylum offered to Edward Snowden in Russia, following the US's stated intention to prosecute them for leaking classified information.[64]

Arguably, this condemnatory function of asylum can be either *explicit* or *implicit*; that is, either accompanied by official statements by states of asylum which condemn refugees' states of origin, or only in effect, given that a grant of asylum may fuel at least a wider *perception* that a condemnatory stance is being taken by a state. Indeed, even without official accompanying statements of condemnation, it is, as I observed earlier, impossible to grant asylum to any given refugee without, at the least, judging that his or

[63] However, Price's contrast between 'humanitarian' and 'political' asylum is problematic not only, as I observed earlier, because it falsely assumes that humanitarianism is not political, but also because it mistakenly assumes that the only manner in which asylum can act politically is by expressing condemnation. To the contrary, asylum can act politically in a number of ways that stretch beyond the expression of condemnation. As I discuss shortly, other moral functions of asylum, such as its potential reparative role, can also be properly classified as being political. Overall, then, it is more accurate to characterise Price's conception of asylum as one of 'asylum as condemnation' or 'condemnatory asylum', rather than as being 'political', as if condemnation exhausted the ways in which asylum can act politically.
[64] I leave aside the question of whether either Assange or Snowden should themselves be seen as refugees.

her state of origin is unsafe, and therefore that that state has not fulfilled its basic role as the guardian of its citizens' basic rights. This will be the case however meekly or diplomatically it may be expressed, and even if this message is kept largely under wraps, so to speak, within the walls of the state organs responsible for RSD, rather than being loudly pronounced by politicians directly towards refugees' states of origin.[65]

Whereas explicit condemnation possesses a greater degree of expressive power, there is some evidence that states of asylum are alert to asylum's implicitly condemnatory potential, and forge their asylum policies accordingly. As I discuss in Chapter 6, for instance, many commentators have attributed the reluctance of the US to offer asylum to Iraqi refugees in the years immediately following 2003 to a belief that this would amount to an admission of defeat and failure in Iraq; that is, that it would constitute a form of self-condemnation, as it were. Furthermore, recognition of asylum's implicitly condemnatory function may have driven the reluctance of states to offer asylum to refugees fleeing from states with which they are allied, or in whose affairs they have been heavily involved, such as the arrival of Haitians and refugees from wars engulfing Central American states to the US (Price 2009: 6). States could even conceivably attempt to downplay or disavow any element of condemnation in their decision to grant certain refugees asylum out of considerations of diplomacy, political expediency, or the desire to pursue a classically humanitarian asylum policy.[66]

[65] Indeed, some states are highly selective in what aspects of their asylum policy they choose to trumpet. For instance, despite its reticence to highlight any inclusionary aspects of its asylum and immigration policies, a cursory glance at the UK Border Agency's news web-page suggests that its public relations strategy is strongly focused on placating restrictionist public opinion by emphasising refusals and removals of so-called 'bogus' applicants (UKBA undated, a).

[66] For instance, states may have sought to provide assurances to this effect through the 1967 UN General Assembly Resolution on Territorial Asylum, which asserted that '[t]he grant of asylum by a State is a peaceful and humanitarian act and…as such, it cannot be regarded as unfriendly by any state' (quoted in Price 2009: 7).

This condemnatory function of asylum is clearly secondary in character, given that asylum only *sometimes* assumes this condemnatory function. Indeed, there are occasions in which a grant of asylum to a refugee is justified, but no condemnation is warranted; if the refugees' flight is the result of a genuine and non-culpable inability of a state to provide protection to its citizens, rather than being the result of injustice or an unwillingness to do so. Condemnation of states of origin may also be inappropriate in cases in which the refugees' flight is not the responsibility of the state of origin at all, but is rather borne by external states, in which case asylum would assume a reparative, rather than a condemnatory, function.

Solidarist Asylum

At times, discussions of asylum and refugees are framed as encounters with the 'stranger'. Carens (2013: 15), for instance, views refugees as a matter of 'people who have no claim to belong to a political community' but who 'may nevertheless have a moral right to entry' into it. However, some refugees *do* also have a pre-existing claim to belong in such a community in addition to their need for protection against serious harm, on the basis of a relation of solidarity between the refugees and the states in question.

As Ashley E. Taylor (2014) has recently argued, solidarity can come in at least two forms. The first, which Taylor (2014: 1, 3) dubs 'robust solidarity', is used to denote situations in which 'individuals act with a group as a result of obligations incurred because of membership with that group'. The second, in contrast, Taylor (2014: 3) calls 'expressional solidarity', which exists when 'individuals act in solidarity to express empathy or support for a group in which they have never actually participated, and whom they could not possibly be considered to be acting *with*' (emphasis in original).

Grants of asylum can express solidarity in both of these senses. First, asylum can express 'robust solidarity' if asylum policy is partly based on what Samuel Scheffler (2001: 49) has described as 'associative duties', which arise by virtue of our relationships and associations with others, whether they be family members, friends, colleagues, members, compatriots, or through sharing common values. While shared citizenship can be a source of associative duties, the latter are by no means limited to the former, for certain associations, such as shared religion or political affiliation, are clearly transnational, cutting across state boundaries.

Perhaps the clearest example of this is the creation of Israel in 1948 as a refuge for Jews in the aftermath of the Holocaust. Since its inception, Israel has also continued to accept refugees partly on the basis of religious affiliation. For instance, Israel's airlifting of Ethiopian Jews, known as Falashas, to Israel since the 1980s is an example of religious association forming the basis of a decision to grant asylum to a restricted class of individual.[67] In another example, as Matthew Gibney (1999: 30) has argued, a sense of 'relatedness' also partly motivated the inclusive response to the arrival of Kosovan refugees in Western European states in the late 1990s.

Second, grants of asylum can express 'expressional solidarity', given a state's support for the aims of certain refugees. Walzer (1983: 49), for instance, has taken 'ideological affinity' to be a strong basis on which to base an asylum or a broader admissions policy. At times, asylum's condemnatory and solidarist functions are effectively two sides of the same coin: for accepting a Cold War dissident simultaneously expresses condemnation of the state to which they are opposed, and solidarity with that dissident. Arguably, furthermore, if a state encourages political activists in a state to

[67] As Michael Sandel (2009: 227-228) has put it, '[i]f you accept obligations of solidarity and belonging…Israel has a special responsibility to rescue Ethiopian Jews that goes beyond its duty (and that of all nations) to help refugees generally'.

dissent, and they become endangered as a result of that dissent, then the state develops a solidaristic obligation to offer asylum to those refugees. This has been implicitly recognised by the US in its modern asylum policies, when refugees were produced by uprisings that it encouraged, such as the Hungarian Uprising in 1956, and the Kurdish rebellion against Saddam Hussein in Iraq in 1991. In this way, asylum's solidarist role is linked to what Gil Loescher and John A. Scanlan (1986: 50) have dubbed 'the politics of failed revolution'.[68]

Moreover, grants of asylum can also express solidarity with other states of both the robust and expressional varieties, if they are motivated by the goal of so-called 'burden-sharing'. Some states might feel obliged to share their responsibilities to refugees with other states given their shared membership of transnational institutions, or a sense of regional identity. For instance, the Common European Asylum System (CEAS) contains a 'principle of solidarity', which requires 'the principle of solidarity and fair sharing of responsibility, including its financial implications' (quoted in McDonough and Tsourdi 2012: 7). If states view refugee protection as a collective responsibility, moreover, they may also express solidarity with one another by devising 'burden-sharing' schemes. This solidarist potential has been recognised in the case of resettlement, which UNHCR (2011: 3) sees as a potentially 'tangible expression of international solidarity and a responsibility sharing mechanism', but also extends to asylum (given that, as I explained earlier, resettlement itself can be viewed as a form of asylum in any case).

Given that asylum possesses this solidarist function only when the receiving state has certain affinities with the refugees it accepts, it is clearly a *particularistic* form of

[68] Durieux (2013: 157) argues that what he calls the 'admissions paradigm' of asylum, based on the 1951 Convention, is linked to 'a version of affinity', which he believes 'centres on the rejection of discrimination and the celebration of diversity'. 'Our repugnance vis-à-vis persecution', Durieux argues, 'make[s] for an affinity between us and refugees fleeing persecution'.

asylum, and may even be communitarian, by prioritising the protection of those with values and identity that are shared with the state of asylum. It is also one of asylum's *secondary* moral functions, given that asylum only contingently assumes such a solidarist role, and states routinely accept refugees with whom they have no prior association or affinity.

Nevertheless, the existence of solidarity – whether robust or expressional – between states and refugees should be seen as potentially *strengthening* an existing claim for asylum, rather than creating one *de novo*. Given that states may have affinities with other non-citizens besides refugees, admitting those will not be a form of asylum, but rather of immigration more broadly. Indeed, if this solidarist conception of asylum is not accompanied by its humanitarian role, however, then there is a danger that its flip-side, as it were, will be a disregard for refugees with whom a state does not share any particular affinity. For instance, in contrast to Israel's inclusive policy towards Ethiopian Jews, it has refused to accept a particular responsibility for the continuing predicament of Palestinian refugees, and has branded African refugees from countries such as Sudan and Eritrea as 'infiltrators', constructing a wall along Israel's border with Egypt out of a desire to protect Israel's Jewishness (Sherwood 2014). Another example is the welcome offered to Cuban refugees by the US during the Cold War, which stands in stark contrast to its exclusion of Haitians, given the US's rapport with Haiti and its antagonism with Cuba (Gibney 2004: 132).

Moreover, asylum's solidarist function may at times overlap with its reparative function; for instance, if refugees with whom a state of asylum shares an affinity are put at risk in their states of origin by virtue of that affinity, and therefore asylum can simultaneously act as an expression of solidarity and as an offer of reparation, as is the case for Iraqis and Afghans employed by the US in the last decade as part of their

interventions in Iraq and Afghanistan. Nevertheless, this is not necessarily the case, given that states of asylum may cause the flight of refugees with whom they had no prior affinity, and they may share an affinity with some refugees for whose flight they are not responsible.

Asylum and Desert

Finally, an additional candidate for one of asylum's moral functions is that it can function as a reward, or as an expression of gratitude, for individuals for the conduct or assistance they provided to the receiving state. As Miller (2013b: 15) has observed, '[s]omeone might apply for admission as a refugee while at the same time claiming that he deserves admission for his past services to the state'. This approach has been implicit in the response to Iraqis employed by the US since the invasion in 2003. This potential function is clearly particularist in nature, given that it would only apply to certain refugees deemed to be morally deserving of asylum.[69] It should also certainly be considered as a *secondary* function, given that eligibility for asylum should not turn on one's past conduct, and should be a means of protecting individuals from serious harm, rather than acting as a mechanism for selecting morally desirable members of a polity (Souter 2011b). Like asylum's potentially solidarist function, although it may be that considerations of desert could *bolster* an asylum claim, it should not constitute a distinct

[69] Although international refugee law 'makes no provision as to character' (Goodwin-Gill and McAdam 2007: 65) and does not view asylum as a potential reward, the exclusion clause of the 1951 Refugee Convention appears to incorporate desert-based considerations by allowing for the exclusion of individuals from refugee status if they are found to have, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity' (cited in Ghandhi 2006: 32). In contrast to these implicitly desert-based elements of refugee law and state practice, the development of human rights law and jurisprudence has led to a universal prohibition on return to torture or cruel, inhuman and degrading treatment, even to terrorists or those who have sought to cause the receiving state serious harm. In such cases, states recognise that a lack of desert does not bar a foreigner from protection, given their residual basic rights which are not contingent on conduct or character. While they may well be held in conditions that fall short of full asylum that will normally be granted (for instance, being kept in detention on account of the threat they pose), their conduct does not render them ineligible for any form of protection *whatsoever* (Durieux 2013: 167).

ground for asylum in itself. As Miller (2013b: 38) has argued, 'those who…qualify for refugee status, but also can make reparative claims or claims of desert against the receiving state, should have lexical priority'.

Again, there may be overlap between asylum's potentially desert-based function and its reparative role, given that those who assisted the state of asylum – such as Iraqi interpreters whose case I examine in Chapter 6 – may also have been endangered and forced to flee as a result of that assistance.[70] Equally, however, states of asylum often cause the flight of refugees who have offered no assistance to them and therefore have no desert-based claim for asylum, but their entitlement to asylum as reparation may nevertheless remain compelling.

The Relationships between Asylum's Moral Functions

In my typology of asylum's primary and secondary moral functions above, I have already sketched some of the relationships between these various functions and its reparative role. My discussion thus far has presumed a *pluralistic* approach to asylum's moral role, suggesting that asylum can assume various moral functions at once, even if these functions may pull states of asylum in competing moral directions, so to speak.[71] For instance, there appears to be no reason why asylum cannot simultaneously relieve suffering, as humanitarianism emphasises, *and* express condemnation of other states. However, Price (2009) has argued for the opposing view, effectively adopting a *monistic*

[70] It might be thought that my reparative conception of asylum is effectively desert-based, insofar as it might be seen as rendering certain refugees *deserving* of asylum given the harm they had been caused by being forced to flee. However, I draw a distinction between *deserving* and being *owed* asylum, seeing the former as arising from certain admirable conduct, and the latter as not necessarily being contingent on such conduct.

[71] Carens (2013: 196) also views the bases on which states' duty to admit refugees rests that he identifies as 'complementary', contending that '[a]ll three can be relevant at the same time'.

view of asylum which sees it as *only* having a condemnatory function, given what he sees as the need for it to maintain its expressive capacity. Although, as I have already suggested, Price is correct to highlight a potential incompatibility between his favoured condemnatory approach to asylum and its *classically* humanitarian function, the other functions of asylum are not necessarily mutually exclusive. This is because Price's belief that condemnatory asylum is the only function of asylum to possess expressive capacity is misconceived. Humanitarian asylum, at a minimum, makes some kind of statement of the state's values and intentions, even if only implicitly. Indeed, as Loescher and Scanlan (1986: 3) have put it, offers of asylum on humanitarian grounds may be expressive, as some states 'may be seeking some symbolic advantage from its act of kindness', while Howard Adelman (1990: 18) has observed that states' asylum policies are 'a way of giving witness, of demonstrating the principles of such a state'. Price (2009: 13) is therefore mistaken to claim that, whereas his favoured political approach to asylum 'communicates condemnation of the persecutory regime responsible for the persecuted refugee's flight', the 'humanitarian approach' to asylum 'is directed toward the asylum seeker's welfare and communicates *nothing* to their state of origin', and would 'eliminate from asylum *any* expressive valence' (Price 2009: 71-72, emphasis added). Rather than oscillating between, and effectively conflating, asylum's potential specifically to express *condemnation* and asylum's expressive potential more generally, as Price appears to do, we can see asylum as being expressive of a range of values, which I have outlined, besides condemnation.

I now hope to have shown that asylum is best understood as the protection of refugees' basic human rights in a state other than their own, for as long as they remain at risk of serious harm on return to their state of origin, and which they may access through either their spontaneous arrival, or through conventional resettlement or evacuation

undertaken by states of asylum. I have also argued that asylum's primary humanitarian and legitimacy-repair functions can co-exist, albeit not without potential tensions, with its secondary moral functions, such as the expression of condemnation, solidarity and gratitude. With a conception of asylum and its moral functions now to hand, in the next chapter I seek to characterise the principle of reparation, in order to demonstrate the ways in which the former may constitute a form of the latter.

Chapter 2: Asylum as a Form of Reparation

As reparation has become an increasingly important political concept of the modern era, its uses and meanings have multiplied and come to overlap significantly (Samy 2010: 36).[72] In what has become a 'terminological minefield' (Bradley 2013: 66), notions of reparation strongly intersect with those of, for instance, redress, rectification, restitution, compensation and satisfaction, as well as corrective and restorative justice.[73] As Butt (2009: 22) has observed, confusion is fostered when scholars use such terms in a variety of ways, from the broad to the narrow, without necessarily clarifying how they understand them. This may stem from the fact that, as Spinner-Halev (2012: 5) has noted, many scholars working on reparations have focused on particular cases, such as slavery and colonialism, leaving the concept itself under-theorised.

The Principle of Reparation

Contained within the idea of reparation are notions of causality, responsibility, harm and capability, which have not been fully scrutinised to date. In order to bring these notions into the open so they can be applied to the case of asylum in the following chapters, I use the following 'principle of reparation' as my starting point:

[72] For a careful tracing of the emergence and consolidation of the norm of reparation as applied to refugees and forced migrants at the international level, see Bradley (2013: ch. 3).

[73] There also appears to be a close linkage between the notion of reparation and the 'harm principle'. Indeed, scholarly discussions that implicitly recognise asylum's reparative potential have not used the term 'reparation', but have instead tended to use this 'harm principle' as their basic theoretical framework. For instance, Mark Gibney (1986: 79), Matthew Gibney (2004: 49) and Wilcox (2007: 277) all view the harm principle as comprising two basic components: a duty not to harm, and a duty to compensate those one has harmed. Some of these authors draw on concepts within tort law to elaborate the harm principle, such as the 'but for' test (Gibney 1986: 97) and that of 'negligence' (Gibney 2004: 52).

> When an agent bears outcome responsibility for causing another agent unjustified harm, the first agent bears a special obligation to provide the second agent with the most fitting form of reparation for that harm that is available.

Although I defer more detailed discussion of the concepts within this principle for Part II, a word of clarification is nevertheless warranted at this point. First, 'outcome responsibility' has been broadly defined as 'being responsible for the good and harm we bring about by what we do' (Honoré 1999: 14), and as 'the responsibility we bear for our own actions and decisions' (Miller 2007: 81). Importantly for subsequent discussion, an agent can bear outcome responsibility 'even in the absence of fault' (Honoré 1999: 9), wrongdoing or blame. Consequently, as I explain later, the 'unjustified' in 'unjustified harm' does not necessarily refer to unjustified *actions*, but rather unjustified *outcomes*, which morally should not be allowed to persist (Butt 2009: 85).

As an 'umbrella term' (Samy 2010: 43), reparation can take a variety of forms. Although both philosophy and international law hold broadly similar conceptions of the forms that reparation may take, given my decision to follow Butt (2009: 8) and to pursue the 'double practicality' that I described in the introduction, I follow the standard division within the international legal arena which sees reparation as having three main components: *restitution, compensation* and *satisfaction* (International Law Commission 2001: 52; UNGA 2005).[74] Within this framework, while restitution refers to attempts to restore the *status quo* before the harm in question occurred, compensation attempts to replace what was lost with something of equal or approximate value, whereas satisfaction entails apologies and acknowledgement.[75]

[74] The UN Reparations Guidelines also lists *rehabilitation* (in the form of medical, psychological, legal and social care and assistance) and *guarantees of non-repetition* as forms of reparation (UNGA 2005).

[75] Reparations are often discussed in conjunction with transitional justice (e.g. de Grieff 2006; Torpey 2006). However, although reparation and transitional justice are, for the displaced and non-displaced alike, 'intertwined endeavours' (Bradley 2013: 20), when applied to the case of asylum, the links between

In contrast to the principle of humanitarianism outlined earlier, the principle of reparation can be broadly characterised as a *partialist, special* obligation.[76] Unlike the general nature of humanitarian duty, the principle of reparation is clearly a *special* obligation, which arises only in relation to certain individuals on account of a relationship of harm and, as such, fits squarely within a *partialist* framework. Scheffler (2001: 97), for instance, categorises reparative obligations as a form of special obligation that arise by virtue of our *interactions* with others, rather than those which may arise as a consequence of 'the nature of our relationship to that person'.

It is also important to note that the principle of reparation is a *pro tanto* principle that does not necessarily hold in every instance or context. As Miller (2007: 87) has put it, 'There is a *presumption* that where A is outcome responsible for O, then the gains and losses that fall upon A should stay where they are, whereas gains and losses falling upon P and Q may have to be shifted: A may have to compensate P for imposing a loss' (emphasis added). This presumption, however, can be overridden by other moral considerations, such as fairness and, as we shall see, may not apply invariably to every single conceivable context; a point which will have strong implications when I move to consider the potential ways in which displacement may be brought about justifiably in Chapter 4. As Honoré (1999: 27) has argued, outcome responsibility grounds reparative obligations most strongly in cases of *fault* or *wrongdoing*; that is, what Butt (2009: 103)

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reparations and transitional justice weaken somewhat. On the one hand, it is possible to imagine situations in which granting asylum as a form of reparation would play a role in transitional justice processes; for instance, if a new government in a host state decided to grant asylum to all those displaced by the actions of the preceding government to differentiate itself from it, then grants of asylum could be part of the government's transition to a more just form of governance. Similarly, if refugees had been generated by a war between their host state and their country of origin, the host state's agreement to provide asylum to those which fled to its country until conditions improve could form part of a peace agreement between those two states, or what Brian Orend (2006) would describe as an element of *jus post bellum* (that is, the justice of the aftermath of war). On the other hand, however, this is only a contingent link, and offers of asylum as reparation may equally have little in practice to do with transitional justice processes.

[76] In his influential work on world poverty, although Pogge (2002a: 26) uses the language of 'negative duties', rather than that of reparation, he views these negative duties as generating 'compensatory obligations' to those who perpetuate poverty.

views as the 'paradigm case'. However, as I discuss later, there are also strong grounds for assigning outcome responsibility to agents who have acted without fault in certain circumstances; for instance, in the context of activities that impose 'special risks' (Honoré 1999: 27).[77] Wrongdoing or fault can, therefore, be seen as a sufficient, but not a necessary, condition for the bearing of a reparative obligation.

Conceptual Ambiguities

Any adequate account of reparation must grapple with a number of ambiguities and potentially misleading associations within the concept. First, by making outcome responsibility a key part of my principle of reparation, I adopt a broad view of reparation as being potentially owed even in the absence of wrongdoing. This approach stands in contrast to a narrower view, which sees reparation as owed *only* when the harm-doer can be properly designated as morally culpable (see Honoré 1999: 76; Montague 1984). While I see the case for reparation as being especially strong in the paradigmatic cases of a wrong being committed, I follow the view that even 'justified rights infringements' (Butt 2009: 88) can ground reparative obligations (see also Davis 1985; Feinberg 1978; Lomasky 1991; Rodin 2011: 87; Westen 1985).

Second, reparative obligations are only one form of special obligation among others, from which they should be carefully distinguished. Indeed, other forms of special obligation ground some of the moral functions of asylum that I outlined earlier. Special obligations encompass 'associative duties' (Scheffler 2001: 49), which partly underpin asylum's potentially solidarist function, and duties of gratitude, which may ground a

[77] The task of comprehensively specifying all the derogation conditions of the principle of reparation that I propose here stretches far beyond the scope of this thesis. In Chapter 4, I restrict my attention to the ways in which I believe that other moral considerations can affect states' reparative obligations towards refugees given the context in which they operate.

desert-based approach to asylum. Special obligations may also be established, whether in the context of asylum or more broadly, on the basis of *proximity* to a person in need, which in this context grounds the norm of *non-refoulement*; that is, the norm that refugees shall not be returned to face threats to their life and freedom (see Gibney 2000).[78] Additionally, special obligations include contractual or promissory duties (see Ross 2002 [1930]: 20). As I discuss in greater detail in Chapter 7, reparative obligations (and special obligations more broadly) are widely believed to be both weightier and more extensive than positive, humanitarian duties.

Third, the term 'reparation' is often used to refer to *historic* or *past* injustice, which may lead readers to anticipate that my focus will be on refugee movements which are rooted in historic injustices such as colonialism. However, the logic of reparation equally applies to recent or current injustices, or what Spinner-Halev (2012) has termed 'enduring injustice', which persists into the present across generations. As my choice of case study indicates, I focus on recent and ongoing injustices by applying my theoretical framework to the case of Iraqi refugees generated since 2003.

Fourth, the term 'reparation' contains an ambiguity with respect to the question of by whom the repair should be provided. Some use the term to refer to the repair of injustice by *any* agent, while others use it only to describe redress specifically provided by the perpetrator. Indeed, in one, broader sense, *every* grant of asylum acts as a form of reparation, given that asylum's basic aim is to repair the injustice or harms of refugeehood. Without attempting to settle this terminological issue here, I use the term in the latter sense, and follow Janna Thompson (2002: 42) in distinguishing between *reparation*, which is provided by the perpetrator of an injustice, and a *remedy*, which can

[78] Article 33 of the 1951 Refugee Convention states that 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever 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' (cited in Ghandhi 2006: 37).

'result from the good will…of a third party'.[79] This choice reflects the fact that my main argument concerns the allocation of responsibility for refugee protection, and that a humanitarian conception of asylum already demands that third-party states provide a remedy in Thompson's terms.

Fifth, a distinction needs to be drawn between actions which may be reparative only *in effect*, and those that constitute reparation *per se* (de Grieff 2006: 471). For instance, a state may offer benefits to those it has harmed for other reasons – for instance, perhaps as part of a humanitarian or development aid package – without making any acknowledgement that they have harmed them or that the aid they now offer is capable of rectifying that harm to some extent. Without being able to settle this issue conclusively here, I hold that the reparative capacity of asylum (or, indeed, of any other form of reparation, whether for refugees or others) is greatly strengthened by accompanying acknowledgement and apology. For instance, whereas in one sense the granting of asylum to the small number of Iraqi refugees which the UK has admitted in the past decade could be seen as effectively being a *de facto* form of asylum as reparation, given the UK's role in the invasion of Iraq in 2003, the overwhelming absence of any acknowledgement of a special obligation to Iraqis by virtue of the UK's involvement in that invasion greatly limits asylum's reparative capacity in this case.

Sixth, reparation, in one context, is strongly associated with indemnities for aggression (Falk 2006: 486). Following the paradigm of reparations established by the 1919 Treaty of Versailles, in which the victorious European powers imposed reparations on a vanquished Germany following its defeat in World War One, reparation can be seen in strongly *punitive* or *retributive* terms. In the following section, I argue that this

[79] Although, in one sense, compensation can be offered by those *other* than the perpetrators of a harm (see O'Neill 1987: 85), such as the state, I restrict my focus to compensation that is offered by those who are outcome or morally responsible for that harm.

potentially punitive function of reparation must be kept separate from a theory of asylum as reparation.

Seventh, I view reparations as being owed primarily, though not exclusively, in response to actions rather than omissions. This is not to suggest that omissions never generate reparative obligations, however. Whereas actions which cause harm give rise to reparative obligations regardless of the respective identities of the harm-doer and the person harmed, omissions which lead to harm only do so in certain contexts, depending on the nature of the relationship between the two agents. As Honoré (1999: 12) has put it, '[a] non-action or failure to act can be treated as an intervention in the world, and so as a cause whenever a positive act is expected or required but the agent does not perform it'. On this view, if states do not launch a military intervention to prevent atrocities from occurring, that lead thousands to flee, then they do not owe asylum as a form of reparation to those refugees.[80] However, once a state *has* intervened, then its omissions can become far more relevant. For instance, as I argue in Chapter 6, by invading Iraq, the US acquired what could be dubbed 'positional duties' (see e.g. Simmons 1979: 12); that is, more extensive duties to assist and protect the Iraqi population. Its failure to do so has given rise to its reparative obligations towards displaced and non-displaced Iraqis alike.[81]

[80] However, a radical variant of a theory of asylum as reparation could assert that, for instance, Western states who have not intervened in Syria to prevent its mass refugee movements owe asylum as reparation to Syrian refugees, or that their widely condemned failure to intervene in Rwanda in 1994 to prevent genocide gave rise to a special obligation towards those who fled the killings. However, this would render a theory of asylum as reparation contingent on any given theory of what constitutes a justified humanitarian intervention, and in particular on the idea that humanitarian interventions are at times not only *permissible*, but also *obligatory*. In order for this more radical variant to get off the ground, it would have to be shown that (a) the conditions of just war theory were met in the case of a particular potential intervention designed to avert refugee movements; (b) that certain actors bear that obligation to intervene; and (c) that they failed to discharge it. An account would also be needed of how reparative duties are to be most fittingly discharged and divided amongst the negligent states.

[81] For debate over the significance of the acts/omissions distinction in the context of asylum and refugee protection, see Singer and Singer (1988: 120) and Carens (1992b: 38-39).

Reparation and Remedial Responsibilities

Lastly, my principle of reparation needs to be distinguished from Miller's concept of remedial responsibility, which he sees as the responsibility that we 'may have to come to the aid of those who need help' (Miller 2007: 81). Indeed, it might be thought that my proposed linkage between outcome responsibility and reparation is misconceived, for it ultimately relies upon the notion of remedial responsibility, rather than on that of reparation *per se*.

Miller (2001; 2007: 99-107) proposes a 'connection theory of responsibility', in which remedial responsibilities are distributed on the grounds of, *inter alia*, who bears *moral* responsibility, *outcome* responsibility or *causal* responsibility for the bad situation which stands in need of remedy. If remedial responsibility is assigned on the basis of who bears outcome responsibility then, it could be argued, 'what is at stake here is not the remedying of historic injustice for its own sake, but the lifting of Ps above the threshold in question, and the corresponding need to find an agent with the responsibility to do this' (Miller 2007: 139).[82]

Remedial responsibilities differ from reparative obligations, it can be claimed, in at least two ways. First, claims for reparation can exist 'even in cases where the injured party is not deprived in some absolute sense'; that is, when remedial responsibilities are not activated in the first place (Miller 2007: 106).[83] Whereas remedial responsibility is fundamentally *forward*-looking, in that its concern is 'that nation A can relieve nation P or group P's suffering, and we look to the past only to single out A from other nations who might also bring relief to P', reparative claims are 'straightforwardly backward-

[82] Miller's understanding of a remedy is therefore distinct from that of Thompson (2002: 42) who, as I have described, views a remedy as an action undertaken by a third-party rather than by the perpetrator of a harm.
[83] As an example, Miller (2007: 106) writes that, '[i]f I deliberately or carelessly ruin one of your paintings, I owe you compensation even though, without the painting, you are still in a perfectly comfortable state overall'.

looking', such that '[t]he forward-looking benefits of redressing historic injustice are an incidental bonus, not the reason for doing it' (Miller 2007: 147).

The difficulty in sharply distinguishing between the assignment of remedial responsibilities on the basis of moral, outcome or causal responsibility and reparative duties *per se* seems to stem from the fact that, in numerous cases, 'redress and deprivation…are intertwined', and '[w]e become concerned about redress only because the person who has suffered the loss is thereby deprived in a way that causes independent moral concern' (Miller 2007: 106). This intertwining of remedial responsibilities and reparative obligations is certainly typically present in the case of refugees: they are not only owed reparation for its own sake, but are in situations which stand in urgent need of a remedy; such that, if the party who owes them reparation is unable or unwilling to offer that reparation, then remedial responsibilities pass onto others on different grounds in Miller's connection theory, given the urgency of the need to alleviate their plight.[84]

Nevertheless, it makes sense to see the assignment of remedial responsibilities on the basis of moral or outcome responsibility as a matter of reparation. Indeed, as Miller (2007: 106) has himself recognised, some of the grounds for distributing remedial responsibilities – those of moral, outcome and causal responsibility – are a matter of 'making redress to someone who has been wronged'. While Miller is correct to point to cases in which remedial responsibility and reparative obligation come apart, in cases where both remedial responsibilities and reparative obligations are in play – such as those

[84] Indeed, as Miller (2013b: 32-33) has written in response to the argument of this thesis,

> By focusing on asylum-seekers, it raises the question of whether reparation is really the main source of the justice claim here. One could instead present the situation as follows: the refugee has a claim for human rights protection which potentially could be lodged against any state that could offer her asylum, but if one state is chiefly responsible for bringing the condition of refugeehood about, then that state will also bear remedial responsibility for correcting it. The idea of reparation may be less important than the idea of singling out some state as the one that bears the relevant responsibility.

concerning refugees – protecting those refugees as a form of reparation will be *at once* forward- and backward-looking.[85] It is difficult to see in such cases what else reparation could be other than the claim that the agent responsible for bringing about the harm is the one who should remedy the situation, for the remedying of the harm in question is the *means* to the achievement of reparation.

However, although reparative obligations in cases of severe deprivation are based on moral or outcome responsibility, assignments of remedial responsibility on the basis of *causal* responsibility appear to have less to do with reparation, and more to do with the purely forward-looking task of finding an agent to remedy the situation. As Miller (2007: 140) has put it, in such cases 'the conditions for attributing responsibility…may be less demanding than in redress cases proper. That is, it may be enough to show some causal impact of the As on the Ps…without having to establish that the As acted unjustly' or that the As bear outcome responsibility for the harms suffered by the Ps. Therefore, assignments of remedial responsibility on the basis of causal responsibility should be seen as an obligation broader than that of reparation.

Presuppositions

Even with these clarifications in place, it is important to note that the principle of reparation contains some philosophically controversial presuppositions – concerning *severity of harm*, *collective responsibility*, *intergenerational justice*, and *its proper scope* – the defence of which lies beyond the scope of this thesis. First, the principle of reparation is confined to those actions which can be properly seen as harmful, rather than those which cause experiences that are so trivially negative as to be mere inconveniences.

[85] Indeed, while Torpey (2006: 5) critiques reparations politics as restricting its vision to the past, others stress reparations' ability to lay the ground for a better future, by being a potential catalyst of 'social solidarity' (de Grieff 2006: 451) or facilitating reconciliation (see e.g. Thompson 2002: 47).

Some have implicitly seen reparation as only owed once the harm caused exceeds a certain minimal level of severity, building a process of prioritisation and triage into the determination of who is owed reparation in any given case.[86] While I remain neutral on the question of a threshold for reparations *generally*, as I noted in the previous chapter, for *asylum* to be owed, the actual or threatened harm must have surpassed a certain, but not easily specifiable, threshold of gravity. In any case, the harms associated with refugeehood are typically severe enough for reparation, whether in the form of asylum or not, to be clearly warranted.

Second, a difficult philosophical issue which cannot be discussed in detail is whether collective agents such as nations and states, rather than the individuals constituting them, can bear moral responsibility at all. An individualist could claim that imposing an obligation on states to provide asylum reparatively would unfairly penalise their individual citizens who have no responsibility for refugees' displacement, as they would be ultimately called to finance the reparation through taxation (for a similar point, see Tan 2007: 296), or be obliged to allow significant social changes by allowing potentially large numbers to settle.[87] Once collective responsibility has been assigned to a state, a further question of who *within* that state should take responsibility remains (see Miller 2007: 120). In the case of refugees created by a dictatorship, we may wish to say that the population bears no responsibility for the actions of the state, given its lack of democratic participation within it (see Miller 2007: 127-130).

Third, if one believes – as many of those claiming reparations do – that reparations can be owed by the ancestors of those who committed injustices, such as slave-owners or colonialists, then some conception of intergenerational justice, and the

[86] For instance, Mark Gibney (1986: 84) suggests that 'there are degrees of violations against individual autonomy, and the HP [harm principle] seeks to protect against the most serious ones'.
[87] For a defence of the notion of national responsibility, see Miller (2007: ch. 5).

idea that obligations can be transmitted through the generations, is required. While my principal case study of asylum as reparation concerns the very recent refugee-producing actions of the US in Iraq, any application of my theory of asylum as reparation to actions further back in time that have contributed to the production of refugees will presuppose some notion of the intergenerational transmission of responsibility.

Lastly, I assume that the principle of reparation applies internationally as much as it does domestically. While this idea is already enshrined in international documents such as the 2005 UN Reparations Guidelines, and those of a cosmopolitan orientation (e.g. Caney 2005b) will have no quarrel with this assumption, even proponents of what Carens (2013: 256) has characterised as 'bounded justice', and Butt (2009: ch. 3) views as 'international libertarianism', such as Miller (2007: 48), recognise that states can bear reparative obligations to other states or to individuals within them. Although philosophical discussion of rectificatory justice has tended to take a domestic rather than an international perspective (Butt 2009: 3), I use some of these discussions as the basis of my discussion of states' *international* duties towards refugees.

The Case for Viewing Asylum Reparatively

Having outlined my conceptions of asylum and reparation, we are now in a clearer position to discern how the former may constitute a form of the latter. As I observed in the introduction to this thesis, asylum and reparation have generally been discussed in isolation from one another. While it is widely accepted, both by scholars and within international law, that refugees have rights to both asylum and to reparation *separately*, an argument is needed to support the linkage between them that I propose in this thesis; that is, for why we should see refugees as bearing a right to asylum

specifically *as* reparation, in addition to an account of how these two rights can be fulfilled simultaneously. On the most basic level, a moral case for viewing asylum as a form of reparation can be made in several relatively simple and highly intuitive steps which, in spite of the veneer of self-evidence I observed earlier, are nevertheless worth outlining in order to lay out the logic behind this approach explicitly, and to lay the ground for discussion of more controversial matters that arise from it.

The first step is to acknowledge that many of the unjustified harms that refugees experience before, during and following their flight – whether through the loss of their safety, security, homes, livelihoods or relationships – flow from their lack of basic rights protection within a state (Arendt 1986 [1951]: 293; Shacknove 1985), which may occur when their states of origin actively violate their basic rights, or fail to protect them from serious harm either perpetrated by external states or non-state actors, or which is the result of severe deprivation. Basic human rights protection operates as a bulwark against such abuse, harm and deprivation.

The second step in this argument is to note that the obvious means of offering reparation to refugees for the unjustified harms of displacement is to offer such rights protection to them. If these unjustified harms stem from a lack of basic rights protection, then such harms can be rectified, at least to a large extent, by offering such rights protection, either in refugees' states of origin or in other states. This can involve either the *restoration* of rights protection, if refugees enjoyed such protection before they fled, or the *creation* of it for the first time if, as is often the case, the refugees in question have never enjoyed it.[88] Such protection may, but not necessarily, be offered formally and entail naturalisation.

[88] Accordingly, Long (2013: 2) contrasts repatriation with what she calls '*em*patriation', which can involve 'the remaking of the state itself' so as to include previously marginalised or excluded groups (emphasis in original).

The third point, as I have established in the previous chapter, is that the content of asylum is the protection of basic human rights. If the unjustified harms of displacement stem from a lack of rights protection, and asylum is a means of creating or restoring such rights protection, then it is not hard to see how asylum can potentially act as a form of reparation.[89] While *any* benefit bestowed on refugees by a state bearing outcome or moral responsibility for their flight could conceivably constitute a form of reparation to them, the good bestowed on refugees by a state through a grant of asylum – the protection of basic human rights – matches, and responds to, what refugees most lack and are most in need of.

What this argument clearly shows is that the obvious form of reparation for the unjustified harms of displacement is the protection of refugees' basic human rights, *and that asylum is just one means of protecting such rights among others.* As I discuss in Chapter 5, under certain circumstances, other durable solutions, such as voluntary repatriation, may be, all things considered, more fitting forms of reparation for certain refugees.

It is important to note, however, that states of asylum may have to go *beyond* an offer of asylum in order to provide fully adequate reparation to refugees. Indeed, it is important not to exaggerate asylum's reparative potential, strong as it is, for basic rights protection is an important, yet sometimes insufficient, form of reparation by itself, given that refugees may have suffered losses and harms which are not necessarily addressed by a grant of asylum alone, such as the separation of families or the psychological impact of displacement, which may require family reunification programmes and specialist psychological support as supplementary forms of reparation. To suggest otherwise would be to risk allowing states to shirk any additional reparative obligations they may have

[89] For an argument with a parallel structure for the notion that durable solutions can function as forms of reparation for the unjustified harms of displacement, made with reference to the concept of 'effective citizenship' rather than basic human rights protection, see Souter (2014b: 174-175).

towards refugees once they have offered them asylum.[90] To be sure, there is a certain indeterminacy within the notion of reparation – such that there can be reasonable disagreement over the exact extent of what a perpetrator owes a victim in any given case – but it is at least a strong possibility that a state of asylum may not have fulfilled the entirety of its reparative obligations to refugees once it has granted them asylum. Rather, while asylum can have strong reparative value, in order for that value to be maximised, a reparative asylum policy needs to be embedded in broader reparations efforts to redress refugees.

Asylum as Restitution, Compensation and Satisfaction

Reparation, as I observed earlier, is not a monolithic term, but can take various forms, most prominently as *restitution*, *compensation* and *satisfaction.* Ideally, reparative asylum will fulfil all these functions simultaneously (although it could fulfil only one or some of them while remaining a form of reparation). As Pablo de Greiff (2006: 461) has commented, satisfaction in the absence of compensation can seem an 'empty gesture', while compensation without satisfaction can appear as an 'attempt…to buy the…acquiescence of victims' and 'may be regarded as demeaning the suffering of the individuals in question' (Torpey 2006: 70). That said, the status of an act as a form of reparation does not depend on it simultaneously providing all forms of reparation available. The basic case for viewing asylum in reparative terms that I outlined above can be fleshed out by exploring the ways in which asylum can assume these three forms.

Restitution is sometimes expressed as the principle of *restitutio in integrum*, that is, the attempt to restore the victim to their state before the violation occurred (de Greiff 2006: 3). Restitution is very often associated with the return of property or cultural

[90] I am grateful to Roger Duthie for prompting this point.

artefacts (see Butt 2009: ch. 5). The paradigmatic cases of restitution may be those in which a wrongfully appropriated item is handed back to its rightful owner.[91] The clearest way of seeking to restore refugees back to their situation prior to their displacement is through voluntary repatriation; that is, the recreation of the previous situation in their country to permit their safe return. However, this is often impossible, for the state of asylum's actions may have unleashed forces it subsequently cannot check.[92] Moreover, voluntary repatriation, even when it involves refugees returning to their previous properties, cannot provide full restitution. Indeed, a frequent criticism of the principle of restitution is that some crimes, and many of those associated with displacement, are so abhorrent as to be irreparable (e.g. Bradley 2013: 189). Many of the crimes surrounding displacement are so severe that a simple turning back of the clock is utterly impossible. *Full* restitution for refugees, therefore, may be unfeasible.

Clearly, asylum cannot even offer restitution of the sort that voluntary repatriation provides, for it entails residing in a *different* state, which may be radically different from the states of origin of the refugees in question. Although two different states may offer protection of the same *formal* basic rights, they may be realised in different ways, and may be accompanied by various 'membership-specific' rights (Carens 2013: 97) which differ in terms of both their content and munificence across states. Nevertheless, asylum can arguably provide a meaningful, albeit limited, degree of restitution in one key respect. The state may be unable to erase the traumas of flight or enable return for those who desire it, but it can offer refugees state protection of the sort that they previously had. Clearly, this is not an *exact* recreation of the *status quo ante*, for the refugees gain

[91] As Butt (2009: 22), quoting Peter Birks, has pointed out, '[t]here can be restitution of a thing or person to an earlier condition and restitution of a thing to a person', with the first interpretation being closely related to compensation, while the second is distinct from it.

[92] As I discuss in Chapter 6, after causing the collapse of the Iraqi state through its invasion in 2003, the United States may have been unable, at least not immediately, to prevent the rise of insurgents who took advantage of the ensuing lawlessness.

protection from a *different* state than the one by which they were previously protected, and basic rights may be realised in different ways from their states of origin. State protection is, therefore, unlike certain material possessions that can be replaced, not interchangeable. However, to this extent, some limited restitution lies within the responsible state's capacity.

It could be argued that this principle of restitution can justify only differential levels of protection in another state, depending on the conditions obtaining for each individual before their flight. If the goal of restitution is to restore the victim to their original situation, it follows that a refugee from a 'fragile state' such as Somalia would be entitled to a lower quality of protection than both the state of asylum's citizens and refugees from stronger states, such as Iran.[93] However, this may illustrate that restitution is not the only principle of justice relevant to asylum, for considerations of equity and solidarity may well justify exceeding the basic requirements of restitution and providing equal protection to citizens and all refugees in the state alike. Exclusive adherence to the requirements of restitution through differential treatment may mandate lower levels of rights for some refugees within their state of asylum, and thereby prevent their full inclusion within it. Some may also find the existence of such inequalities now *within* a society after these refugees' arrival as more morally troubling than those that were once *across* societies before it (Wellman 2008: 122).

It might be concluded that, if asylum can offer only limited restitution to refugees, then the notion of asylum as reparation as a whole is therefore something of a non-starter. This conclusion would be premature, however, given that the capacity of asylum to offer compensation is significantly stronger. Compensation is often seen as being required when full restitution is impossible (de Greiff 2006: 455). As Onora O'Neill (1987: 76)

[93] I owe this point to Elena Fiddian-Qasmiyeh.

has put it, '[c]ompensation *substitutes* a vicarious good, rather than restoring the original one' (emphasis in original). When a victim is compensated, as Renée A. Hill (2002: 399) has observed, she 'may now be in a different place with different resources at her disposal, but she should be able to move forward once again'. Whereas the fact that asylum offers protection to refugees in a *different* state from their own limits asylum's capacity to offer restitution, the attempt to substitute one state protection for another constitutes a strong form of compensation.

Moreover, a grant of asylum may act as a gateway to the access of further benefits, which may also provide supplementary compensation. If, as Butt (2009: 102) has observed, '[t]he whole point of compensation is to provide counterbalancing benefits to offset losses', then the bundle of rights that refugees gain upon being granted asylum – perhaps including welfare provisions, either in monetary or material form – can offer the kind of reparation described by de Greiff (2006: 468) as a 'service package'.

Satisfaction, again in contrast, is the most symbolic form of reparation, allowing the responsible state formally to acknowledge its wrongdoing and make guarantees of non-repetition. While Price (2009: 70) has, as I discussed earlier, demonstrated the capacity of asylum to express and symbolise the state's values and aims, whereas he focuses predominantly on asylum as an *outward*-looking expression of condemnation – as having its eye on refugees' states of origin, so to speak – there is no reason in principle why it cannot also be an *inward*-looking expression of contrition and apology, explicitly acknowledging the granting state's role in the refugee's situation, and thereby acting as a form of satisfaction.[94] Indeed, Bradley (2005: 17) sees reparation as a 'valuable

[94] However, neither condemnatory asylum nor asylum as reparation is *exclusively* inward- or outward-looking. In one sense asylum as condemnation is also inward-looking as it uses its own values to condemn the actions of other states. Reparative asylum is outward-looking insofar as it recognises the external impact of its actions. The distinction is intended to highlight just one key difference between Price's conception and reparative asylum.

opportunity' for 'state self rehabilitation'; that is, a means by which states can re-legitimise themselves following their refugee-creating actions.

While states can of course apologise for having caused displacement *without* offering asylum to those it displaced (and may potentially be justified in only doing so, if its role was sufficiently limited), grants of asylum alongside an apology can be a means through which the state *makes good* on that apology. Whereas apologies in the absence of action can, as I observed earlier, appear vacuous, their moral force may be significantly strengthened if a state reinforces its apology by granting asylum to those it is also apologising to.

Although asylum can be a valuable *component* of satisfaction, it is the case that it cannot offer refugees full satisfaction alone. Grants of asylum can help to communicate recognition of wrongdoing, but do not in themselves address the structures or propensities within a particular society to produce refugees, which need to be tackled independently. As Spinner-Halev (2012: 106) has argued, moreover, whereas an apology is a mere 'moment in time' and may be inadequate in itself, they can form part of an ongoing process of acknowledgement which, over time, redress injustices in a far more comprehensive manner.

A Punitive Function?

As I observed in the previous section, reparations can play a potentially punitive or retributive role, which raises the question of whether asylum as reparation should act in such a way, especially if the obligation were to be imposed by a powerful state or international body on other states. On the one hand, it might be thought that bestowing such a function upon asylum would be morally appropriate, given that the serious, and

often heinous, crimes that give rise to refugee movements stand in strong need of punishment. Whether or not asylum as reparation, either theoretically or by states in the politics of refugee protection, is given a punitive rationale, it may well be experienced by responsible states in precisely that way, as they find themselves saddled with the task of protecting unwanted refugee populations as a consequence of their foreign interventions. Using asylum as reparation as a form of state punishment might also, given the desire of most states to avoid large refugee burdens, motivate those states to avoid engaging in refugee-producing acts abroad. A powerful deterrent against such interventions could potentially be that states will be required to protect the human by-products of such interventions.

Nevertheless, establishing this function would have highly undesirable consequences regarding the representation of refugees for, as has been observed in relation to market-based 'burden-sharing' schemes which effectively 'commodify' refugees (see Gibney 2007: 69-74; Sandel 2012: 63-64), it would cast them as burdens which a state must bear, rather than as potential assets to it. In contrast, far from being a burden imposed as a means of punishment, refugees are often highly beneficial to their states of asylum in economic, social and cultural terms, however they are perceived by such states and their often restrictionist publics.

Clarifications

Before moving to identify the conditions under which asylum should act as a form of reparation in the next part of this thesis, I end this chapter by making a number of clarifications concerning the nature and scope of my argument, in order to seek to avoid possible misunderstandings from the outset. First, in focusing on the reparative obligations of states of asylum, I do not wish to deny the fact that reparative

responsibility also frequently lies with refugees' states of origin, or that they may be shared. Indeed, even if a refugee gains protection elsewhere, then his or her inability to return is an ongoing injustice, given the status of the right to return as a human right (Bradley 2013: 32-33, 48), that becomes latent, but is not eliminated, once a refugee has gained protection elsewhere. To suggest otherwise would be to allow refugees' states of origin to abrogate their lifelong duties to their citizens. In presenting a theory of asylum as reparation, it is important not to lose sight of a key *asymmetry* of duties between refugees' states of origin and their states of asylum: whereas the former bear duties on the basis of a bond of citizenship between state and citizen, the latter's duties are more contingent and are only activated under certain circumstances.

Second, by focusing on asylum, it should be clear that I am focusing on the reparative claims of refugees, not other categories of migrant more broadly. Given the stipulation earlier in the previous chapter that asylum's duration should be fixed by reference to the refugee in question's continued risk on return in his or her state of origin, moreover, asylum will only remain a fitting form of reparation for the harms of refugeehood for as long as that risk persists. If the refugee was never granted asylum by the responsible state while the risk was ongoing, the latter will still be obliged to offer the refugee other forms of reparation in his or her current place of residence once the risk has lapsed, such as compensation.[95] Alternatively, if the responsible state has already offered asylum as reparation during this period, then it can nevertheless provide the former refugee with a right to remain, but this will no longer be strictly *asylum* as reparation, but rather *immigration*, *settlement* or *citizenship* as reparation. Again, it would be an open question in each case as to whether the period of asylum offered would constitute

[95] Indeed, the US's resettlement programme for Vietnamese refugees has been criticised on the grounds that it was initiated only after the cessation of hostilities, by which point 'the threat of death for many was greatly lessened' (Gibney 1986: 117).

sufficient reparation for the harm suffered by the ex-refugee, or whether additional reparative measures would also be morally required from their state of asylum.[96]

Rather than only at times being required as a supplement to asylum as reparation, immigration or citizenship as reparation may also be owed to migrants who are not, or who have never been, refugees. This has occurred in the case of the Gurkhas, a Nepalese regiment of the British army, who have been allowed residence in the UK in recognition of their services following a high-profile public campaign. Indeed, while some of the existing literature which applies the 'harm principle' to states' admissions policies focuses specifically on refugees (Gibney 2004: 48-57; Lennox 1993; Shacknove 1988: 140-141; Walzer 1983: 49), others discuss a special obligation to allow entry to immigrants more generally whom the receiving state has harmed (Gibney 1986: 79-108; Wilcox 2007).

Lastly, my focus in this thesis is on reparation owed by states of asylum specifically on account of their outcome or moral responsibility for the harms of becoming a refugee. It may be that states are also obliged to accept current refugees not because they bear this particular responsibility, but rather because of some deeper harmful historical connection, association or affinity that links the refugee and the receiving state, such as colonial heritage. It may also be the case that a state is obliged to institute robust measures to protect refugees as a means of making amends for their past wrongdoing and to become a human rights-respecting state, when these new measures protect not those which the former regime within the state harmed specifically, but rather *future* refugees whose flight will be caused by other forces, thereby taking a *preventive*¸

[96] Furthermore, I focus on reparation owed to refugees for the unjustified harms they experience as a result of being forced to flee, and set aside cases in which individuals who have already become refugees for other reasons are mistreated and thereby owed reparation in their states of refuge. For instance, some asylum seekers in the UK have been awarded compensation for their unlawful detention (e.g. see Travis 2013).

rather than strictly speaking *reparative*, approach. Carens (1992b: 44), for instance, has argued that the refusal of the US and Canada to admit a boat carrying Jewish refugees fleeing Nazi Germany during the Second World War, with the result that many of the returned refugees perished in concentration camps, gives rise to a special historical duty to protect future refugees, by claiming that '[i]t is right that we should take this history into account – that we feel a special obligation that our communities never again commit this sort of wrong'. Another example of this may be the inclusion of a wide-ranging right to asylum within Germany's Basic Law following World War Two, which Christian Joppke (1999: 122) interprets as a 'conscious act of redemption' in response to its Nazi past. In contrast, in this thesis I restrict my focus to the use of asylum as a means of offering reparation to refugees for the harms they experienced as a result of their flight, not as a form of reparation for other sorts of injustice that a state may have committed, either to refugees or to individuals or groups more widely.

PART II: THE CONDITIONS OF ASYLUM AS REPARATION

Introduction to Part II

With a basic case that asylum can function as a form of reparation in place, I now move to apply the principle of reparation that I introduced in the previous chapter to the case of a refugee in need of asylum in another state. In doing so, I seek to identify the conditions under which asylum should act reparatively. This principle of reparation, it will be recalled, runs as follows:

> When an agent bears outcome responsibility for causing another agent unjustified harm, the first agent bears a special obligation to provide the second agent with the most fitting form of reparation for that harm available.

If this principle is applied to the case of a refugee seeking asylum in another state, then the basic conditions under which asylum should function as a form of reparation flow relatively simply.[97] They can be stated as follows:

> (1) An external state must bear outcome responsibility for causing the refugee's lack of state protection;[98]
>
> (2) That refugee must either have experienced unjustified harm, or be at risk of unjustified harm, as a result of this lack of protection;[99]

[97] The fact that I have taken a general principle of reparation as my point of departure and only *then* applied it to the case of asylum should make clear that my argument is emphatically not that states *only* have reparative obligations to refugees. States, and individuals for that matter, hold such duties towards anyone for whose harm they are responsible, and it would be morally arbitrary generally to privilege the reparative claims of refugees *qua* refugees over those of any other individual.

[98] I write 'lack of state protection' instead of 'flight' to include refugees who have fled and those who either remain in their countries of origin or had originally left voluntarily, in the case of refugees *sur place* (that is, an individual who left his or her state of origin voluntarily but subsequently became unable to return given a deterioration of the human rights condition in that state). Moreover, this application of the principle of reparation to states is not to suggest that states are the only actors which produce refugees, given the role that non-state actors and multi-national corporations can play in generating refugees. While some of these corporations may operate under the aegis of external states, which may have the effect of implicating those states in the production of those refugees, I restrict my focus in this thesis to states because they are the actors who offer asylum in the modern world. This is not to deny that non-state actors also owe refugees reparation for their contribution to their flight; rather, this reparation must come in forms other than asylum.

(3) The provision of asylum by that state must be the most fitting form of reparation for that harm available.

Furthermore, implicit within the principle of reparation formulated above is the requirement that the state must have the *capability* to offer reparation. The notion that a state is obliged to offer 'the most fitting form of reparation *available*' already presupposes some conception of capability, for it may well be that certain forms of reparation are unavailable to states precisely because of their limited capabilities. Given the dictum that 'ought' implies 'can', it would not be possible to require reparation from a state that is simply incapable of doing so. I discuss this implicit fourth condition, observing certain complications and adding certain qualifications, in Chapter 5.

This list, to be clear, lays down what I see as the *necessary* conditions for a state to bear an obligation to offer asylum as reparation to refugees, and the fulfilment of any one condition alone is not sufficient.[100] It is also a simplification for the purposes of initial exposition given that, in cases in which multiple states bear joint responsibility for refugees' predicaments, the word 'state' would have to be pluralised.[101] Moreover, as I observed in the introduction, laying out these conditions allows for an identification of other moral considerations, pertaining to issues of causality, justice, capability and fittingness, which might ultimately militate against the assignment of a reparative obligation towards certain refugees to certain states.

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[99] These criteria are adapted from Matthew Gibney's contention that, '[f]or the harm principle to be applicable in the realm of entry two things need to be shown: first, that the outsiders seeking entry have actually been harmed (or risk being harmed); second, that the states of attempted entry can be said to be responsible for that harm' (Gibney 2004: 50).

[100] In contrast, as I intimated in Chapter 2, moral responsibility can be seen as being a sufficient, but not a necessary condition for the bearing of a reparative obligation.

[101] Similarly, the fact that I use the term 'refugee' in the singular when formulating this list of conditions is not to deny that, very often, reparation can only be offered to refugees *en masse*, in the context of mass influx, where only *prima facie*, and not in-depth and individualised, RSD is feasible. For discussion of collective reparations in such contexts, see de Grieff (2006) and Peter van der Auweraert (2012).

Formulated in a single sentence, my contention is that a state owes asylum as reparation to a refugee when it bears outcome responsibility for unjustified harms experienced by that refugee, or that he or she is at risk of experiencing, as a result of his or her lack of state protection; when asylum is the most fitting form of reparation that is available to that state; and when that state has the capability to offer such reparation. In the following three chapters, I discuss and defend each of the elements in this formulation in turn, identifying in the process some of the key premises and sub-conditions of my account of asylum as reparation, as well as working through some of the philosophical and more practical issues raised by each condition of my theoretical framework.

Chapter 3: Causality and Outcome Responsibility

The first condition of my theoretical framework is that, for an external state to owe asylum as reparation to refugees, that state must bear outcome responsibility for causing the refugees' lack of state protection. While many popular discussions of states' special obligations towards refugees whom they have created refer only to responsibility as a monolithic concept, a distinction between the various forms of responsibility is indispensable as a means of accurately characterising the conditions under which asylum should act reparatively. This is because, as Miller (2001: 455) has observed, 'few concepts in moral and political philosophy are more slippery than that of responsibility', and such popular discussions do indeed end up sliding imprecisely between various senses of the term, with the result being that it can be difficult to see exactly what claim is being asserted.

Outcome Responsibility

On a basic level, responsibility can be understood according to its etymological root, denoting 'liability to answer' for one's actions (Kroslak 2007: 5) and as being closely related to the notion of accountability (see Bukovansky *et al.* 2012: 21). Miller (2007: 87-90) helpfully breaks the concept down, distinguishing between *causal*, *outcome*, and *moral* forms of responsibility. Whereas *causal* responsibility concerns 'why something happened', *outcome* responsibility, following the work of Honoré (1999), relates to 'whether a particular agent can be credited or debited with a particular outcome'. While *outcome* responsibility entails *causal* responsibility, the converse does

not necessarily hold for, unlike causal responsibility, outcome responsibility exists only when there is a 'foreseeable connection between…action and…result' (Miller 2007: 87-90). *Moral* responsibility, in contrast, can be seen as a 'necessary precondition for moral praise or blame' (Miller 2007: 89).

Given this diversity of forms which responsibility can take, it might be asked why I have chosen to stipulate that an external state must bear *outcome* responsibility in order to owe asylum as reparation to a refugee, over other forms of responsibility that could alternatively be required as part of a theory of asylum as reparation. Indeed, as I observed earlier, some scholars, such as Carens (2013: 195), have asserted that *causal* responsibility for refugee movements alone is sufficient to establish a special obligation to protect them.[102] On the other hand, adherents to the narrow form of reparation – who view it as owed only in response to wrongdoing (e.g. Montague 1984) – would presumably argue that states owe asylum as reparation only to refugees for whose flight they are *morally* responsible.[103] Whereas I view a state's moral responsibility for generating refugees as being a sufficient, yet not a necessary condition, for that state to owe asylum as reparation to those refugees, such an adherent may wish to argue that moral responsibility should be seen as a necessary condition of my theoretical framework in itself. My decision to frame the principle of reparation in terms of outcome responsibility, then, is, as it stands, vulnerable to attack from two sides: from those who may see it as setting the bar too high, given that they favour viewing causal responsibility

[102] Similarly, Blake (2013: 114-119) evaluates (and then rejects) what he calls the 'causality argument' (Blake 2013: 114) which holds that, 'where a state is causally responsible for the destruction of a foreign political community, that state acquires a moral duty to open its borders to at least some number of those individuals affected by the state action' (Blake 2013: 112). While it may be that what both Carens and Blake consider to be a relevant 'causal connection' is actually broadly similar to what others would view as 'outcome responsibility', this remains unclear, for they do not clarify their underlying conceptions of causality.

[103] However, it is possible that such an adherent would want to introduce the concept of 'blameless wrongdoing' (Parfit 1984: 31-35) into a theory of asylum as reparation. It could potentially be argued that states can at times commit the wrong of producing refugees blamelessly, and that this is consequential for the question of whether they owe asylum as reparation to those refugees. However, given that my favoured conception of reparation does not require wrongdoing, I leave aside this possibility here.

as sufficient to ground reparative obligations, but also from others who may believe that the bar has been set too low, by not requiring that the state in question has acted wrongly in creating refugees.

Recalling that, for an agent to be outcome responsible for a harm, rather than bearing only causal responsibility for it, there must have been a reasonably foreseeable connection between their action and that harm, it would seem unfair to impose a reparative obligation on states towards refugees when they could not have possibly known that their actions would have created such refugees. As an example, consider the rapidly industrialising states of the nineteenth century, which may bear significant causal responsibility for setting in motion the processes which have led to climate change; a process that is often regarded as a potential catalyst of significant future displacement. It has become commonplace in the literature on responsibilities for tackling climate change to point out that, given the lack of scientific understanding of the likely environmental impacts of industrialisation at the time, the onset of climate change was not foreseeable (see e.g. Caney 2005a: 761; see also Butt 2013: 759).[104]

This, however, is not to deny the possibility that, as I highlighted earlier, states may bear a *broader* special obligation to protect refugees purely on account of their causal responsibility for them. As I briefly touched upon in the previous chapter, according to Miller's 'connection theory' of remedial responsibility, if the agent who bears moral responsibility for a harm is either unable or unwilling to offer reparation, then remedial responsibility may be assigned on the basis of other considerations, with the bearing of causal responsibility being among them. However, this would only constitute a form of reparation in a rather stretched sense.

[104] Of course, it is far more plausible to argue that these same states *now* bear both *outcome* and *moral* responsibility for any future climate-induced displacement, given the weight of the current scientific evidence of the environmental impact of their emissions.

In response to adherents of a narrow, wrongdoing-based conception of reparation, it can be strongly argued that it is morally appropriate for agents to offer reparation for harms even if they did not bring them about culpably. Honoré (1999: 25-27) has used an analogy with betting in order to explicate his rationale for outcome responsibility: as agents, when we act we effectively take a bet on the outcomes of actions. If we see ourselves as entitled to reap the rewards of our actions, then we should also be prepared to bear the costs of them if they harm others (see also Miller 2007: 93). As Loren E. Lomasky (1991: 15), moreover, has contended, justifiable actions – undertaken, say, in self-defence – can nevertheless create 'a moral imbalance for which compensation is the indicated remedy'. Lomasky (1991: 36) further makes his case for compensatory duties even in the absence of wrongdoing by linking these duties to harm-doers' status as moral agents. In the case of self-defence – such as Joel Feinberg's now famous example of a backpacker caught in a blizzard who breaks into a mountainside cabin to save his own life[105] – Lomasky argues that, since the harms have been brought about by the harm-doer 'in service of his own continuing capacity to live as a project pursuer…he has powerful reasons to bear costs to preserve himself, reasons that cannot be universalised, in all their power, to everyone'.[106]

Finally, harms can be unjustified not only when they are caused by wrongful acts. Harms can be unjustified when they place individuals into situations which should not be

[105] Feinberg's example runs as follows: 'Suppose that you are on a back-packing trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperilled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in the corner…until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture…to keep warm. Surely you are justified in doing all these things, and yet you have infringed the clear rights of another person…almost everyone would agree that you owe *compensation* to the homeowner for the depletion of his larder, the breaking of his window, and the destruction of his furniture' (Feinberg 1978: 102, emphasis in original).

[106] Although these arguments have been advanced in an interpersonal, domestic context, Miller (2007) has demonstrated the potential fruitfulness of applying the notion of outcome responsibility to questions of global justice.

allowed to continue. Whereas rights are arguably only *violated* as a result of wrongdoing, they may be *infringed* even in the absence of such wrongdoing (Thomson, quoted in Lomasky 1991: 14). As Butt (2009: 88) has put it,

> …justified rights infringements do not close the door on rectificatory justice, in that those responsible for the actions face duties to pay appropriate compensation. If this is not done, they act wrongly and unjustly. Even if we accept that the action is justified, the outcome of the action will itself be unjust unless rectified.

As I observed earlier, however, bearing outcome responsibility for a harm creates only a *presumption* that the harm-doer owes reparation, which may be defeated either by countervailing moral circumstances, or be affected by the context in which the responsibility is borne. Indeed, although a general case for this presumption can be made with reference to examples on the individual level, such as Feinberg's backpacker, as I argue in the following chapter, the context in which harm is caused affects the force of reparative obligations. This is not to deny the general principle of reparation above, but rather only to suggest that there are cases in which it is overridden by other moral considerations.

The Causes of Forced Migration

Whereas the concept of outcome responsibility has seldom been applied to the case of refugees, there has been animated scholarly debate on the causes of forced migration. This debate is highly relevant to any theory of asylum as reparation which centres on the notion of outcome responsibility given that, as I observed earlier, the concept itself presupposes causal responsibility. In this section, I explore some of the

putative causes of forced migration in order to reveal some of the complexities of applying this first condition of my theoretical framework in any given case.

Evidently, the condition that an external state must bear outcome responsibility for causing refugees' lack of state protection assumes that such states both can and do generate refugees outside their territories. Although this might seem obvious – after even a cursory glance at the numbers of refugees generated by recent foreign interventions such as those in Iraq and the Balkans – this assumption runs counter to what can be termed an *internalist* approach to refugees, which is somewhat surprisingly prevalent within both the political and academic arenas. The basic internalist assumption is that the primary driver of refugees' movements is the actions of refugees' states of origin, laying the lion's share of causal responsibility for displacement firmly at their doors. While internalism is not, to my knowledge, a theory explicitly developed or held by any one scholar, its traces can be found in various academic works on refugees. These traces range from fairly explicit assertions that refugees' states of origin bear primary responsibility for their flight (e.g. Bradley 2008: 300; Kymlicka 1995: 99; Schuck 1997: 273; Shacknove 1988: 133; Tomuschat 1996: 59) to more subtle presuppositions, appearing perhaps only as an unintended consequence of the focus of scholarly work.[107] If internalism is correct, then the development of a theory of asylum as reparation would be fruitless, as causal responsibility would lie exclusively, or at least predominantly, with

[107] For instance, by conceptualising asylum as a means of condemning refugees' states of origin, Price (2009) implicitly attributes responsibility for these refugees to these states. Similarly, B.S. Chimni (1993: 458) observes that Luke T. Lee's proposal that states of asylum should have a right to compensation from refugees' states of origin (Lee 1986) overlooks the fact that it may be the state of asylum itself which bears primary responsibility for prompting displacement. Internalism can also be found within international documents with, for instance, Principle 2 of the 1992 Cairo Declaration of Principles of International Law on Compensation to Refugees stating that '[t]he responsibility for caring for the world's refugees rests ultimately upon the countries that directly or indirectly force *their own citizens* to flee…' (quoted in Lee 1993: 158, emphasis added).

refugees' states of origin.[108] Demonstrating the inadequacy of internalism is, therefore, a crucial step in developing this theory.

Nevertheless, various scholars have given strong grounds for departing from internalism, and in favour of recognising the complex interplay of both endogenous and exogenous factors in the production of refugees.[109] Some have argued that, although internal persecution may be the immediate precipitant of flight, this can be often merely 'epiphenomenal' (Schuck 1997: 261); that is, a manifestation of deeper structural ills for which external states bear primary responsibility. Yet others have emphasised the importance of international political support and the phenomenon of client states, pointing to the 'transnational dynamics of social conflict in the contemporary world, which at least to some degree makes the North coresponsible for the upheavals in the South' (Zolberg *et al.* 1989: 277). Stephen Castles (2003a: 18) has even argued that 'the North does more to cause forced migration than to stop it, through enforcing an international economic and political order that causes underdevelopment and conflict'.[110]

Despite the frequently external causes of refugee movements, however, it is quite possible to take externalism too far. Indeed, perhaps the most radical form that a theory of asylum as reparation could take would be by endorsing extreme externalism, and claiming that one external state or another bears causal responsibility for *all* of the

[108] The concept of 'internalism' within refugee and forced migration studies broadly corresponds to the notion of 'explanatory nationalism' employed by Pogge (2002a: 17) in order to characterise endogenous explanations of global poverty. Just as discussions of refugees have often proceeded as if receiving states are unconnected to the production of refugees, classic treatments of responsibilities for the world's poor, as Pogge (2002a: 288) points out, have proceeded 'on the basis of the tacit assumption that we are not contributing to the distress we are able to alleviate'.

[109] For critiques of internalism, see Chimni (1998: 360) and Zolberg *et al.* (1989: vi). For an explanation of its prevalence, see Mark Gibney (1991: 87).

[110] As Zolberg (1983: 25) has argued, the formation of new states from the remnants of previous empires, which involves the pursuit of ethnic, religious, cultural or linguistic homogeneity can lead to 'entire social strata' coming to be 'viewed as obstacles' and therefore displaced or expelled.

world's refugees.[111] Without underestimating the myriad ways in which external states bear responsibility for generating forced migration, however, the most accurate view of its causes lies between the poles of internalism and externalism. While extreme internalism disregards clear examples of recent internationally-driven displacement, full externalism overlooks the fact that, 'even in our globalised world, some injustices are simply local' (Gibney 2004: 235). For instance, the flight of Libyans before the fall of Colonel Gaddafi's regime cannot be explained *purely* by reference to his oppression, but is also at least partly attributable to the external support for his regime.[112]

One implication of requiring that a state bear outcome responsibility for a refugee's flight in order to owe him or her asylum as reparation is that states which pursue strongly interventionist foreign policies, or powerful states with the resources to execute them are – unless they intervene abroad only with impeccable diligence and vigilance – far more likely to fulfil this condition by creating refugees than are isolationist or weak states. As Matthew Gibney (2004: 50) has put it, 'accepting a principle of responsibility for harm means that the scope of state duties is going to be set not by the borders of the state or the boundaries of the nation, but by the causal reach of the state – the scope of its ability to do harm to individuals'. This may explain why so many of the empirical examples discussed in this context by scholars concern one of the world's most powerful states, the US (e.g. Carens 2013: 195; Gibney 1986: 115; Walzer 1983: 49; Wilcox 2007: 282).

[111] If the discussion were extended to include immigration or citizenship as reparation, then the argument could even run that *all* migrants are owed it, which would effectively enjoin states to open their borders entirely on reparative grounds. Indeed, Matthew Gibney (2004: 235) notes that implicitly reparative arguments concerning refugees have appeared to assert 'a more radical – but typically unspecified – account of state responsibilities', amounting to 'perhaps even a duty to end all immigration controls'.

[112] For analysis of the previous Libyan-Western rapprochement and related arms sales, see Derek Lutterbeck (2009: 173-177).

The Questions of Directness and Intervening Agency

In some cases, the identification of causal and outcome responsibility for refugee movements can be relatively straightforward. If, as Honoré (1999: 3) has suggested, the 'causal paradigm' is taken to be 'initiating physical sequences of events', then cases in which states *directly* create refugees, due to clearly identifiable actions such as military intervention which push civilians out of their homes, appear to reflect, or at least approximate, this model. However, as Honoré (1999: 2) has also observed, 'in law and morals, people are commonly held responsible not merely for initiating physical sequences of events, but for causing, inducing, advising, helping or providing opportunities for others to do harmful (or beneficial) actions'. This includes cases in which external states have *enabled* internal actors to create displacement or in which they have *facilitated* that displacement, through, say, the provision of military supplies to a refugee-producing regime. It is, after all, no accident that the claim that states bear a special obligation towards refugees they have created has been most frequently and prominently deployed in relation to cases of external states generating refugees in at least a fairly direct manner, such as the Vietnam and Iraq Wars prosecuted by the US in the second half of the twentieth century (e.g. Blake 2013: 114-119; Gibney 1991; Walzer 1983: 49; Wilcox 2007: 282), with some regarding the former as a 'prototype' (Gibney 1986: 115), or as a 'paradigmatic' case (Price 2009: 3).[113]

However, in other cases of refugee movements, such a direct causal link with the actions of external states either does not exist or cannot be identified. Rather than directly causing a refugee crisis, external states may instead only *intensify* an existing pattern of forced migration for which they are not primarily responsible or, even less directly, only

[113] In Chapter 6, I assess the extent to which the flight of Iraqi refugees since 2003 fits this paradigm, arguing that the assignment of outcome and moral responsibility for the displaced is possible, yet more complicated than has been assumed by commentators to date.

create the conditions for the emergence of such a trend. Unlike cases of direct refugee creation, examples which fit into the latter two categories are complicated by the phenomenon of what could be dubbed *intervening agency*; that is, the fact that causal responsibility is shared with other agents and is therefore less direct.[114]

A putative example of external states *intensifying* or *accelerating* an existing refugee crisis is NATO's bombing of Kosovo in 1999, which it undertook in response to ethnic cleansing perpetrated by Slobadan Milošević's Serbian forces, given that '[p]erhaps over half of Kosovo's 2 million inhabitants were displaced over the two months of the bombing campaign' (Barutciski 1999: 9). Many have suggested that the campaign compounded the very violence and displacement that it had intended to curb (e.g. Barutciski 1999: 9-10; Chimni 2000: 252; Walzer 2004: 99; Wheeler 2000: 269); a fact which has been used to argue for a special obligation to protect those refugees (van Selm 2000: 200). While Eric Herring (2001: 228) sees the intervention as adding 'fuel on the fire' of the violence, Noam Chomsky (1999: 5) goes as far as seeing the intervention as 'uncontroversially' escalating the ethnic cleansing and resulting displacement. This assertion of a particular responsibility on the part of NATO's constituent states need not entail any denial of the fact that Milošević's forces bear primary outcome and moral responsibility for perpetrating the forced displacement, and the attribution of causal responsibility is thus more qualified than in cases in which an external state created a refugee crisis *de novo*.

There are various examples upon which one could draw in order to explore the ways in which states may *create the conditions* in which refugee crises can emerge, and therefore cause them only indirectly. In Anthony Richmond's terminology, external

[114] For discussion of the ways in which such 'intervening agency' may affect the assignment of responsibilities in the context of just war theory, see Thomas Hurka (2011: 247-251).

states may create the 'predisposing factors' which generate refugees, but not the 'precipitating events' (Richmond 1994: 62). An important example in which refugees are arguably generated by extremely complex chains of events – which are embedded in similarly convoluted social, political, economic and cultural systems and in which a large number of diverse actors are implicated to various extents – is the operation of the global political economy, comprising as it does a vast and intricate network of countless individuals, organisations and transactions. In contrast to implicitly internalist approaches and a scholarly resistance to viewing forced migration as 'deeply embedded' within social and economic processes identified by Sarah Collinson (2011: 309), some have adopted a resolutely externalist perspective when exploring the relationship between forced migration and the global political economy. For instance, Chimni (1998: 360-361), Castles (2003b: 17) and Philip Marfleet (2006: 48) have argued that gross global economic inequalities and neo-liberal policies spearheaded by institutions such as the World Bank and the International Monetary Fund have created conditions ripe for mass displacement in recent decades.

Even more indirectly, former colonial powers may bear some measure of causal and outcome responsibility for post-colonial refugee movements in now independent states throughout the developing world. Carens (2013: 330) considers, in passing, that 'one might consider the extent to which contemporary refugee flows in Africa and Asia are attributable to the legacy of colonialism and the extent to which they are due to independent, intervening causes', although he does not then pursue this line of thought further. While consideration of the responsibility, or the lack of it, on the part of former colonial powers for the poverty and violence that have characterised many post-colonial states has been an important strand of the broader debate on whether such powers owe those states reparation, which has taken place in political fora such as the World

Conferences on Racism in Durban and Geneva (see Butt 2009: 1), there has been far less attention paid to the links between past colonial rule and contemporary refugee movements. Constance G. Anthony (1989: 574), however, has argued that the prevailing models of the colonial state 'set the stage' for post-colonial refugee movements, by deploying strategies such as 'divide and rule', which involved the privileging of certain ethnic groups over others, and thereby created the conditions in which post-independence conflict would result. It is also frequently observed that the imposition of arbitrary boundaries that were insensitive to local social and ethnic groupings also sowed the seeds of such conflict (e.g. Adepoju 1982: 24) and that former colonies perpetuated the repressive apparatus of the colonial administration that they inherited upon independence in order to consolidate and maintain their control (Ottunu 1992: 18). Nevertheless, the problem of intervening agency is even starker than in cases, such as that of Kosovo, in which external states intensify existing refugee crises, given that it would be absurdly reductive to attribute *all* contemporary refugee movements from former colonies solely to the legacy of colonial rule, for this would, somewhat patronisingly, grossly underestimate the agency of post-colonial governments in perpetrating displacement, and unduly exonerate them.[115]

This being so, it is far easier to attribute fairly clear outcome responsibility to *specific* former colonial powers for *certain* recent refugee movements than to hold all equally responsible for all refugees from former colonies. A more specific way in which one former colonial power may bear outcome responsibility for contemporary displacement is the role of Belgium in creating the conditions that made the Rwandan genocide of 1994 possible, as well as its attendant refugee crisis, in which three million

[115] As Torpey (2006: 69) has objected in relation to Western responses to the 1994 Rwandan genocide, 'A striking feature of this discussion is the extent to which the West is held responsible for the killings that, after all, were committed by Rwandans…The discussion of responsibility for the genocide thus seems oddly to reprise the colonialist perception that Africans lack independent agency'.

Rwandans had become refugees by the end of July 1994 (Klinghoffer 1998: 3). Although the genocide has popularly been explained in internalist terms as almost primordial ethnic violence (see Chimni 1998: 360-361), Belgian colonial policies were responsible for ossifying the distinction between Hutu and Tutsi, and privileging the latter; thereby laying the ground for the subsequent acrimony and violence between them (see e.g. Prunier 1995: 37).[116]

Assigning Outcome Responsibility

In paradigmatic cases of refugee-producing military intervention, it may well be possible to identify causal and outcome responsibility for displacement accurately. In other cases, where accurately identifying responsibility is difficult or impossible, the pursuit of reparative justice may only be feasible if a more relaxed evidentiary standard is adopted. For instance, the probable future flight of citizens of island states in response to dramatically rising sea levels may well be a highly direct consequence of anthropogenic climate change, but it is impossible to determine precisely *which* states' carbon emissions are most responsible for bringing about the displacement, given that it is the cumulative

[116] Others have pointed to the partial and indirect responsibility of modern Western states for the Rwandan genocide and its related displacement. For instance, Daniela Kroslak (2007) has documented French support for the genocidal regime even after the killings had begun, while Wheeler (2000: 208, 237) points to the withdrawal of international forces on the eve of the genocide, and the role of a belated French intervention, Operation Turquoise, in providing a safe haven to *génocidaires.* As I mentioned in Chapter 2, what many have seen as the West's 'egregious dereliction of moral responsibility' (Klinghoffer 1998: 41) by failing to intervene in order to prevent the genocide also arguably gave rise to a special obligation on the part of Western states towards those Rwandans displaced by the atrocities. This omissions-based argument might be made more fully by pointing to the fact that the West was already heavily involved in Rwanda prior to the genocide, given the presence of the UN Assistance Mission for Rwanda within the country, such that the decision to withdraw which allowed the genocide to begin can be seen as ignoring a positional duty towards the Rwandan population of the sort that I mentioned earlier. This is without mention of the fact that the 1948 Genocide Convention enjoins its signatories to prevent and punish the crime of genocide (Wheeler 2000: 217).

result of the emissions of many different actors in different locations over a long time-span.[117]

In such cases, at least a degree of reparative justice may be attainable through the assignment of remedial responsibilities to those states we can reasonably suppose to be the most outcome responsible for the harm in question.[118] In the case of island states, given the scientific evidence that the world's largest polluters bear the lion's share of causal responsibility for climate change, even if the *precise* role of their emissions in bringing about a certain instance of environmental displacement cannot be established, it makes sense to assign causal responsibility for the environmentally displaced to those polluters. Peter Penz (2010: 167-168) has suggested, given the epistemic problems associated with identifying causal and outcome responsibility for climate change, a potential system of '[g]lobal climate change insurance', in which a fund would be created to compensate states adversely affected by the effects of climate change, including displacement, with each state's contribution fixed with reference to its level of carbon emissions. In this way, Penz (2010: 173) argues, 'the crucial advantages of the tort law model underlying compensation responsibilities' can be retained, 'while avoiding the difficulty of detailed causal determination'.

[117] I have chosen the case of island states because it is accepted as the clearest case of man-made climate change precipitating forced migration. In other contexts, the role of climate change in generating displacement is rarely so clear-cut. Indeed, misgivings over the category of 'environmental refugee' have emerged from social scientific literature within refugee and forced migration studies, arguing that the term postulates a simplistic mono-causal explanation for forced migration when, in reality, environmental change is likely to be just one contributing factor to the multi-causal process of displacement (see e.g. Piguet *et al.* 2011: 12-13).

[118] Miller (2007: 84) has distinguished between *identifying* and *assigning* responsibility in the following manner. Whereas *identifying* responsibility involves 'looking to see who, if anybody, meets the relevant conditions for being responsible', *assigning* responsibility entails 'a decision to attach certain costs or benefits to an agent, whether or not the relevant conditions are fulfilled'. Nevertheless, in the process of assigning responsibilities that I am exploring here, 'we…want our assignments of responsibility to track identified responsibility' to the greatest extent possible (Miller 2007: 85).

A Causal Threshold?

The fact that external states' causal and outcome responsibility for forced migration can be highly attenuated raises the question of whether there is some threshold of causal directness below which those states' reparative responsibilities evaporate. Some scholars have implicitly accepted the idea of this kind of threshold (e.g. Carens 2013: 330; Gibney 2004: 56; Schuck 1997: 280; Shacknove 1988: 141), with Price (2009: 3) stating that

> When a state is directly responsible for making a foreigner's homeland uninhabitable…restorative justice demands that the state rectify conditions of insecurity that it has directly caused…Some may be tempted to argue further that states are responsible for refugee flows, and are therefore specially obligated to refugees, merely because they offered diplomatic or political support to a persecutory regime or imposed destabilizing structural adjustment programs on developing economies…That, however, stretches the concept of special obligation, created by direct responsibility, too far.

What rationale is there for seeking to fix this kind of threshold? In short, it appears to be strongly linked to the notion of proportionality, in the sense of whether an external state is sufficiently implicated in refugees' lack of state protection for it to be *that* state which is obliged to provide asylum as reparation. If refugees' lack of state protection can only be tenuously linked to a state's actions, then providing them with asylum as reparation is not a proportionate response. As the causal link between the state's actions and the refugees' situations becomes more strained, it might be that *that* state is obliged to provide a lesser form of reparation, such as limited compensation, perhaps at the same time as providing asylum on humanitarian grounds. Indeed, it would be unfair to impose an identical obligation towards a set of refugees on two states, when one was the main architect of the intervention which produced them, while the other

played a peripheral role (note how the impact of the US military dwarfed that of, say, Poland in the last Iraq war).

Nevertheless, it is far easier to identify cases of externally caused displacement that do and do not cross this threshold than to specify where the threshold should be fixed. Indeed, in the passage quoted above, Price (2009: 3) does not explain why 'making a foreigner's homeland uninhabitable' crosses the threshold, while the effects of 'destabilizing structural adjustment programs' do not, and it is difficult to see how he could do so with any precision and without resorting to arbitrary stipulation. We might also want to say that, whereas a state that enables another state to displace its own citizens through the provision of military supplies crosses the threshold, a state that is merely involved in a refugee-producing state's affairs, but where this involvement makes no difference to the production of refugees, does not cross it.[119] Certainly, there is no simple algorithm for determining this threshold or for deciding whether each case meets it. At some point, however, the contribution of external states to the production of refugees becomes too indirect to ground a distinct reparative obligation in itself, but rather instead merely adds weight to the existing humanitarian case to protect those refugees. This is implied by Matthew Gibney (2004: 56), who states that 'a recognition of the many and varied ways – intentional and unintentional – in which external actors contribute to refugee creation *adds* to the moral case for the participation of Western states in schemes to share the refugee burden' (emphasis added). Thus, the US's actions in Iraq from 2003 onwards by itself *creates* a reparative obligation to offer asylum to

[119] However, some scholars appear to believe that involvement with a refugee-producing regime or operation is sufficient to establish a special obligation to offer asylum. Barutciski and Suhrke (2001: 109-110), for instance, contend that 'it is evident that some states are more deeply involved in some refugee-producing conflicts than others…These states would be the ones to call upon in the first instance during contingency planning for the humanitarian consequences of violent conflict or intervention'. Similarly, Mark Gibney (1986: 97) asserts that, '[a]lthough one nation might be implicated in the affairs of another, and therefore have some special responsibility to prevent harm or to aid those who have been harmed, the degree of responsibility it should bear will depend on its level of involvement with that regime'.

many of those refugees (as I argue in Chapter 6), whereas the role of an affluent state in a global economic order which contributes to the creation of refugee movements only *bolsters* the existing case for protecting refugees *more generally*. In the absence of such an algorithm to determine whether states' actions cross the causal threshold discussed above, in more indirect cases causal and outcome responsibility for refugees can only be decided on the basis of public deliberation and contestation.[120]

[120] I examine some of the implications of the fact that attributions of outcome responsibility to states for refugee movements are highly contestable for the politics of asylum and refugee protection in Chapter 8.

Chapter 4: Unjustified Harm

The second condition is that, for asylum as reparation to be owed to a refugee, that refugee must either have suffered unjustified harm, or be at risk of unjustified harm, as a result of his or her lack of state of protection. How should each of the terms within the notion of 'unjustified harm' be understood? Harm, as Feinberg (1987: ch. 1) has argued, can be understood as entailing a serious setback to one's basic interests.[121] Such setbacks can be unjustified, as I briefly observed earlier, because they are the result of wrongdoing, because they create outcomes that should morally not be allowed to persist, or both simultaneously.[122] Given that I have already argued that, in principle, a state need not bear moral responsibility or have acted wrongly for it to bear reparative obligations to refugees, it would not be consistent to now contend that the state in question must have caused harm through its unjustified actions in order to owe reparation to the victim. Rather, I contend that states must have, whether or not they acted wrongly, harmed refugees by placing them in unjustified *situations* in order for those states to owe reparation to those refugees.[123] In this chapter, I begin by exploring the harms typically associated with displacement, before examining the circumstances in which these harms may conceivably be justified. Finally, I turn to the question of whether external states owe reparation to refugees if they were produced justifiably, either as part of a justified war of self-defence or as part of a justified humanitarian intervention.

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[121] Applications of the concept to discussions of the ethics of asylum and migration have been broadly similar to this approach, in seeing harm as involving a process in which one is rendered worse off than one otherwise would have been (Gibney 2004: 49), or as a serious setback to one's basic welfare interests (Wilcox 2007: 278).

[122] It is not necessarily the case that unjustified actions will always lead to unjustified situations, although this often occurs. An unjustified action (if, for instance, it is the product of a malign intention) could conceivably happen to bring about morally good benefits inadvertently. Conversely, a justified action may potentially bring about unjustified situations.

[123] Another way of putting this point is that, if the phrase 'unjustified harm' is understood in terms of wrongdoing and unjustified *acts*, then the second condition of my theoretical framework is sufficient, but not necessary. However, if the phrase is understood in terms of unjustified *situations*, then it can properly be seen as a necessary condition for the bearing of a reparative obligation.

The Harms of Displacement

It may seem obvious, from even a cursory glance at the current situations of refugees across the world, that all stages of displacement typically involve unjustified harm. Displacement is very often the result of unjustified *actions*, being inextricably linked to grave violations of basic human rights, given that abuses such as mass killings, torture, persecution and rape frequently prompt displacement, and displacement can be either a deliberate military strategy or the by-product of unjust wars, and may amount to a war crime or crime against humanity under international law (Brookings-LSE Project on Internal Displacement 2012: 2). It is, therefore, often appropriate to speak of a 'crime of displacement' (Bradley 2007b: 663).

In addition to covering refugees who have actually suffered unjustified harm, the second condition also encompasses refugees who are only *at risk* of experiencing such harm. In this way, the condition gels with the forward-looking nature of existing refugee law, which requires a well-founded fear of persecution, whether or not this fear has in fact been borne out.[124] On my account, therefore, a refugee *sur place* – i.e. an individual who left his or her state of origin voluntarily but subsequently became unable to return given a deterioration of the human rights conditions in that state – is also owed asylum as reparation, so long as, *inter alia*, an external state bears outcome responsibility for that deterioration.

Whether the actions precipitating displacement are unjustified or not, they often set in motion a chain of further harmful experiences, which place refugees in unjustified *situations*, such as perilous journeys; separation from families and loved ones; loss of

[124] In other words, to use the terminology of Richmond (1994: ch. 3) and others, the condition encompasses both *proactive* and *reactive* forms of forced migration.

home, livelihoods and property; and psychological harm stemming from trauma or a deep sense of limbo and 'ontological insecurity' (see Chase 2013).

Upon arrival in their new locations, refugees often suffer further unjustified harms caused by morally indefensible actions and policies on the part of host states which fail to respect their human rights, as they may face destitution, poverty or exploitation; warehousing in refugee camps; imprisonment in immigration detention centres; or forcible deportation. Even if refugees successfully gain protection and are fortunate enough to avoid further unjustified harm, the task of adjusting to, and integrating within, a new society can be a very difficult and lengthy process. Hannah Arendt's classic account of refugees as being deprived of 'a right to have rights' – often entailing the 'loss of their homes and ... the entire social texture into which they were born and in which they established for themselves a distinct place in the world' (Arendt 1986 [1951]: 293) – aptly highlights the vulnerability that displacement so frequently engenders. Despite the varying degrees of agency retained by refugees and the resilience they often exhibit, the experience of displacement can nevertheless seriously limit their autonomy.[125] Moreover, for indigenous peoples or members of expelled political communities, displacement can involve a loss of collective identity and attachment to land (Spinner-Halev 2012: 7). All of these harms are very often caused to refugees without any compelling moral justification, such as the protection of the rights of others. Indeed, given the severity of many of the harms experienced by refugees, it is debatable

[125] Many scholars within refugee and forced migration studies tend to see an emphasis on refugees' vulnerability as morally problematic and implying a lack of agency or, worse, a conception of refugees as 'passive victims' (see Harrell-Bond 2002: 52; Turton 2005: 278). However, if we view vulnerability according to its etymological root as denoting an ability to be wounded (Turner 2006: 28), then it is possible to see agency and vulnerability as not being necessarily mutually exclusive, and to recognise that it is perfectly possible to be vulnerable and to exercise agency simultaneously. For the view that any adequate political theory must treat individuals as *both* responsible agents and vulnerable patients, see Miller (2007: 5-6).

as to whether *anything* could justify their infliction or fully rectify them (Bradley 2013: 1).

Despite the need to recognise fully the severity of the harms so often caused by displacement, it is also necessary to acknowledge the fact that the harms of displacement do differ in gravity from case to case. Clearly, a refugee forced to flee severe generalised violence in Somalia to the extreme and protracted physical and socio-economic insecurity of the massive Dadaab refugee camp in neighbouring Kenya has experienced significantly greater harm than a so-called 'Mercedes refugee' from Iraq (Sassoon 2009: 36) or those who were dubbed as 'golden exiles' from Cuba residing in the US during the late 1950s and early 1960s (Gibney 2004: 148), who had the resources and connections to find protection in another state very quickly with few losses to their assets. Indeed, it is even conceivable (although unlikely in most cases) that one may become a refugee *relatively* painlessly, in the case of a refugee *sur place* who, following the deterioration of conditions in their state of origin, is immediately granted asylum in a state where they often reside and have access to their assets, and especially if they had only fairly weak ties to their state of origin.

It is also important to note that, despite its often grave harms, it is possible that displacement ultimately brings about significant benefits to the displaced. If a refugee from the global 'South' is granted asylum in the global 'North' then, given the scarcity of alternative legal routes for gaining residence in 'Northern' states besides the asylum system, they may come to enjoy a far higher standard of living than would ever have been possible had they not been compelled to flee.[126] Experiences of displacement are

[126] It is also possible that an individual may, given their own philosophical or spiritual outlook, be able to find experiences of value within their displacement. Just as the asceticism of a monk may imbue the privations that others would find unbearable with meaning, some ancient Stoics viewed their exile positively, with Seneca claiming that '[i]t is the mind that makes us rich; this goes with us into exile' (quoted in Irvine 2009: 185).

often unremittingly bleak, but need not be so entirely. Comparing her reactions to her own exile with her eventual knowledge of the Holocaust, in an interview Arendt said:

> 1933 was not the decisive year. At least not for me. The decisive day was when we heard about Auschwitz…That was the real shock…About everything else that happened I must say it was sometimes rather hard, we were very poor. We were hunted down, we had to flee. We had to find a way to survive. We were young. We even had a little fun with it. I cannot deny that…This [Auschwitz] was something very different. Personally, I could accept everything else (Arendt 1994: 12-13).

Yet, despite the fact that displacement *may* bring about eventual benefits and can at times be compatible with certain positive experiences, this should by no means be used to downplay or justify the severely unjustified harms which characterise the experiences of so many refugees. As Lomasky (1991: 28) has argued, there may be cases in which '*B* has not caused *A* any wrongful loss, but he has nonetheless wronged *A*', such that '*A* may have no reason to complain of the outcome that has fortuitously emerged, but he has reason to be indignant about the means through which that outcome eventuated' (emphasis in original; see also Pogge 2002a: 23).

'Justified Displacement'

Recognition of the typical severity of the harms of refugeehood and the close relationship between human rights violations and displacement has led some to formulate a 'human right not to be displaced' (Stavropoulou 1994; see also Morel *et al.* 2012) and a 'right to stay' (Oberman 2011).[127] Such a right has been seen as being implicit within international human rights law, and is already found within soft law instruments such as

[127] Furthermore, the former UN High Commissioner for Refugees, Sadako Ogata, famously argued for a 'right to remain' when speaking of displacement in the former Yugoslavia during the early 1990s. As Bradley (2013: 57) has commented, while there are 'strong theoretical arguments' to be made for such a right, in practice it may weaken refugee protection, and specifically the right to asylum (see also Hathaway and Neve 1997: 134).

the *Guiding Principles on Internal Displacement* (UN Commission on Human Rights 1998) and the UN's *Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons* (UN Sub-Commission on the Promotion and Protection of Human Rights 2005). It can also be given a moral rationale by linking the right to stay with the protection of morally important values such as 'freedom of movement, cultural membership and territorial attachment' (see Oberman 2011: 253).

However, even advocates of the right not to be displaced acknowledge that it is not an absolute human right and that it can be overridden under certain restricted circumstances (Stavropoulou 1994: 69; see also Oberman 2011: 258). Both the drafters of the *Guiding Principles* and commentators either explicitly or implicitly emphasise the notion of *arbitrariness* in their formulations of the right not to be displaced, seeking to prohibit arbitrary displacement – in which the displacement in question has no higher justification – rather than displacement *per se*.[128] Stavropoulou (1994: 741), for instance, articulates the principle that

> No one shall be forced to leave his or her home and no one shall be forcibly relocated or expelled from his or her country of nationality or area of habitual residence; unless under such conditions as provided by law solely for compelling reasons of national security or specific and demonstrated needs of their welfare or in a state of emergency as in cases of natural or man-made disasters. In such cases all possible measures shall be taken in order to guarantee the safe departure and resettlement of the people elsewhere.

In the same way as these discussions of a right not to be displaced recognise that this right may be limited under certain conditions, the notion of 'unjustified harm' within my theoretical framework recognises the possibility that the harms of displacement may potentially be justified. This is also a possibility that is recognised within just war theory,

[128] This may have some reflection in international law. As Goodwin-Gill and McAdam (2007: 3) have put it, '[a] rule to the effect that "States shall not create refugees" is too general and incomplete. An ambulatory principle nevertheless operates, obliging States to exercise care in their domestic affairs in the light of other States' legal interests, and to cooperate in the solution of refugee problems'.

which outlines the conditions under which war – and its attendant death, destruction and displacement – can be morally justified. Indeed, philosophers writing on just war theory argue that it is possible to *harm* an individual without necessarily *wronging* them (Lee 2012: 88; Rodin 2011: 75). In the following section, I explore the circumstances in which displacement may be morally justified, before questioning whether this affects states' reparative obligations towards refugees.

Refugees and Just War Theory

Before developing such an account, however, it is important to note that the notion of 'justified displacement' may, from the perspective of scholars and refugee advocates who focus their efforts on alleviating the human suffering associated with displacement, induce significant queasiness, or even repugnance.[129] For instance, as Penz (1997: 38) has put it in strong moral language, displacement can be seen as a clear 'evil', while Spinner-Halev (2012: 7) views 'exile and dispossession' as a case of 'radical injustice'. In the same way as a pacifist sees all war as a crime necessitating reparation, an unflinching moral absolutist would presumably regard the notion of 'justified displacement' as an oxymoron, or even a blatant contradiction, which potentially hands on a plate a justification for states to continue to act in ways which are impervious to basic human needs.

Indeed, a large degree of caution, grounded in a proper appreciation of the typical severity of the harms of displacement, is indispensable when engaging with a somewhat slippery notion such as 'justified displacement'. Given a general psychological tendency to downplay or deny the gravity of suffering (Cohen 2001; Kagan 1989: 283; Mayerfeld

[129] As Matthew Gibney (2013a: 116) has noted, the phrase 'forced migration' is highly value-laden and often seen as itself morally impermissible, which may explain the reluctance to see practices such as deportation, which are often viewed as morally legitimate, as forms of forced migration '*par excellence*' (emphasis in original).

1999: 101-107), there is a risk that political theorists – situated as they generally are in privileged surroundings far removed from zones of violence, war and displacement – may come to see these phenomena as abstractions, and therefore be willing to weigh the human costs of displacement against other moral considerations in a way which would not be tenable if they were to come directly into contact with these costs. The notion of 'justified harm' must fully reflect the moral evils of harm and suffering, even if the theorist is unable psychologically to grasp their full gravity.[130] This gravity is sufficient to create a strong presumption against the notion of justified displacement which can be overridden only by extremely weighty countervailing moral considerations. When presented with highly malleable grounds which, according to Stavropoulou (1994: 741), can legitimately restrict the right not to be displaced – such as 'national security' or the existence of a 'state of emergency' – we must take great care in delineating any such grounds. Consequently, setting the bar for justified displacement this high means that it will be very difficult, although not impossible, for states to cross that threshold.

Nevertheless, the possibility that such weighty countervailing considerations can at times outweigh the right not to be displaced and justify the harms of displacement can by no means be discounted, given the frequency with which both individuals and states face tragic situations in which human suffering will be the inevitable consequence of *any* act a state might undertake. Therefore, although displacement is difficult to justify, it is not the case that *any* instance of displacement will violate a deontological constraint by virtue of its very nature.

In order for any instance of displacement to be justified – whether it is brought about through war, a development project or any other action – I contend that two conditions must be met: (1) there must be an overriding moral reason or just cause for the

[130] As Jamie Mayerfeld (1999: 106) has beautifully put it, '[s]uffering, like the sun, is not something we can steadily behold. We must look at it, if at all, obliquely, in the form of its own reflection. We must rely for our image of it on fainter likenesses of itself, which serve as indirect testimonies of its nature'.

displacement; and (2) the displacement must be carried out subject to certain ethical constraints, to be specified later in this section. These two conditions correspond to a standard distinction made within just war theory between *jus ad bellum* (the justice of the resort to war) and *jus in bello* (the justice of the conduct of war). Within this theory, war is *ad bellum* just if there is a just cause; the war is initiated with the right intention and by a legitimate authority; the war is the last resort; there is a reasonable probability of success; and it is proportionate. In contrast, war is *in bello* just if its conduct respects the principles of discrimination and non-combatant immunity and is proportionate (Caney 2005b: 191-192). Weaving together these criteria of *jus ad bellum* and *jus in bello*, I now move to discuss the ways in which they may be satisfied.[131]

As David Rodin (2011: 74) has argued, harms may be justified in two distinct ways. First, harms may be justified because the agent harmed is specifically *liable* to be harmed; if, through their aggressive behaviour, self-defensive action which harms them is justified. Second, harms may be justified if they are the *lesser of evils*. How might the harms of displacement be potentially justified in these two ways?

Liability to the Harms of Displacement

Individuals may be *liable* for harm (such as that associated with displacement) if causing them this harm is the only way of preventing them from inflicting unjustified harm themselves. In Shue's words, 'those, and only those, engaged in efforts to harm others without justification may themselves be harmed to the extent necessary to prevent further unjustified harms' (Shue 2003: 743). According to Steven P. Lee (2012: 170), unjust combatants in war bear what he dubs 'threat liability', which he views as 'liability

[131] The test of formulating and justifying the precise criteria for *jus ad bellum* and *jus in bello*, and specifying the relationship between them, of course stretches well beyond the confines of this thesis. However, *whatever* the most justifiable conditions of just war may turn out to be, they would have to be fulfilled in order for displacement to be justified as part of such wars. In what follows, I focus on the criteria of just cause, necessity and proportionality.

to attack due to posing a threat of immediate and serious harm'. In consequence, the harms caused to members of an unjustly invading army by repelling and displacing them in self-defence do not constitute wrongs (Lee 2012: 77). In the same way as unjust combatants are, unlike civilians, not immune to attack, neither do they possess any moral immunity to displacement.

The Harms of Displacement as the Lesser of the Evils

The notion that displacing individuals who are innocent and lack threat liability can be justified is a more controversial one, and one which perhaps requires more elaborate justification. Blake (2013: 117), for instance, has recently argued that displacement of civilians could potentially be a legitimate element of a just war. He invites us to

> Imagine we are the authors of the perfect invasion…and are asked for help by one of those displaced by our military adventure….We might say to such a person: yes, we have caused you to experience an evil. This evil, however, results from a risk you would have accepted ahead of time, given the importance of the rights this invasion is designed to defend. We have, therefore, not done anything we ought not have done to you; you have been harmed by our action, but not wronged…

This justification could conceivably be offered to those displaced in the event of either a justified war of self-defence, or a justified humanitarian intervention. In making this argument, Blake implicitly draws on contractualist moral theory, espoused by philosophers such as T.M. Scanlon, which states that infringements of rights must be justified directly *to* those individuals whose rights are being infringed with, in Scanlon's phrase, reasons which they 'cannot reasonably reject' (Scanlon 1982: 119; Scanlon

1998).[132] Nevertheless, it is necessary to distinguish between two different cases which affect the strength of Blake's argument. If displacing a civilian is the lesser of the evils *for that person* – in that, say, they would be killed if they remained – then it will be harder for that individual to reasonably reject (presuming that they do not prefer death over displacement) than if the displacement of some citizens is necessary to rescue others and to bring about the greater good.[133]

Moreover, Blake does not indicate the conditions under which he would consider such displacement to be justified, and he does not break down the notion of just war into its constituent parts. In order to scrutinise Blake's claim, let us return to the two conditions which state that, for displacement to be justified, there must (1) be an overriding moral reason or just cause for the displacement; and (2) the displacement must be carried out subject to certain ethical constraints.

What kind of just cause is capable of justifying the displacement of innocent civilians? Given the typically severe harms of displacement, it appears that only an utterly overriding moral reason will do here. The only kind of military intervention which will qualify here, besides wars of self-defence, are what are often termed as 'humanitarian interventions', which are undertaken in order to protect the basic rights of citizens in other states who are suffering egregious harm in a 'supreme humanitarian emergency', such as mass killing, crimes against humanity or genocide (see Caney 2005b: ch. 7; Wheeler 2000: 34).[134] This is clearly what Blake (2013: 117) has in mind when he writes of the 'importance of the rights this invasion is designed to defend'.

[132] Scanlon's full formula reads as follows: 'An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced agreement.' (Scanlon 1982: 110).

[133] This raises the difficult question of what level of self-sacrifice an individual can be expected to bear for the greater good, which stretches beyond the scope of this thesis.

[134] J.L. Keohane (2003: 1) defines humanitarian intervention as 'the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied'.

Some see not only a *right* to engage in humanitarian intervention, but an *obligation* to do so, given the dire consequences of allowing atrocities to escalate unabated (Téson 2003: 97). Another candidate for a just cause for displacement is a development project which is genuinely the *only* available means of fulfilling the poorest citizens' basic socio-economic rights to the fulfilment of their vital subsistence and livelihood needs.

However, we might want to strengthen Blake's language in order to restrict the cases in which displacing individuals is morally justified to humanitarian interventions which respond only to egregious abuses. Indeed, such a restriction is vital in order to ensure that the intervention is proportionate to the end pursued. Such is the gravity of the suffering which war inevitably unleashes for both citizens of the war-torn country and the soldiers deployed to that country in terms of death, destruction, displacement and trauma that, for this suffering to be proportionate to the end pursued, the end must be extremely pressing, and restricted to heinous violations.[135] The threshold must be extremely high, lest the inevitable harms of displacement impose a cost that is simply too high for us to expect individuals to bear. No one should be expected to experience such a significant harm for the sake of *any* benefit, but only for overriding necessity.[136]

The existence of a just cause by itself clearly does not morally empower intervening states to bring about *any* displacement for that end in any way they choose, however. Here the criteria of *jus in bello* become highly relevant. While there has been much philosophical debate over the precise relationship between the requirements of *jus ad bellum* and those of *jus in bello* (e.g. Lee 2012: 98, McMahan 2012), it seems that the permissibility of measures during wartime are, in at least one respect, conditional on the

[135] As Nicholas Wheeler and Justin Morris (2006: 455) have argued, arguments in favour of the invasion of Iraq in 2003 problematically sought to lower this threshold, seeking to justify war in order to install a democratic system in Iraq when, although Saddam Hussein had met the threshold in the past, he did not on the eve of the invasion.

[136] Indeed, Blake's invocation of Scanlon's formula is problematic, for the imposition of excessive demands has been seen by Scanlon (1982: 119; 1998: 208-209) himself, and by others such as Nagel (1991: 38-39), as constituting a basis for reasonably rejecting a course of action.

justice of the cause. Nagel (1979a: 53), in his classic essay *War and Massacre*, considers that if a war is 'entirely wrong to begin with, then that engagement is incapable of providing a justification for *any* measures taken in its pursuit'. If the criteria of *jus ad bellum* are not fulfilled, then the unjust warring party should simply 'desist' from the military action (Shue 2003: 744), or refrain from it in the first place.

Even if a just cause *does* genuinely exist, however, then any displacement that is brought about in its name must satisfy certain stringent procedural criteria. While the principles of *jus in bello* have focused on attacking and killing civilians and have typically made no mention of displacement, displacement can also be seen as an important part of *jus in bello*, and the need to respect the putative right not to be displaced can be recognised as an important part of this element of just war theory.[137] If there are moral constraints on attacking and killing civilians in wartime, then there are also constraints on displacing civilians, not least because the killing of civilians can prompt survivors to flee in order to avoid the same fate, and unsuccessful attacks can also provoke displacement. The ordinary prohibition on attacking and killing civilians is rooted in the principle that innocents should not be harmed, which is a principle that can of course equally generate a similar prohibition on displacement. In short, we need to factor whether an intervention produces displacement into our overall evaluation of whether it is justified or not.[138]

Assuming that there is a just cause, then, all military operations which produce displacement must, in order to be *in bello* just, be both necessary and proportionate to that morally compelling end. These principles are already reflected in the provisions of international humanitarian law and certain international documents concerning

[137] Benjamin Banta (2008) and J. Bryan Hehir (2010) are seemingly rare examples of scholars whose work brings together just war theory and scholarship on forced migration.

[138] That, however, is not to suggest that *any* displacement under *any* circumstances will render an intervention unjustified, but rather that the occurrence, or lack of, displacement, needs to be taken into account when seeking to ascertain its justifiability.

displacement. For instance, Article 17(1) of the Second Additional Protocol to the 1949 Geneva Conventions states that '[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless…imperative military reasons so demand' (ICRC 1977: 320), while Principle 7 of the *Guiding Principles on Internal Displacement* recognises that 'prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether' (UN Commission on Human Rights 1998).

It is important to recognise that even an intervention which is motivated by a wholly just cause and is conducted impeccably is still almost bound to lead to *some* level of death, destruction and displacement, which is precisely what leads pacifists to conclude that war is morally impossible (Lee 2012: 88; see also Fiala 2008). In response to this reality, some theorists have drawn upon the doctrine of 'double effect' to justify collateral deaths (and, by extension, collateral displacement). According to this doctrine, an act likely to bring about civilian deaths is justified if (a) the act is good in itself; (b) the direct effect is itself morally acceptable; (c) the agent's intentions are good; and (d) the good effect is proportionate to the harm caused (Walzer 1977: 153). However, as Walzer has convincingly argued, the requirements of the doctrine of double effect are insufficiently stringent, for they would allow for the death or displacement of innocent civilians when this is wholly and reasonably foreseeable. We need a further requirement, which is that the military forces take all due care (Lee 2012: 157), even if this increases the risk to their own troops (Walzer 1977: 155).[139] Anything less than this constitutes negligence, or – if there is a complete absence of care taken – perhaps even recklessness.

[139] The First Protocol to the 1949 Geneva Conventions obliges signatory states to abide by the 'precautionary principles' such as taking 'constant care…to spare the civilian population, civilians and civilian objects' (quoted in Shue 2003: 739). Lee (2012: 218) describes this as the 'least harm' principle', which is the notion that 'the expected civilian harm must be minimized'.

Similar principles are at work when we consider the ethics of development-induced displacement and resettlement (DIDR). The huge number of individuals displaced by development projects in recent decades has prompted discussions of whether this kind of displacement can be morally justified. In these discussions, we find the moral equivalents of *jus ad bellum* and *jus in bello*: there must be a just cause for the development projects; that is, an overridingly important moral reason for the project, such as the alleviation of extreme poverty and the fulfilment of basic socio-economic rights, and there must be no viable alternative to realising these rights besides the displacement of some citizens. There must also be a just procedure leading to any displacement, including extensive consultation with those to be displaced and the achievement of informed consent from the would-be oustees (see Penz *et al.* 2011).[140]

There is one particular kind of case, however, in which the reverse moral conclusion seems to be reached: it is not that civilians should *not* be displaced, it is that they *should* be displaced *when this is for their own safety*. This kind of scenario is envisioned in Article 49 of the Fourth Geneva Convention, which states that 'the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand' (ICRC 2012: 167). Similarly, Walzer (1977: 191) considers that '…in a conventional war, removing civilians from a battlefield is clearly a good thing to do'. If a military force is fighting a war with a just cause, and bombarding a particular city is a necessary and proportionate means of bringing about that end, then the principles of discrimination and non-combatant immunity can compel them to evacuate civilians from that city before

[140] Something similar also holds for other practices which are not often considered within the remit of forced migration, such as deportation (see Gibney 2013a): there must be a just cause for the deportation (a genuinely overriding moral consideration which justifies the enforcement of immigration controls such as the protection of the welfare state or the security of a state's citizens), and the satisfaction of the requirements of procedural justice, with deportation only conducted after a fair and independent hearing, with all legal avenues exhausted.

commencing the bombardment.[141] Walzer (1977: 168) argues that '…in the direness of a siege, people have a right to be refugees. And then it has to be that the besieging army has a responsibility to open, if it possibly can, a path for their flight'.[142] However, this evacuation must be undertaken justly, with the harm minimised and, again in the words of the *Guiding Principles* in Principle 6, paragraph 3, 'last[ing] no longer than required by the circumstances' (UN Commission on Human Rights 1998).[143] Again, both *ad bellum* and *in bello* criteria must be fulfilled in such cases: there must be a just cause and a just procedure must be fulfilled. It is possible for a well-meaning evacuation to be morally botched, so to speak, such that refugees cannot return to their homes, are not provided with support or subsistence during their displacement, and so on. In such a case, even though *jus ad bellum* criteria might be satisfied, the harm would still in one way be unjustified. The converse is also true: an evacuation designed to protect civilians might be carried out impeccably from a moral perspective, but if there is no just cause to justify the bombardment in the first place, then the harm and anxiety inevitably caused by the evacuation will constitute unjustified harm.[144]

Given these requirements of *jus in bello*, a war may be wholly just in terms of its cause and its conduct *except* for the fact that displacement is produced in an unjustifiable manner, whether it is the result of a lack of proportionality, necessity or the consequence of negligence and lack of care and precaution. Therefore, although Blake is correct to

[141] It might be argued that an analytical distinction should be made between *evacuation* and *displacement.* Evacuations can, after all, be completely voluntary, whereas the notion of 'voluntary displacement' is somewhat oxymoronic. However, when a choice is presented to civilians between evacuation or death before a bombardment or siege by those who are about to carry it out, there is clearly a strong element of compulsion involved. Therefore, some – but not all – evacuations can be seen as forms of displacement.

[142] However, Walzer (1977: 168) also contends that, once a siege commander has given sufficient opportunity for inhabitants to leave, 'the offer of free exit clears him of responsibility for civilian deaths'.

[143] Moreover, Article 17(1) of the Second Additional Protocol to the 1949 Geneva Convention states that, '[s]hould…displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition' (ICRC 1977: 320), while Article 49 of the Fourth Geneva Convention stipulates that '[p]ersons…evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased' (ICRC 2012: 167).

[144] I briefly discuss the displacement resulting from, and the other effects of, the siege of Fallujah in Iraq by the US in 2004 in Chapter 6.

point out that displacement may at times be carried out justifiably, we need to pay closer attention to the conditions which need to be fulfilled in order for it to be just, and to recognise that refugee-producing interventions may fulfil *some* of the criteria of justice, while failing to fulfil others.

Justified Harm and the Obligation to Offer Reparation

Having outlined some of the ways in which displacement may potentially be justified, I now turn to the question of whether the justice or injustice of a refugee-producing intervention affects the subsequent obligations of the intervening state towards those refugees. According to the general principle of reparation that I have proposed, provided that the intervening state bears outcome responsibility for the production of refugees, the answer is unequivocally in the affirmative, for it states that reparation can be owed even in the absence of wrongdoing. However, recalling that the principle of reparation is only presumptive and may not invariably hold in every context, there is reason to ask whether the specific context within which the justified creation of refugees would occur might affect the applicability of reparative justice to it. Although Carens (2014: 17) may be correct in arguing that recognising 'a moral responsibility to find homes and permanent solutions for refugees who have had to flee their homes because of our actions…should have nothing to do with whether one supports or opposes these wars', the justice or injustice of such wars may turn out to have a bearing on states' reparative obligations to refugees.

In the foregoing discussion, I identified three potential cases in which displacement might be justified: (a) as part of a fully justified humanitarian intervention; (b) as part of a justified war of self-defence; and (c) as part of a justified programme of development-induced displacement. Setting aside the latter on the grounds that development-induced displacement very often occurs internally and so does not always

trigger reparative obligations on the part of external states, in what follows I consider the first two cases; asking whether, as my general principle of reparation would presume, the refugee-producing states owe reparation to refugees despite the fact that they acted justifiably, or whether there are other moral considerations or contextual factors that justify a departure from this principle.[145] It is worth reiterating at this point that, given the difficulty of meeting the threshold for the justified production of refugees, the following cases are very likely to be hypothetical. Nevertheless, they are important to consider as part of an overall theoretical effort to specify some of the most salient circumstances in which the obligation on the part of external states to offer reparation to refugees may hold or not hold.

Justified Humanitarian Intervention

Some theorists have in effect adopted the narrow, wrongdoing-based conception of reparation in their discussions of states' special obligations towards refugees they have created. Indeed, Blake (2013: 118) concludes his imaginary justification, quoted earlier, to a refugee generated by a just military intervention by writing

> We have not…done anything we ought not have done to you; you have been harmed by our action, but not wronged. As such, we do not owe you now any more than any other state. *All* states able to help you now fall under a duty to provide aid. Our responsibility to you is no greater than any other national government. We ought to provide our fair share of material support for the shared project of helping your plight. This project, however, remains shared; the burden of aid is not exclusively ours (emphasis in original).[146]

[145] In the following discussion, I set aside the issue of exactly how it would be ascertained, either theoretically or in practice, whether or not any given instance of displacement was justified, beyond the criteria of *jus ad bellum* and *jus in bello* discussed in the previous section. Instead, I enquire as to, *however* the justice or injustice of displacement is ultimately determined, whether the justice or injustice of a refugee-producing intervention affects the intervening state's obligations to those refugees.

[146] Banta (2008: 280) expresses a similar sentiment: 'It is clear that displacements often fall into the category of a "hardship of war", especially in cases of classic self defence or interventions done justly. In those cases the international community will and should undertake the bulk of responsibilities toward any ensuing displacements'.

While I agree with Blake, for reasons to be specified shortly, that in the case of a justified humanitarian intervention any refugees created by it would not be owed reparation by the intervening state, I do so not because I also adhere to the narrow conception of reparation but rather because the international context in which a justified humanitarian intervention would take place limits the applicability of the broad conception of reparation that I generally endorse to this kind of case.

Some of the cases – such as Feinberg's famous backpacker – used by theorists to argue in favour of a broad conception of reparation pertain to the interpersonal, domestic level. However, it should not be assumed that reparative justice in the domestic sphere will necessarily or automatically carry over to the international level (Butt 2009: 52). Whereas Feinberg's backpacker is an isolated individual who finds himself unable to communicate with the cabin's owner whose property rights he goes on to infringe, the international context in which humanitarian interventions may be conducted and refugees are produced and protected has very little in common with this scenario. Whereas, as Lomasky (1991: 36) has commented, the backpacker infringes another's rights out of his *own* '*commanding* interest' (emphasis in original), states bear a *collective* responsibility to uphold the basic human rights of the world's population. In a similar way as Carens (2013: 195) and Owen (2011) have argued that the legitimacy of the international state system hinges in part on the provision of an institution of asylum for those who are unprotected in their states of origin, it can be argued that the international state system is legitimate only insofar as it protects basic human rights more generally. In the same way as efforts are made to create so-called 'burden-sharing' systems to fairly allocate the costs of hosting refugees among states, the burdens of human rights protection need to be shared, and the collective obligation to uphold human rights distributed equitably. In contrast to Feinberg's backpacker, who acts without being observed by anyone else,

states' foreign policies and asylum systems are observed and monitored by other states and international organisations, and may become the subject of heated diplomacy.

This normative context within which states operate suggests why the broad principle of reparation should not be applied in the case of refugees generated by a justified humanitarian intervention. If a state undertakes a justified humanitarian intervention in order to make up for the shortcomings of a particular state then, given the collective responsibility to uphold human rights, it does not act purely for itself, as the backpacker does, but rather *on behalf* of the international society of states as a whole. Indeed, this idea appears to be implicit within the idea, enshrined in the preamble to the UDHR, that some human rights abuses are so grave as to 'outrage the conscience of mankind' (quoted in Ghandhi 2006: 20): they give every state, and indeed any individual, a reason to try to stop them if they are capable of doing so.

This immediately has implications for how the burdens of human rights protection should be distributed. If a state undertook a fully justified humanitarian intervention which, say, averted terrible atrocities yet unavoidably produced thousands of refugees in the process, while other states chose not to involve themselves, then applying a broad principle of reparation and enjoining the intervening state to protect the refugees it created would produce highly unfair results. The state which acted on behalf of the international society of states incurs further obligations as a result of its justified actions. Meanwhile, other states which chose not to join the intervention need not, despite their part in the collective responsibility to uphold human rights, bear any of the costs. This would set up the perverse incentive of encouraging a reluctance or refusal to engage in justified humanitarian interventions, given that such an engagement would bring in train yet more potentially onerous obligations. Indeed, as Walzer (2004: 20-21) has written more broadly,

> Imagine a humanitarian intervention that ends with the massacres stopped and the murderous regime overthrown; but the country is devastated, the economy in ruins…The forces that intervened did well, but they are not finished. How can this be? Is the price of doing well that you acquire responsibilities to do well again…and again? The work of the virtuous is never finished. It does not seem fair.[147]

In cases of a genuinely justified humanitarian intervention, then, the costs of that intervention should be shared and not borne by the intervening state alone. However, it can be argued that, if the other states refuse to discharge their share of the collective responsibility to uphold human rights by protecting refugees produced as a by-product of a justified humanitarian intervention, *then* the broader principle of reparation that I have proposed in this thesis should be engaged, and the intervening state should take up the slack. Given the need to protect the refugees' basic rights, remedial responsibilities towards them have to be distributed on other grounds; with the outcome responsibility of a particular agent foremost among these.

Justified Self-Defence

The issue of whether reparation is owed to civilians displaced as part of justified wars of self-defence is complicated somewhat by the fact that there is not one single scenario in which a self-defending state might justifiably create refugees, but rather many and various permutations, the comprehensive discussion of which stretches far beyond the scope of this thesis. A self-defending state might, for instance, inadvertently displace *its own citizens* while repelling an aggressor; or the self-defending state might launch a justified counterattack into the aggressor's territory, which leads to a minority being persecuted for its perceived collaboration with the self-defending state.[148] In what

[147] Nevertheless, Walzer (2004: 21) goes on to assert without argument that, despite this appearance of unfairness, this is an 'accurate account of the distribution of responsibility'.
[148] I am grateful to Matthew Gibney for suggesting this possibility.

follows, I focus on the possibility that a state might, in defending itself, justifiably cause citizens of the aggressor state to flee, say, during a counterattack.

It might initially be thought that, unlike the potential case of justified humanitarian intervention, the broad principle of reparation proposed in this thesis *does* hold in cases of justified self-defence and, given that the self-defending state is acting to secure its own vital interests, it should be the one to bear the costs of its actions, even if they are justified. Nevertheless, this line of thought would ignore the fact that it is highly questionable that the self-defending state bears outcome responsibility for the refugees it inadvertently created in the first place. It is far more plausible to suggest that it is the *aggressor* state which bears outcome responsibility for the displacement. Recall that, for a war of self-defence to be *in bello* just, all actions within it must be necessary and proportionate, and the creation of refugees would have to have been utterly unavoidable. If it were unavoidable, then the self-defending state was, given the aggression of another state, effectively forced into a choice: either it can defend itself and create refugees; or it can choose not to defend itself and be overrun by the attacker. Given that the right to self-defence is often seen as an elementary one, it would be difficult to plausibly argue that the state under attack should not defend itself to avoid the creation of refugees. The attacked state has been forced into the horns of this dilemma, and consequently it should not be held outcome responsible for the production of refugees in the first place. Rather, outcome responsibility lies with the aggressor who placed the attacked state in that dilemma to begin with.[149] Just as someone who justifiably kills an attacker out of self-

[149] In what may in some respects be an analogous scenario on the interpersonal, domestic level, Miller (2007: 92) invites us to imagine that

> …a bank robber holding a sawn-off shotgun tells the cashier to open the safe…let us suppose that A's threat is to kill P and that A is certain to carry this out. Then let us ask what B has control over. She cannot bring it about that the money remains in her safe keeping while P stays alive. She can choose between keeping the money and seeing P killed, or handing over the money and saving P's life. So if she decides to hand over the money, she is not outcome responsible for

defence is not outcome responsible for that killing and thereby does not owe reparation to the attacker's family who is devastated by their loss, a state which can only defend itself by creating refugees does not bear outcome responsibility for the displacement it caused.[150]

Let us assume for the sake of argument, however, that a convincing objection to this argument is found, and that the self-defending state *can* indeed be seen as bearing outcome responsibility for the refugees it justifiably generates after all. Even if this were the case, it would nevertheless be doubtful that they would be acting only for themselves, and that they should therefore bear the costs of their actions. At the risk of unnecessarily complicating matters, there are two distinct potential cases in which a self-defending state might be said to be acting on behalf of either some other states, or the international society of states as a whole, such that the costs of the intervention should be shared, and that it would be unfair to impose them entirely on the self-defending state.

First, in some cases the aggression of a particular state can have serious ramifications for international stability and security, either on the regional or global levels. In such cases, the self-defending state would be defending itself not purely for its own good, but also acting on behalf of the other states which would be adversely affected by the act of aggression. In some cases, the defeat of the aggressor state may constitute an international public good. As such, the same considerations of fairness which would arise in the case of justified humanitarian intervention may also arise in the case of justified self-defence.

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losing the money *per se*, but only for bringing about one outcome (money lost + P saved) in preference to another (money saved + P killed).

Similarly, the self-defending state would have been forced into a choice between one outcome (defending itself + creating refugees) and another (forfeiting its self-determination + not creating refugees).

[150] I am indebted to Blair Peruniak for this analogy.

In a second kind of case, however, let us assume that the aggression of a particular state genuinely is of importance only for the state under attack. We could envisage the invasion of a remote island state that is of little strategic or geo-political importance. If we can argue that a self-defending state is only acting for itself and should therefore bear the costs of its actions in any case, it will be in this kind of scenario. However, perhaps even here there is a case to be made that the same considerations of fairness militate against an assignment of refugees created to the self-defending state. This is because, even in this kind of case, the self-defending state would not be acting purely for itself, but would be upholding the norms of self-determination and state sovereignty that are constitutive of the international regime. Just as the grave violation of human rights gives each state a reason to act to stop them, the status of the right to self-determination and state sovereignty as a '*grundnorm*' of the international society of states (Owen 2011) arguably means that a state acting to uphold it is not acting purely for itself, but on behalf of the international order.

Whereas this exploration of whether states bear reparative obligations towards refugees whom they justifiably displace has led us into markedly abstract and hypothetical territory, it serves as something of a vindication of Miller's contextualist approach to political theory that I outlined in the introduction, by showing the need to attend carefully to the context in which a principle is being applied, rather than assuming that it can be smoothly transplanted from one context to another. While I believe that most cases of displacement will be unjustified in one way or another, especially if the threshold for a justified intervention is set as high as I favour, I hope in this chapter to have shown how the context in which reparative claims are deployed can strongly affect their applicability.

Chapter 5: Reparative Fittingness and Capability

Taken together, the third and fourth conditions are that, for asylum to be owed to a refugee, asylum must be the most fitting form of reparation for that refugee that is available to the state bearing outcome responsibility for causing him or her unjustified harm, and that the state must be capable of offering asylum as reparation in the first place. While I discuss the third and fourth conditions separately in this chapter, I shall argue that the latter has implications for the former, for there may be cases in which a responsible state's limited capability means that only some forms of reparation, which are less fitting than asylum, may be available to it.

The Reparative Fittingness of Asylum

The third condition – that, for a state to owe asylum as reparation to a refugee, asylum must be the most fitting form of reparation for the unjustified harms suffered by that refugee that is available to that state – presupposes, as I observed earlier, the clear concession that asylum is not necessarily and invariably the most fitting form of reparation for these harms. This is not altogether surprising, given that asylum is, after all, as Price (2009: 12) has put it, 'just one of many ways to help refugees'.[151] If, from a range of available reparative measures within the 'refugee policy toolkit' (Price 2009: 12), a state chooses to provide a refugee with anything short of the most appropriate form of reparation available, it is not fully discharging its special obligation to him or her.

It might be thought that this notion of reparative fittingness should include concern for whether the reparation provided is proportionate to the gravity of the harm

[151] Similarly, Miller (2013b: 37) has contended that 'particularity claims' advanced on the part of would-be entrants, such as those based on reparation, 'often carry considerable weight, but do not always translate into rights to immigrate'.

caused.[152] This notion of proportionality appears to be deeply embedded within the concept of reparation, for it would seem unfair for an individual who has been harmed only mildly to receive a more substantial form of reparation than an individual who has received a greater harm. Using this principle of proportionality, it could be argued that if the harm caused by a state in turning someone into a refugee happened to be limited, then asylum would effectively be too generous a form of reparation to offer, and that a form of reparation falling short of full asylum, such as material or monetary compensation, would be more proportionate and therefore most fitting.[153]

Nevertheless, I have chosen not to build the notion of proportionality into the concept of reparative fittingness. This is because, given that the unjustified harms of displacement often entail gross violations of human rights, they typically are sufficiently severe to render proportionality unattainable, even if the relatively 'munificent' act (see de Greiff 2006: 12) of providing asylum in the rich 'North' is undertaken.[154] As Bradley (2013: 1) has put it, '[c]ertain crimes are beyond the reach of repair' and 'many of the violations that force refugees from their homes count among those injustices for which it is impossible to truly make amends'. If this is the case, then even the most generous form of reparation possible will fail to be fully proportionate to the gravity of the harm inflicted on refugees.

[152] Indeed, this principle has been incorporated into the reparations framework, for the United Nations General Assembly (2005) has declared that reparation 'should be proportional to the gravity of the violations'.

[153] This notion of proportionality to the *gravity of harm suffered by a refugee* should be clearly distinguished from the notion of proportionality to *the degree of states' causal and outcome responsibility for displacement* that I discussed in Chapter 3.

[154] I owe this point to an anonymous reviewer for *Political Studies.*

Reparative Alternatives to Asylum

It might be argued, contrary to the thrust of this thesis, that asylum is in fact often a fairly poor candidate for being the most fitting form of reparation that is available to states for the harms of displacement, and that other measures – such as voluntary repatriation and *in situ* interventions – can be far more fitting means of making amends for these harms. Whereas 'completeness' is a desideratum for any reparations programme – which de Grieff (2006: 6) defines as 'the ability of a program to cover, at the limit, the whole universe of potential beneficiaries' – the dominant Western model of asylum, which encompasses only refugees who have fled to another state, is incapable of achieving this completeness alone, and must be supplemented by other reparative programmes in order to do so. Indeed, a number of biases and weaknesses within this model have been identified, not least an exilic or 'expatriate bias' alongside a 'proximity bias' (Price 2009: 164). By protecting only those able to reach another state, this model arguably offers protection somewhat arbitrarily, creating unfair gendered, generational, disability and class dimensions to asylum, as many refugees able to flee are young, 'unencumbered', able-bodied men able to pay smugglers' fees (Gibney 2000: 315-316; 2013b). This is without mention of the fact that asylum remains largely restricted to those who are deemed to have demonstrated a 'well-founded fear of persecution' under the 1951 Convention. In short, using asylum in its current operation alone as a form of reparation will deny many refugees the redress to which they are strongly entitled.

Asylum may also create morally undesirable side-effects, which strongly limit its potential as a fully fitting form of reparation. While playing the morally important role of offering immediate protection to individuals in dire need, this can come with sometimes heavy costs to refugees' states of origin and those who stayed behind. For instance, a generous asylum policy may, as I briefly discuss in relation to Iraqi refugees in Chapter

6, deepen a devastating 'brain drain', in which the professional classes required for post-conflict reconstruction become absent from a state (Sassoon 2009: 140).[155] If asylum is offered to those fleeing ethnic cleansing, as in the case of refugees fleeing the Balkans to other European states throughout the 1990s, then that may reinforce the process rather than reverse it.[156] Similarly, as the discourse on the 'root causes' of displacement within the UN system during the 1980s would emphasise (see Stavropoulou 1994: 706-717), asylum can also be faulted for playing a merely 'palliative' role (Price 2009: 7), and for leaving the structural causes of forced displacement intact. Some have also objected that grants of asylum may undermine efforts at local reform by citizens, through a loss of activists who claim asylum (e.g. Martin 1991: 44).

It might be thought that consideration of such morally undesirable side-effects of asylum are, strictly speaking, not relevant to the question of whether asylum is or is not the most fitting form of reparation for refugees in any given case. However, as Tan (2007: 291) has argued, one of the conditions a reparations claim must fulfil in order to be valid is that 'the reparations demanded can be offered without incurring further injustices'. If grants of asylum unintentionally create unjust side-effects, then they can affect its ability to offer a fitting form of reparation.

In contrast to these weaknesses of asylum, voluntary repatriation might seem like a far more promising candidate as the most fitting form of reparation for the harms of displacement.[157] As I noted in the introduction, the reparative potential of voluntary

[155] This objection is one which has often been made to refugee resettlement in general (Milner 2005: 523).
[156] Weiner (1998: 449-450) sees asylum's potential role in entrenching ethnic cleansing as a strong 'clash of norms' given that, *however* external states respond to those fleeing such ethnic cleansing, morally undesirable side-effects will occur: whereas offering asylum may entrench the effects of ethnic cleansing, withholding asylum in order to avoid this outcome may lead to the refugees' deaths or to their 'indefinite confinement' in camps.
[157] As I have argued elsewhere, all three 'durable solutions' – of voluntary repatriation, third-country resettlement and local integration – can potentially be fitting forms of reparation for the unjustified harms of displacement (Souter 2014b). However, I restrict my attention in this thesis to the potential reparative fittingness of voluntary repatriation, given that I see the other two durable solutions of resettlement and local integration to be forms of asylum in themselves. As I argued in Chapter 1, resettlement can be seen as

repatriation has been explored in depth by Megan Bradley (2013: 44), who views a 'just return' as in itself possessing a reparative function, by 'put[ting] returnees back on an equal footing with their non-displaced co-nationals'.[158] Bradley (2013: 40) largely focuses on what she calls 'paradigmatic cases', in which 'the state of origin is causally and morally responsible for displacement'. It is in these cases that voluntary repatriation can most obviously act as a form of reparation for refugees. However, voluntary repatriation can also act as a strong form of reparation even if *external* states bear primary responsibility for those refugees' flight. If a state wreaks havoc in another state through a military intervention, then it may provide reparation to those who fled that havoc by offering assistance with reconstruction or development, and thereby paving the way for their safe, sustainable and voluntary repatriation.[159]

It is not just asylum that, as I argued in Chapter 2, can function as a form of restitution, compensation and satisfaction, for voluntary repatriation can also fulfil exactly these functions.[160] Indeed, voluntary repatriation can arguably act as a stronger form of restitution for refugees than asylum, given that it often involves, as I also observed in Chapter 2, the restoration of refugees' basic human rights *within the same state in which they once enjoyed them*, unlike asylum, which offers a more limited form of restitution by offering this basic rights protection only in *another* state. Indeed, the

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a form of asylum that differs from asylum's current operation only in respect of the way it is accessed and its duration. Although asylum is not permanent and differs from local integration, the former can be a clear pathway to the latter for many refugees.

[158] Similarly, Long (2013: 174-175) conceives of an 'ethical repatriation' in terms of a re-making of the social contract between refugees and their states of origin.

[159] Furthermore, given that reparations and other transitional justice measures can contribute to the conditions that allow for voluntary repatriation or other durable solutions (see Duthie 2012b), then the external states responsible for refugees' flight may bear a further subsidiary responsibility to offer and facilitate reparations programmes in refugees' states of origin, such as property restitution, the criminal prosecution of perpetrators, truth-telling exercises or compensation. In short, specific reparations may have to be offered within a state of origin for voluntary repatriation to operate reparatively in itself. Such forms of reparation and voluntary repatriation may be mutually reinforcing, for the reconciliation, however minimal, which may result from reparations allows for voluntary repatriation to be more sustainable, while voluntary repatriation may increase access to, and participation in, other reparations efforts in refugees' states of origin (see Bradley 2012b).

[160] Indeed, the UN Reparations Guidelines views both 'citizenship' and 'return to one's place of residence' to be potential forms of restitution (UNGA 2005).

greater the ability of voluntary repatriation to restore the *status quo ante*, by allowing refugees to regain their particular homes, properties and assets, and resume their lives prior to their displacement, the stronger a form of restitution it is. Thus, as Long (2012: 369) has commented, 'the righting of the wrong of involuntary flight can arguably only be achieved through return, rather than resettlement', while Miller (2013b: 34) has suggested that, '[s]ince the purpose of reparation is to return the victims as nearly as possible to the position they would have been in had the wrongful event not occurred, it is better to try to rectify the situation on the ground than to move them to entirely new surroundings'.[161]

Voluntary repatriation – if it is conceived more broadly as the renewal of the relationship between a state and citizen which does not necessarily entail physical return to that state's territory (see Long 2013: ch. 9) – may also provide restitution, even if the refugee decides *not* to return physically, but rather to continue residing elsewhere. In such a scenario, a refugee would regain effective citizenship in their state of origin, but would choose not to avail themselves of the right to residence in that state that forms part of such citizenship.

In addition to offering restitution, voluntary repatriation can also act as a meaningful (although not necessarily sufficient) form of compensation given that, by re-admitting a refugee back into the fold of its political community, the refugee's state of origin re-grants him or her access to the same goods and services that are available to his or her compatriots. If a refugee's voluntary repatriation involves physical return, as has been traditionally assumed, then the state of origin (or external states, for that matter) may be in a better position to offer additional forms of compensation for their flight, such

[161] Restitution through voluntary repatriation has been assumed to be the optimal form of redress for the harms of displacement in documents such as the *Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons* (see Bradley 2013: 83) and within return policy in Bosnia-Herzegovina following its conflict in the 1990s (Williams 2012: 92).

as family reunification, or specialist psychological support, as part of an overall reparative process.[162]

Voluntary repatriation may also constitute a strong form of satisfaction for refugees, especially if it is accompanied by acknowledgement and apologies of the abuses that led to their flight in the first place. This symbolic aspect of voluntary repatriation can be strengthened in conjunction with other initiatives aimed at achieving satisfaction for refugees in their states of origin, such as trials or truth-telling exercises (see Bradley 2012c).[163]

In order to create the conditions in which refugees can access the restitution, compensation and satisfaction that can flow from voluntary repatriation, external states may undertake *in situ* interventions. As several theorists have argued, offers of asylum are only one means of discharging, or are but one manifestation of, a more general duty to protect refugees. Rather than waiting for refugees to come to them, so to speak, *in situ* interventions take assistance directly to the refugees, thereby increasing the likelihood that all will receive assistance who are in need of it and avoiding asylum's exilic and expatriate biases.[164] Such interventions also seek to tackle the problem at source, in contrast to asylum's merely 'palliative' function (Price 2009: 7). These theorists argue that this duty may potentially be fulfilled through the creation of safe havens, such as that carved out for the Kurds in northern Iraq in 1991; the provision of humanitarian aid to states neighbouring refugee-producing countries that have faced an influx of refugees (whether directly, or through contributions to UNHCR); or even military intervention to

[162] As Megan Bradley and Roger Duthie (2014: 163) have noted, viewing durable solutions such as voluntary repatriation as potentially possessing reparative value could shift help to the focus away from reparations as 'one-time actions, such as the offering of apologies, or the provision of lump-sum compensation', to 'consider a longer-term reparative act that may truly revolutionize refugees' daily lives'.
[163] That being said, it is important not to engage in what Bradley (2012b: 2) herself has described as the 'idealisation of return as a manifestation of reconciliation', given that repatriation may occur while the precipitants of refugees' original flight, such as enmity between different groups within the state, still persist.
[164] Seglow (2005: 329) captures this thought by stating that 'it is better to shift resources to people, rather than permitting people to shift themselves towards resources'.

topple the regime that is responsible for the production of refugees in the first place (see Miller 2007: 225; Price 2009: 77-78; 164). Wellman (2008: 129) has even argued that 'exporting justice' may be a defensible alternative to grants of asylum.

Nevertheless, while remaining cognisant of asylum's current reparative limitations and voluntary repatriation's reparative strengths, it is important to acknowledge that there are circumstances in which asylum is genuinely the more fitting form of reparation for refugees. This is so for several reasons. First, it is important to maintain a distinction between asylum as it is *in its current operation*, and asylum *in its most normatively desirable form*, and to recognise that reforms to current asylum systems could realise asylum's untapped reparative potential. Certainly, asylum's current operation leaves many refugees unprotected and is skewed in favour of some over others. Yet a strong case can be made, not only for broadening eligibility for asylum beyond persecution but, as I indicated earlier, also for including resettlement, broadly construed, within our understanding of asylum. This inclusion has the strong potential to counteract asylum's exilic and expatriate biases, and to thereby strengthen asylum's reparative capacity. While resettlement is currently viewed as discretionary and operates on a small scale (Carens 2013: 197), with states being criticised for 'selecting the "best and the brightest" refugees' (Pressé and Thomson 2007: 49), an expansion of such programmes according to the criterion of need rather than desirability would allow those least able to flee to secure asylum as reparation.[165]

Moreover, despite the strong ability of voluntary repatriation to offer restitution to refugees, there are some circumstances in which voluntary repatriation would clearly be an unfitting form of reparation. This would be the case if the *status quo ante* itself were

[165] It should also not be assumed that asylum or voluntary repatriation are mutually exclusive forms of reparation for refugees, given that asylum often functions as an interim measure, while voluntary repatriation is a 'durable solution'. For the contention that 'there is an inextricable connection between respect for asylum and sustainable return', see Long (2013: 231).

unjust, for there is no sense in restoring the very injustices that led refugees to flee in the first place as a purported solution for them (Bradley 2013: 188-189). Moreover, it is not only asylum that can have morally undesirable side-effects, for using voluntary repatriation as a tool for achieving restitution could have the consequence of displacing secondary occupants who may have developed genuine property rights over the course of their extended residence, such that exact restitution would precipitate a fresh cycle of displacement (Adelman and Barkan 2011: 231). It is, furthermore, imperative to recognise that repatriation can only constitute a fitting form of reparation if it is *voluntary*. In itself, as Long (2013: 27) has recognised, 'repatriation has very little intrinsic liberal content at all', and must seek to reconcile the tensions it embodies between liberalism and nationalism in order to act as a fitting form of reparation for refugees.

The idealisation of voluntary repatriation as the optimal form of reparation for the unjustified harms of displacement is also problematic given its presuppositions concerning the nature of home, and the aim of durable solutions and reparation to be the cessation of movement and the resumption of residence where refugees 'belong'. Indeed, it is not only asylum that possesses biases, for the prioritisation of voluntary repatriation involves a 'sedentarist bias', which assumes that refugees and migrants have a static conception of home and that reparation for the harms of displacement will involve a return to it (see Warner 1994).[166] As I discuss later, refugees themselves may not view voluntary repatriation as the most fitting form of reparation, and may prefer a more mobile solution to their displacement.

Furthermore, there are grounds for doubting whether *in situ* interventions can function as fully fitting forms of reparation. If they do have reparative value, such

[166] This notion of a sedentarist bias appears in literature which critiques the characterisation in the development world of movement as a problem to be curbed (e.g. Bakewell 2008), and is drawn on by Katy Long (2010: 5; 2013: ch. 9) in her recent work on durable solutions and mobility.

interventions are better seen as a *means* to reparation in the form of voluntary repatriation, rather than as a form of reparation in their own right. Indeed, considered alone, such interventions have a rather low reparative capacity. This is so for three reasons. First, while such aid may provide temporary subsistence to those displaced, it is unlikely to constitute a durable solution which ensures the effective protection of refugees' fundamental rights.[167] Second, as de Greiff (2006: 470) has argued, 'development programs have a very low reparative capacity, for they do not target victims specifically'. Their aim of meeting basic needs, he suggests, means that such programmes are better seen as attempts to fulfil their minimal socio-economic rights as citizens, rather than specifically as victims. Third, on a practical level, just as asylum in its current operation does not cater for all refugees, likewise there will for the foreseeable future be refugees who are not covered by refugee assistance programmes and have to claim asylum on another state's territory instead.[168]

There are also grounds for being highly sceptical of the reparative potential of states' financial contributions to UNHCR. First and foremost, such contributions are unlikely to be targeted only, or even principally, at those refugees towards whom a state bears a reparative responsibility. This is not a problem that could be wholly resolved through the earmarking of funds for specific refugee populations, for some refugees within that population are likely to be owed reparation, but not others. Second, given UNHCR's non-political mandate (however political its activities may be in practice), such contributions communicate no explicit recognition of responsibility, and so do not constitute a form of satisfaction. In order to have an expressive function as a form of

[167] As Gil Loescher (2001: 18) has discussed, UNHCR's expansion into humanitarian work may have weakened its role in ensuring legal protection. While it may be true that 'since material assistance is often essential for refugees' survival, it can also be a sine qua non of international protection' (UNHCR 1994: 9), this suggests that humanitarian assistance is a necessary but insufficient condition for protection.

[168] For instance, UNHCR (2010: 3) claimed to provide 'protection or assistance' to 26 million people in 2009, of a total worldwide population of 43.3 million forcibly displaced people.

satisfaction, the contributions would have to be accompanied by statements which identified the contributions as an intended form of reparation. Lastly, the impact of such contributions on any single refugee is likely to be fairly diffuse, and is unlikely in itself to make the difference between protection or a durable solution on the one hand, and danger and continued limbo on the other, given that the funds might be channelled into overheads, or areas of UNHCR's work such as advocacy which, while indirectly contributing to *eventual* refugee protection, is not decisive in achieving it for any one refugee, and with no guarantee in advance that it would achieve it for a refugee for whom the contributing state bears outcome or moral responsibility for their flight.

Asylum also has one general reparative advantage over both *in situ* aid and military intervention: while these alternatives tend to be long-term and indirect in their effects, with military intervention often causing short-term instability and exacerbating or creating further refugee crises, asylum can *immediately* provide protection and rights to those displaced (despite, of course, not being a full substitute for this kind of long-term remedy). As Wilcox (2007: 285) puts it,

> …all too often, one society creates [human rights] deficit-producing conditions in another country that cannot be quickly or easily remedied. If these conditions cannot be rectified before additional benefits are produced, then resettling the individuals at risk is the only way to avert the imposition of these human rights deficits.

Military intervention is also far more morally risky than granting asylum, for human error, as well as the pressures and horror present even in just wars, are likely to produce at least some fresh injustices and atrocities which will then in turn require reparation in themselves. Drawing on de Greiff's distinction between 'reparations in their strict sense, and the reparative *effects* of other programs' (de Grieff 2006: 471, emphasis added), while aid may be reparative in effect, it does not itself constitute a strong form of

reparation. Regarding attempts at 'exporting justice' (Wellman 2008: 129) as an adequate reparative alternative to asylum must, therefore, be viewed with caution.

The Conditions of Reparative Fittingness

As I hope the above discussion makes clear, any attempt to see one or another form of refugee protection as *generally* or *intrinsically* more reparatively fitting than another is vulnerable to counter-examples. Voluntary repatriation may offer a robust form of restitution but, then again, its fittingness may equally well be undermined by, among other things, the rights of secondary occupants. *In situ* interventions may tackle the underlying drivers of displacement, but they cannot easily fulfil refugees' immediate need for basic human rights protection. Asylum in its current operation excludes refugees who cannot flee their own states under their own steam, but it may nevertheless, as I discuss shortly, be regarded by refugees as the most fitting form of reparation available to them. In the remainder of this section, I shift to the task of identifying the conditions under which one or another form of refugee protection is most reparatively fitting. While the particular answer to this question will of course vary from case to case, in this section I seek to identify some broad criteria which can provide guidance in any given situation.

The first and most obvious consideration is the question of which state is responsible for the flight of any given refugees. As I asserted in Chapter 2, reparation, in the sense of interest here, can only be offered by the actors who bear outcome responsibility for unjustified harm. Having also recognised in Chapter 3 the fact that responsibility for forced migration lies with both refugees' states of origin and with external states, it might be tempting to seek to match the state which bears responsibility for a refugees' flight with a particular form of refugee protection. The seemingly obvious

way of undertaking such matching would be to claim that, if it is refugees' state of origin which is primarily responsible for their flight, then voluntary repatriation is most reparatively fitting, and that, if the refugees' state of asylum is primarily responsible, then asylum is most fitting.

There may indeed be cases in which this kind of matching exercise is justifiable. Equally, however, there are other cases in which other considerations can cause us to depart from this somewhat simplistic procedure. The question of which state bears responsibility for the flight of refugees is only one, albeit central, consideration for determining which durable solution should be offered reparatively. Even if this form of matching does turn out to be justifiable, this will only be because the other considerations which should be taken into account also point to that conclusion. These considerations are, as I shall now argue, the *refugees' choice*, their *location and social ties*, and their *sense of group identity*.

Refugees' Choice

Some theorists do not merely argue that states may discharge their duties to refugees in various ways besides the provision of asylum, but also contend that such states should have substantial discretion in deciding how to discharge them. Miller (2007: 226), for instance, sees refugees' choice of protection as just one factor which can be outweighed by a number of more state-centric considerations. Others contend that, instead of giving refugees a choice over the protection they will receive, asylum should be used only as a 'last resort' (Gibney 1986: 85).[169]

[169] Price (2009: 180) lays out what he calls the '*in situ* principle', that '[a]nyone who can receive help in his or her state of origin, or in camps along the border, ought to be helped there rather than abroad' (emphasis in original), while Wilcox (2007: 285) considers that '[i]deally, a society will stop its deficit-producing conflict and compensate victims in their own communities'. This view is mirrored in jurisprudence on

In contrast to these positions, I believe that refugees' choice is a key consideration when seeking to determine the most fitting form of reparation for them.[170] This choice should be both between asylum and other forms of reparation and, if asylum is indeed chosen, the opportunity to choose the state in which to be granted asylum. Indeed, an important aim of reparation is the firm re-establishment of the agency and dignity of individuals who have been unjustifiably harmed. As Bradley (2013: 205) has put it, '…backstopping the refugee's capacity to make free choices is an important demonstration of respect for…dignity…and may be an important form of redress insofar as it restores a valuable measure of control to the refugee over the refugee's life direction'. If such dignity and agency is understood as the renewed ability to make claims (see Bradley 2013: 60) then, as Roger Duthie (2012b: 54) has put it, 'an important aspect of redress is the ability to choose a solution in itself'. Having had their agency and freedom of movement so restricted by their displacement, special emphasis should be placed upon it when providing reparation.

Nevertheless, Miller's more state-centric approach is justified insofar as it recognises that refugees' choice, despite its great importance, may conceivably be overridden by other considerations. As I discuss in the following section of this chapter, the state of asylum's capacity may be genuinely so limited that it is unable to heed the wishes of all refugees to whom it owes reparation.

Applying this principle of refugee choice, then, means that at times asylum will be a fitting form of reparation, whereas at other times it will not. It may be that asylum is the refugee's preferred form of reparation, or that another form of redress would be more

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international refugee law, which includes the doctrine of 'internal flight alternative', which effectively requires refugees to seek out a safe area in their own state before seeking asylum abroad (see Kelley 2002).

[170] The issue of refugee choice has played an important role in political debates over refugee protection. As Long (2013: 157) has put it, '[t]he history of refugee repatriation is…in many ways a history centred on the meaning of "voluntariness" and the contestation of this term'. For a philosophical exploration of the concept of voluntariness in this context, see Long (2013: ch. 7).

sensitive. As Bradley (2005: 21) comments, 'refugees…may have serious qualms about accepting restitution from a state that seriously violated their rights', especially if asylum was insensitively provided in a state which the refugee in question would regard as an enemy. For instance, many Jewish refugees found the prospect of return to Germany after the end of the Second World War practically unthinkable (Bradley 2013: 11).

Nevertheless, there are a number of potential objections to this placing of such strong emphasis on refugees' choice when deciding whether or not asylum is the most fitting form of reparation available for refugees. To begin, it could be objected that respecting refugees' choice of the state in which they wish to be provided asylum is inconsistent with the logic of reparation: for surely it must be the state that caused the refugees' lack of state protection which bears the obligation to provide them with asylum as reparation on its territory. However, at least two replies can be made here. First, the obligation to provide asylum as reparation is not absolute and can be outweighed by the force of refugees' choice to be granted asylum elsewhere on humanitarian grounds. Second, there are ways in which the responsible state can heed refugees' wishes for asylum in a different state while nevertheless providing them with reparation. If, all things considered, the most fitting form of reparation for certain refugees is one that cannot be directly offered by the state responsible on its territory, then that state may offer reparation more indirectly. For instance, if the state bears outcome or moral responsibility for causing unjustified harm to a refugee who prefers asylum in a state which bears no such responsibility, then the responsible state may still be able to offer them reparation, directly to the refugee in question and through the provision of compensation to the refugee's chosen state of asylum.[171] While this arrangement might

[171] As I discuss in Chapter 8, if the principle of refugee choice is applied in international refugee responsibility-sharing schemes, then such schemes will not only involve *physical* responsibility-sharing, but also a compensatory scheme of *financial* responsibility-sharing (see Kuosmanen 2013b).

seem to shift the focus away from refugees' agency to the settling of scores between states, it potentially allows for greater flexibility for refugees.[172] Although the logic of reparation entails that it be offered by the actor bearing outcome or moral responsibility for an unjustified harm, this option constitutes a means of avoiding the trapping of refugees in the responsible state's territory, by allowing them to choose their preferred form of refugee protection, while also offering them reparation. If managed properly, such an arrangement could therefore enhance, rather than undermine, refugees' agency.

Nevertheless, it is important to recognise that this kind of arrangement may come at the price of one of reparation's central moral functions: satisfaction. If the duty to offer asylum is effectively outsourced to another state, then the expressive, communicative function of asylum as a form of reparation may be correspondingly weakened. Michael Sandel (2012: 97) has noted in a different context the possibility that 'the enactment of…[an] apology by the person who owes it is constitutive of contrition, such that it can't be outsourced'. If this is the case, then the greater flexibility for refugees that can be attained through inter-state compensation is purchased at the price of asylum as reparation's full symbolic dimension. However, this problem could be counteracted by public apologies made by the state bearing outcome or moral responsibility for refugees' flight, and a public statement to the effect that inter-state compensation has been offered specifically as a form of reparation.

Second, it might be claimed that this principle of refugee choice is not an 'inextricable part of the idea of refugee protection' (Gibney 2007: 71; see also Carens

[172] Mark Gibney (1986: 90), in considering the possibility that 'an intervening nation with a special duty to non-combatants might make an agreement with another nation…so that resettlement occurs in this other place', worries that '[w]hat should be avoided…are instances where a nation with a special duty to aid or protect ignores this special duty and it leaves the burdensome task of aiding those in serious need to countries with much weaker moral obligations'. The option of inter-state compensation, however, is a means of avoiding this unfair shifting of responsibility.

2013: 216; Schuck 1997: 285), and that states are therefore not obliged to offer refugees' preferred durable solutions to them. This may well be an accurate description of the duty to offer asylum *on humanitarian grounds*, although, even in that case, offering as wide a palette of options to refugees is highly desirable. However, as far as *reparation* is specifically concerned, refugees' choice must be given even more weight, and is especially strong, given its aim in firmly re-establishing refugees' agency and dignity. As Clare Heyward and Jörgen Ödalen (2013: 14) have contended,

> The claims of the territorially dispossessed are not merely based on a right to asylum combined with some strong interests, but also on a right to be compensated. This creates a stronger requirement to not only supply these migrants with some range of options of "suitable countries" to choose from, but to allow them to choose to become citizens in a particular country.

Location, Social Ties and Group Identity

A second, and related, consideration of relevance to the determination of which form of refugee protection is most reparatively fitting for a refugee, is the place of residence and social ties of the refugees in question. While UNHCR (2011: 35) has rightly recognised that local integration is often the most appropriate durable solution for those who already have developed 'close family, social, cultural and economic links to their country of asylum', theorists such as Carens (2009; 2013: ch. 8) have put forward a 'theory of social membership', powerfully arguing that depriving non-citizens of a right to stay after a number of years often cruelly deprives them of social ties which provide their lives with meaning.[173] For instance, the most reparatively fitting form of protection for an Iraqi asylum seeker who has strong social ties as a result of his or her residence in the UK for several years may very well be British citizenship, given these ties and, as I

[173] This consideration is connected to the notion within international law of a 'genuine and effective link' between an individual and a state, which has been used as a ground for naturalisation (see Batchelor 1998: 157).

discuss in Chapter 6, the UK's partial responsibility for the generation of Iraqi refugees since the invasion of Iraq in 2003.

A third additional, and similarly related, consideration is whether the refugees in question are bound by a strong sense of group identity, which may generate a desire among them to reside together in a community or to take the pursuit of a particular solution to their displacement as the basis of a shared political project. This may manifest itself as a desire to live in a state which already contains a strong diaspora community for that group, or it might instead manifest itself as a strong determination to achieve political rights in a homeland through voluntary repatriation, which has been evident in the cases of Palestinian refugees and the Guatemalan return movement of the 1990s (see Bradley 2013: ch. 4; ch. 8). In such cases, the protection offered may function as a collective, rather than solely being an individual, juridical form of reparation. As Long (2013: 40; see also ch. 8) has strongly argued,

> The limit of liberal refugee resettlement…is that while integration in a new political community can provide a means of righting the individual wrong of forced flight, it cannot recognize the collective dimensions of refugees' identities as groups, or provide them with the political agency or power to remake social and political norms. This explains the value of repatriation. Alone among the three "durable solutions", it can recognize, respect and protect collective group identity and political agency.

Capability

The fourth, implicit condition is that the state must have the capability to offer asylum as reparation to the refugee in question. It might seem that my account of asylum as reparation is rather more applicable to wealthy liberal democratic states, which are more likely to have the wherewithal to engage in refugee-producing policies and interventions, and the ability to host refugees they may have created, than developing or

fragile states located in the global 'South'. Although my argument may be more likely to have practical implications for developed states – although, as I observe later, there are some 'South'-'South' cases to which it may also apply – my account is intended to apply *in principle* to any state, whether the state in question has the capacity to undertake individualised RSD procedures, or whether its resource constraints mean that only *prima facie* RSD is feasible.

This implicit condition appears fairly uncontroversial, given the dictum of 'ought' implies 'can': if an agent is unable to undertake a task, there is no sense in claiming that he or she *ought* to undertake it. Nevertheless, given that the precise implications of this condition for states' obligations to refugees for whose flight they are otherwise outcome or morally responsible are less clear, in this section I aim to identify and explore these implications.

Absorptive Capacity

How might a state which bears outcome or moral responsibility for causing unjustified harm to refugees nevertheless be incapable of offering asylum as reparation to them? In short, a state is incapable of offering asylum, on whatever moral grounds, when it has no, or highly limited, 'integrative abilities' (Gibney 2004) or 'absorptive capacity' (Carens 2013: 214).[174] As Matthew Gibney (2004: 18) has put it, '[a] diverse range of factors including a state's integration history, economic strength, and population size, simply have to be reckoned with if one is accurately to assess a state's ability to provide asylum'.[175]

[174] Throughout this section, I use the terms 'integrative ability' and 'absorptive capacity' as synonyms.

[175] States' absorptive capacities are not considered in the 1951 Refugee Convention, which makes no reference to any numerical limit on those entitled to asylum. Similarly, refugee advocates in developed states tend to sidestep the issue, dismiss concerns over strains on public services that refugees may create or intensify (see Ray 2012), or claim that states *do* have the capacity to offer asylum to those in need of it. However, it would be disingenuous to claim that there is *no* limit to states' absorptive capacities; thus, the

Despite the apparent objectivity of these factors, it appears that the notion of absorptive capacity cannot be understood in wholly descriptive terms, but that the ability of a state to integrate outsiders can ultimately be set only by reference to its obligations to both those outsiders and its own citizens. The following hypothetical example can bring this point into sharp relief. A government could agree to resettle millions of refugees, yet upon their arrival simply dump them on large tracts of unused land with no means of subsistence or support mechanisms. The state is *capable* of absorbing refugees in this way, but yet this is not how anybody uses the term 'absorptive capacity'. Implicit in such uses is the idea of states being capable to absorb refugees *in a manner that is consistent with the refugees' rights.* Similarly, when the protection of a nation's culture is seen as limiting its absorptive capacity, those making the argument are not claiming that national culture somehow renders it physically impossible to accommodate large numbers of refugees, but rather that this culture is of such *value* that it ought to be protected, and that limiting the number of entrants will so protect it. In short, the notion of absorptive capacity does not refer to state's brute ability, but rather implicitly appeals to the legitimate entitlements and expectations of both outsiders and citizens.[176]

If this line of thought is sound, then the notion of absorptive capacity can only be set by reference to states' overall schedule of obligations and responsibilities. The absorptive capacity of states is effectively the result of an interaction between its material resources and its various obligations.[177] Thus, a state with voluminous resources and limited obligations (say, a physically large and wealthy state with a sparse population) is

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issue needs to be broached both at the theoretical level and in political debates over asylum, however unpalatable the notion of a threshold above which a state is entitled to leave refugees to suffer without protection may be to those concerned for their welfare.

[176] Indeed, there is a value-laden notion of capability that appears in everyday speech, when people say that they are incapable of something when they mean that they cannot legitimately be expected to do it. For instance, although an impoverished family may say to a door-to-door fundraiser that they "can't" make a charitable donation, even if they *could* make that donation yet go hungry, what is meant is that, given their circumstances, they cannot be expected to donate.

[177] As Bukovansky *et al.* (2012: 220) have put it more broadly, special responsibilities 'need to be calibrated in response to requisite capacity and competing rights'.

likely to have far greater integrative ability than a small and already over-populated state with scant resources and a daunting schedule of responsibilities (say, an impoverished state which owes reparation to a large number of both its citizens and non-citizens on account of its past actions).[178] The overall integrative ability of states also depends on the manner in which the state's various obligations are justifiably *prioritised*. Thus, a highly resource-constrained state which justly prioritises its own citizens will have a smaller absorptive capacity than one which is bound to prioritise outsiders for entry. One consequence of this is that, as I shall argue in Chapter 8, states' absorptive capacities can look very different according to whether they only bear humanitarian duties towards refugees, or whether they bear reparative obligations towards them. Given the greater stringency of reparative obligations, states bearing only humanitarian duties towards refugees can, I shall argue, claim that they should not be expected to accept more refugees at an earlier point than those states bearing reparative obligations towards them, who will have to exhaust their absorptive capacity if need be in order to provide reparation to refugees.

It is also possible that, if a state's obligations are sufficiently finely balanced, this could lead to a scenario of what Michael S. Teitelbaum (1980: 22) has dubbed '"right" versus "right"', in which both a decision to offer asylum as reparation to certain refugees *and* a decision not to are justified. However, it is important to note that the mere existence of these other obligations does not in itself provide sufficient grounds for resisting reparative obligations. If a state is able to discharge its obligations both to its citizens *and* to those it has harmed, such as refugees, then it is clearly obliged to do both.

[178] Nevertheless, it is conceivable that a state with great *material* capabilities might nevertheless be genuinely incapable of offering asylum as reparation because of its full schedule of competing responsibilities, given that even highly affluent states can over-burden themselves with responsibility-generating agreements and relationships.

The great, but not exclusive, relevance of a state's material resources to its absorptive capacity has obviously different implications for wealthy 'Northern' states than it does for impoverished 'Southern' ones. For the former, this condition is unlikely to absolve any developed state of responsibility to provide asylum as reparation, given the North's 'enormous resource capabilities relative to those of the South' (Zolberg *et al.* 1989: 277).[179]

However, capability is a real issue for poor states, in cases in which a developing state is responsible for refugees' flight, especially if the state in question can be justifiably designated as a 'fragile' or 'failed' state, which possesses juridical, but not empirical sovereignty (see Jackson 2000: 296), and which is incapable of providing basic services and protection to its own citizens, let alone to refugees and other non-citizens.[180] It may be that the responsible state *already* provides asylum, whether formal or informal, to a huge number of refugees that is well out of proportion to its absorptive capacity, wealth or what it would be expected to do in any fair system of 'burden-sharing', given what Matthew Gibney (2007) has described as a system of 'engineered regionalism', in which 'Northern' states use their political clout to ensure that the majority of refugees are confined to the global 'South'. In situations of extreme material scarcity, meeting the minimal needs of one's citizens may trump the obligation to offer reparation to refugees for, as Catherine Lu (2007: 203-204) has argued, 'nothing may justify a level of material reparations that would incapacitate a state from fulfilling its domestic obligations'.[181] In

[179] This is not to suggest that a state's reparative obligations towards refugees will never place pressure on a wealthy state's ability to provide services to its citizens, for debate has recently centred on the extent to which immigration more generally may undermine the welfare state. However, given the stringency of reparative obligations, it may be that developed states have to accept a degree of strain on their social services in order to offer asylum as reparation to all those refugees who are owed it. For normative and empirical discussion of the impact of immigration on the welfare state, see Nils Holtug (2010).

[180] Robert Jackson (2000: 296) sees failed states as states which 'have an international legal existence but very little domestic political existence', which 'exist because the outside world recognizes them and respects their sovereignty regardless of their domestic conditions'.

[181] This is the case, however, only for the protection of citizens' most basic rights. If fulfilling the obligation to offer asylum as reparation to refugees would impose great costs on the well-being of that

extremely impoverished states, it is far more likely that there will be what could be described as a *contingent coincidence* between a state's special obligations and its general duties: that, in order to discharge both sets of duties, it is obliged to prioritise its own citizens.[182]

In addition to the possibility that material constraints might incapacitate a state from offering asylum as reparation to those who are owed it, political obstacles might too limit its ability to offer asylum as reparation. As a fundamentally 'particularistic agent' (Gibney 2004: 196), it is embedded within the very structure of the modern state that it will prioritise its own citizens. Within liberal democracies, in order to respect the wishes of the *demos*, it might be argued, a limit can be set on the numbers admitted for asylum as reparation. While this democratic consideration has some force, however, it is not decisive. Liberal democracies, after all, do not grant unfettered power to the restrictionist wishes of electorates, regardless of the moral character of such wishes, but are characterised by a strong tension between democratic pressures and embedded liberal norms, which Matthew Gibney has, in the context of asylum policy, characterised as a conflict between the 'law of inclusion' (Gibney 2003: 33) and the 'politics of restriction' (Gibney 2003: 22). Indeed, public opinion is properly constrained by legal, constitutional and human rights-based principles.[183] Among these principles should sit the fundamental rights to both asylum and reparation which, as matters of justice, cannot simply be

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state, but not to the point of jeopardising such basic rights, then that state is obliged to offer it. This is because, as Pogge (2002a: 136) has argued, 'the permissibility of giving priority to the near and dear is quite dubious in the case of negative duties' and, '[i]n our efforts to stop wrongs in which our society, and therefore we, are materially involved, we must, then, generally give priority to greater wrongs inflicted on foreigners over lesser wrongs inflicted on compatriots' (Pogge 2002a: 291). This is also reflected in part of the 'priority principle' outlined by Henry Shue (1996: 118), which states that 'the fulfilment of basic rights take priority over all other activity, including the fulfilment of one's own non-basic rights'.

[182] As Robert E. Goodin (1985: 16) has suggested, 'under some circumstances…donating to the neediest people with whom we enjoy special relationships – our neediest relatives, neighbors, clients or compatriots – may be regarded as discharging the general obligation to give to the needy. Thus, special obligations not only take priority over our general duties of charity but may even, in this way, take the place of them'.

[183] Without these constraints, there is nothing to prevent the demos from pursuing morally repugnant ends. As Arendt (1986 [1951]: 299) famously put it, 'it is quite conceivable…that one fine day a highly organized and mechanized humanity will conclude quite democratically–namely by majority decision–that for humanity as a whole it would be better to liquidate certain parts thereof'.

annulled in the court of popular opinion.[184] Moreover, any attempt to take political considerations into account must not blur the boundary between, or conflate outright, the difference between an *inability* to offer asylum as reparation and an *unwillingness* to do so.

Even more controversially, it might be argued that the erosion of national culture that may be wrought by the arrival of refugees might legitimately restrict the numbers admitted for asylum as reparation. If providing asylum reparatively would genuinely threaten the character of the community within the receiving state (see Carens 1992a: 36-37; Walzer 1983: ch. 2), then a case could be made for providing an alternative means of protection to refugees whom one has harmed. A theorist of a communitarian orientation could argue that the state's overriding obligation is not to refugees whom it has harmed, but to its own citizens, especially in preserving the collective culture and historical tradition which provides them with meaning and identity.

However, it is crucial not to overestimate the threat posed by entrants to national culture, nor to overstate the moral importance of the protection of such culture vis-à-vis reparative obligations to non-citizens. For what Dummett (2001: 14) has described as the 'right not to be submerged' by outsiders to hold, the arrival of refugees receiving asylum as reparation must genuinely *threaten* the way of life of the community, rather than merely *adapt*, *modify* or *enrich* it. Indeed, communitarianism sometimes errs towards assuming an essentialised conception of culture as bounded, static and homogeneous, which ignores its dynamism and fluidity (see Cowan *et al.* 2001: 3), and the fact that an

[184] Moreover, if one accepts the democratic principle that laws should be passed with the participation of all coerced by them then, as Arash Abizadeh (2008) has argued, restrictions on immigration are only justified if they are formed with the participation of would-be migrants to the state who currently reside outside its borders. The inclusion of non-citizens in the creation of immigration laws would be highly likely to have a radical effect on their character, given that the frequent restrictionism of a state's citizens would be very likely to be strongly counteracted by, or even eclipsed, by the wishes of non-citizens clamouring to enter or to claim their rights to asylum and reparation. For a critique of Abizadeh's argument, however, see Miller (2010).

influx of refugees may not automatically undermine it, especially in already multicultural societies.

Overall, it appears that consideration of a state's material constraints are more decisive when seeking to determine that state's integrative ability than considerations of public opinion or cultural impact. While extreme scarcity can genuinely prevent a state from fulfilling its reparative obligations to refugees, political and cultural factors carry less moral weight in this determination.[185]

Incapacity and Progressive Realisation

If, given these material, political or cultural considerations, a state is genuinely incapable of offering asylum as reparation to those refugees who are owed it, then, given the interaction between these considerations and its moral obligations, it can be said that the obligation to offer asylum as reparation has been *outweighed* by its other, more pressing obligations. This, however, does not mean that the obligation dissipates entirely, but rather that it becomes *latent*, and is put on hold and simply cannot come into force, so to speak. As Bradley (2013: 36) has argued, 'the capacity to exercise moral agency and shoulder responsibility can exist in degrees, and…a state's present inability to make amends for past wrongs does not render it immune to arguments that it *should* develop this capacity' (emphasis in original).[186] While the state must provide *basic* services for its

[185] A theory of asylum as reparation need not enter the debate concerning 'bounded justice' (Carens 2013: 256) and whether we have equal duties to our compatriots and non-citizens. However, it *does* entail that any priority we give to compatriots must be *qualified* by any reparative obligations a state may have, whether to refugees or others. For discussion of different proposals for how special duties to compatriots might be weighted in respect to general duties, see Miller (2007: 44-46).

[186] This account effectively borrows the notion of 'progressive realisation' enshrined within Article 2(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (cited in Ghandhi 2006: 80), to argue that the state's reparative responsibilities may be progressively realised in accordance with its resource constraints. The same idea can be applied when responding to the potential tension between a state's reparative responsibilities and its obligations to heed the frequently exclusionary wishes of the *demos*. The state, while responding to these wishes, is obliged progressively to realise its obligations by seeking to create greater political space in which it can fulfil its reparative responsibilities to refugees by actively 'reshaping public opinion' (see Gibney 2004: 244-246).

own citizens, it may be required to put on hold its own economic development as far as is necessary to provide asylum as reparation or to amend its current schedule of priorities so as to allow for the protection of as many refugees to whom it owes reparation as possible.

As a state bearing reparative obligations to refugees gradually develops its capacity, how is it to progressively fulfil them? There are a number of possible steps a state can take in order to make the transition from a state of incapacity to a position in which it can discharge its reparative obligations to refugees fully. As a starting point, as its resources increase, the state may be obliged to begin to provide a minimal, and interim form of reparation that falls short of full asylum, whether purely symbolic or in the form of limited compensation or *in situ* aid. Then, a further option – which would become more serious in the highly non-ideal scenario of states with greater capacity refusing to assist the weak state in the protection of refugees – is for it to offer only a sub-optimal and standardised form of asylum as reparation to the refugees whom are owed it, if that form of asylum were far more *efficient*.[187]

Such a resource-constrained state may choose to dispense with the expensive accoutrements of Western asylum systems (if indeed they had them in the first place) by opting for recognising *prima facie* refugee status and dispensing with a resource-intensive process of RSD.[188] It could also involve dispensing with the durable solution of resettlement, which has been criticised as a relatively lavish measure, in favour of what

[187] For instance, Price (2009: 12) has echoed recent arguments made by developed states that in-region protection is far more efficient than offering asylum in the 'North', freeing up resources which could then be channelled towards the maximisation of overall refugee protection (and, by extension, refugee reparation). While states have their own interests in achieving optimal efficiency in refugee protection, considerations of efficiency are only relevant to the reparative fittingness of one or other form of refugee protection if the proposed alternative to asylum allows for reparation to be made to all refugees who are owed it, or at least more than would otherwise be possible. For a critique of the deployment of the concept of efficiency in recent debates over refugee protection, see Betts (2006).

[188] This could even be to the significant advantage of the refugees in question, who would not have to be subjected to what is often a highly anxiety-inducing and even traumatic process of having their claims scrutinised, which may prolong their sense of limbo.

may be more cost-effective forms of protection (Helton 2002: 185; Milner 2005: 523), such as *in situ* aid.

Another way in which states with highly limited capacity could offer some degree of reparation to refugees is, as I discussed earlier in relation to the principle of refugee choice, for the refugees to be offered asylum elsewhere, but for this to be, at least partially, supported financially by the state bearing outcome or moral responsibility for their flight. This would be a sound option if it were the case that the responsible state was densely populated and had a low physical absorptive capacity, yet had the financial wealth to offer reparation indirectly via another state. As the state's resources grew further, it would then be obliged to provide an adequate quality of asylum to at least *some* of the refugees for whose plight it is responsible, aiming to prioritise certain refugees justly, on grounds such as vulnerability and urgency of need.

It is important to stress that, having offered refugees an interim and sub-optimal form of protection as reparation, once the state has gained significantly greater capacity, it cannot just leave it at that, so to speak, simply because that was what it offered the refugees when its resources were far more limited. Rather, it must replace that interim reparation with the most fitting form of reparation that is now available to it.

It may be that this process of progressively realising a state's reparative obligations towards refugees is only possible with assistance from other states. As Bradley (2013: 34) has put it, '[w]hen the state of origin lacks the capacity to discharge its remedial responsibilities towards its exiled citizens without external support, this responsibility may be shared with international actors'.[189] If this outside assistance were

[189] Relatedly, Caney (2014: 134-135) makes a distinction between *first-order* responsibilities, which are 'responsibilities that certain agents have to perform (or omit) certain actions' and *second-order* responsibilities, which 'refer to responsibilities that some have to ensure that agents comply with their *first-order responsibilities*' (emphasis in original). In a process of what he describes as 'enablement', Caney (2014: 137) observes that 'as well as assisting people to do what they have a *first-order* responsibility to do, enablement can also have the consequence that agents who previously lacked a particular *first-order*

offered by states which *also* bear some degree of outcome or moral responsibility for refugees' flight, then the status of asylum as a form of reparation would be left intact, or even strengthened, If, on the other hand, the external support is provided by states which did *not* bear any outcome or moral responsibility for the refugees' flight then, although it would help the state to discharge its reparative obligations towards certain refugees, it would also *dilute* the strength of the reparations offered. As Bradley (2013: 188) has also asked, in passing, in the case of in-country reparations, '[i]f donors push for and bankroll reparations programmes, to what extent can they still be seen as an expression of responsibility and accountability on the part of the state of origin?' The same question could be asked of states of asylum, for if asylum as reparation is only made possible through the support of other states which bear no outcome or moral responsibility for a particular instance of displacement, then the symbolic and expressive potential of the act of granting it is arguably diminished.[190] While such support could occur, given the increasing recognition of the importance of reparations for transitional justice and peace-building (see Duthie 2012a; Milner 2009) within the UN system, it is also likely that many states would be reluctant to support a reparations process in response to harms for which they bear no outcome or moral responsibility, and that they would use their innocence, whether real or only asserted, as a means of justifying their refusal.[191]

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responsibility…can now…be expected to bear that responsibility'. Applying these ideas to the matter at hand, it may be that other states bear a second-order responsibility to enable states which bear outcome or moral responsibility for displacement to discharge their reparative obligations to refugees.

[190] It might be objected here, harking back to ideas discussed in Chapter 3, that the extensive interconnections between Western states and the production of refugees are such that no refugees' flight is *completely* unconnected to Western states, and so any external assistance given to a state in order for it to meet its reparative obligations to refugees will not necessarily weaken its reparative value. Yet the problem of diluted expression of responsibility would persist even if this were shown to be the case, for the *principal* perpetrators of displacement would not be the actors driving the reparation forward, but rather those who are only indirectly implicated in systems which contribute to the creation of refugees.

[191] As I discuss in Chapter 6, the reluctance of EU countries to accept Iraqi refugees generated since 2003 has been attributed to the belief that they are the problem of the US.

From Reparation to Capability

If, however, a state which owes asylum as reparation remains genuinely incapable of offering it, even despite its best efforts to progressively fulfil its reparative obligations to refugees, there are strong grounds for departing from the principle of reparation and for assigning remedial responsibilities for refugees to other states on other grounds. On Miller's connection theory of responsibility, one such ground is that of capability. Given the radically differing quality of asylum between the global 'North' and 'South', such that an offer of asylum in the 'North' is, in de Grieff's terminology, exponentially more 'munificent' (de Grieff 2006: 12), it would seem perverse to insist that a highly impoverished state must offer asylum as reparation to a refugee when there are states vastly more capable of doing so.[192] In short, there are clearly cases in which the allocation of responsibilities for refugees is better conducted on the basis of the principle of capability rather than reparation.[193]

This conclusion is consistent with the stance of moral pluralism which I took from the outset of this thesis, when I readily conceded that the principle of reparation is defeasible and non-absolute. Indeed, without the inclusion of capability within Miller's connection theory of responsibility, there could be cases in which the states bearing causal, outcome or moral responsibility for displacement were either unable or unwilling to offer reparation to the displaced, and the injustices of displacement would consequently be left unremedied. Indeed, capability alone is a strong ground for distributing responsibilities to protect refugees. Bukovansky *et al* (2012: 1), for instance, observe a 'seeming proportionality between the material resources enjoyed by a state, and the scale of responsibilities it was required to shoulder', while Simon Caney (2014:

[192] Indeed, concern for the 'quality of protection' can motivate not only arguments for more just burden-sharing among states (Gibney 2007: 64) but also, at times, the assignment of remedial responsibilities for refugees on the basis of capability rather than outcome or moral responsibility for unjustified harm.
[193] Caney (2005a) argues a similar point in relation to responsibilities for mitigating climate change.

141) draws on what he calls the 'Power/Responsibility Principle', which contains the common sentiment that 'with power, comes responsibility'.

There is even a more radical case, rooted in consequentialist moral thought, for *always*, as a matter of routine, allocating responsibilities for refugee protection on the basis of states' capabilities, and from dispensing with the principle of reparation entirely. If a higher level of protection could be achieved for refugees by allocating responsibilities for refugee protection on the basis of capability rather than on the basis of the principle of reparation, then it would seem to be strongly in the interests of the refugees themselves for capability to be the deciding criterion, and somewhat perverse to insist that a refugee receive a sub-optimal form of protection for the sake of reparation.[194] Caney has identified, in a related context, a tension between two ways of distributing responsibilities which are as relevant to refugee protection as they are to his topic of climate justice. On the one hand, he outlines a '*Burden-Sharing Justice*' approach, which 'starts by focusing on how the burden of combating the problem should be shared fairly among the duty-bearers'. On the other hand, he lays out a '*Harm Avoidance Justice*' approach, whose 'focus is primarily on ensuring that…catastrophe is averted' and is 'concerned with the potential victims' (Caney 2014: 125-126, emphasis in original).[195] While these two approaches are matters of emphasis and may work in harmony, they may equally conflict, if the fairest way of sharing a burden turns out not to be the most

[194] It might be objected here that this is a moot point in practice, because the states with the higher material capabilities are likely to be the ones who have the resources to expend on external interventions which create refugees in the first place. For instance, as I observed earlier, it is no coincidence that discussion of special obligations to receive refugees an external state has created has largely focused on the United States, which has the resources both to intervene in other states *and* to absorb large numbers of refugees. In the case of Iraqi refugees generated since 2003, there would appear to be little clash between the principles of reparation and capability, for both principles point in the same direction: the US should offer Iraqi refugees asylum. Nevertheless, in other cases, this coincidence cannot be counted on, for impoverished states also at times expend their limited resources on waging wars that create refugees, instead of protecting the basic rights of their citizens.

[195] Applied to the topic at hand, the 'burden-sharing' approach would advocate, as I explore in more depth in Chapter 8, the fair distribution of refugees among states on the basis of considerations such as integrative ability and responsibility for harm, while the 'harm avoidance' approach would distribute responsibilities for refugees based on where they would receive the best quality of protection.

effective way of avoiding or remedying harm. The theory of asylum as reparation advanced in this thesis clearly fits within Caney's 'burden-sharing justice' paradigm' – which he links to 'the principle that those who have caused the problem should bear the burden' (Caney 2014: 125) – and can therefore clash with the potentially rival, but also highly plausible, 'harm avoidance' approach.[196]

Faced with two approaches in potential tension with one another, both highly plausible, how can they be harmonised? It would clearly not do to dispense with one entirely in favour of the other. This is a problem facing anyone who endorses special obligations of any kind given that, for instance, we hold parents to have special obligations to care for their young children, even though it is quite possible that other people might be better or more effective carers for them, and we do not advocate parent-swapping even if this turned out to be true and we had identified some more effective carers who would be prepared to care for these children.

On the other hand, to continue this partial analogy, if two parents were clearly found to be entirely, or almost entirely, incapable of caring adequately for their child, and to fall below some minimal threshold of responsibility, and there is no apparent way in which the parent could be supported to develop the capacity, then we *would* advocate that the child be cared for by somebody more capable; a belief that partly motivates measures such as intervention by social services, adoption, and foster caring schemes. To apply this partial analogy to the case at hand, it might be said that, if the capacities of a state which bears reparative obligations to refugees are above a certain minimal threshold, then it is they who should offer asylum as reparation to those refugees, even if it is the case that they might have a higher quality of asylum elsewhere. On the other hand, if the state's capacities fall below that threshold, and the state cannot surpass it despite its best

[196] While Caney (2014: 127) does not dismiss the burden-sharing approach, he considers its account of climate justice to be 'incomplete' without consideration of the more neglected 'harm avoidance' approach which he develops.

efforts, then we would be justified in re-distributing the obligation towards those refugees to more capable states. Just as parents who lack the wherewithal to care for themselves are highly unlikely also to be able to raise children adequately, a state which can barely function by itself or protect its own citizens in the first place will be unlikely to be capable of absorbing refugees on reparative grounds.[197]

[197] However, just as Peter Singer's famous analogy between world poverty and the rich world's ability to alleviate it and a child drowning in a pond and a passer-by has been criticised as patronising to the world's poor (Cullity 2004: 2; Miller 2007: 236-237), the analogy between refugees and states on the one hand, and children and parents on the other, might be thought to perpetuate the demeaning view of refugees as victims lacking agency that I noted in a previous footnote. However, they are only *partial* analogies for, while children require the protection of parents, refugees require the protection of states (and refugee children require the protection of both parents and states). For a similar analogy between the concepts of surrogate parenthood and the surrogate protection of refugees in other states, see Carens (1991: 20).

Conclusion to Part II

In this part of the thesis, I have argued that a state owes asylum as reparation to refugees when it bears outcome responsibility for unjustified harms experienced by those refugees as a result of their flight, and when asylum is the most fitting form of reparation that is available to those states. Working through each of the elements of this formulation in turn, in Chapter 3 I explored some of the domestic and international causes of contemporary forced migration and argued against a purely internalist approach to refugees. In Chapter 4, I elaborated some of the ways in which refugees may experience unjustified harm as a result of their displacement, and laid out some conditions under which displacement could conceivably be morally justified, which closely correspond to the principles of *jus ad bellum* and *jus in bello* within just war theory. I argued that, if refugees were ever created by a genuinely justified humanitarian intervention or war of self-defence, then considerations of international fairness would militate against the assignment of reparative obligations to the intervening or self-defending states. I then moved in Chapter 5 to explore alternative forms of refugee protection, such as voluntary repatriation and *in situ* aid, that may at times be more reparatively fitting than asylum, and identified criteria for evaluating which form of protection is most reparatively fitting for refugees in any given case. Finally, I examined some of the ways in which states' limited absorptive capacities might restrict their ability to meet their reparative capacities, how states might seek to progressively realise their reparative capacities towards refugees, as well as the circumstances in which it may be more justifiable to distribute remedial responsibilities for refugees on the basis of capability rather than reparative obligations.

PART III: APPLICATION AND IMPLICATIONS

Introduction to Part III

I now hope to have outlined a plausible theory of asylum as reparation, which specifies the conditions under which states owe asylum as reparation to refugees. However, the abstraction of this theory – centred as it is on concepts of causal and outcome responsibility, unjustified harm, and reparative fittingness – leaves open the question of its applicability to real-life refugee crises, and its implications for the realms of politics, policy and practice. While I briefly explored the possible applicability of certain conditions of my theoretical framework to recent refugee crises – asking, for instance, whether states bore causal or outcome responsibility for NATO's bombing of Kosovo, displacement resulting from the Rwandan genocide, climate-induced displacement and the legacy of colonialism – I have not yet sought to apply the theory as a whole to a single case. After all, it is quite possible to agree readily with the spirit of the theory, yet to insist that it rarely applies in practice, and that this thesis is therefore concerned with an exception of only very limited practical interest. In Chapter 6, I seek to fill this gap by applying my theoretical framework to the case of Iraqi refugees generated since 2003.

Moreover, many issues raised in Parts I and II of this thesis will remain unresolved without exploration of the possible practical implications of my approach. First, my discussion in Chapters 1 and 2 has left the potential tension that I observed between asylum's humanitarian and reparative functions hanging, so to speak, and my discussion in Chapter 5 of how states' limited capabilities might limit their ability to offer asylum as reparation left the question of how a state might have to prioritise its humanitarian and reparative responsibilities to refugees in a climate of scarce resources untouched. Second, although I will show, through the case of the invasion of Iraq in the following chapter, that implicitly reparative arguments can play a significant role in

debates and policies over asylum, the broader question will remain of what the effects of systematically deploying the notion of asylum as reparation as a distinct mode of asylum politics might be. Accordingly, in Chapter 7 I address these remaining issues by examining the implications of my reparative approach to asylum on the domestic level. Beginning with domestic asylum systems, I engage with the potential problem of prioritisation and seek to identify ways in which it can be navigated. I then move to the second issue, looking at the ways in which the notion of reparation could affect domestic asylum politics.

Third, my discussion of the difficulties of accurately identifying and assigning outcome and moral responsibility for unjustified harm, and of determining reparative fittingness and states' genuine capabilities – and recognition of the inherent contestability of such judgements – in Part II leaves open the question of *who* would, or should, seek to make such judgements in practice; that is, if the notion of asylum as reparation were to go beyond being an *ad hoc* response that is voluntarily shouldered by certain states at certain times, and were to become a binding obligation incumbent on states. Although I show in the following chapter that the notion of asylum as reparation could potentially be used by states as a means to neglect or disavow their broader moral duties to refugees, the question will remain of whether its implementation might set up perverse incentives that could ultimately weaken, rather than strengthen, refugee protection in practice. In Chapter 8, I tackle such issues by envisaging the possible impacts of the incorporation of the principle of reparation into refugee responsibility-sharing schemes, and how such an incorporation might alter states' behaviour in relation to the international politics of refugee protection.

In these final chapters, I go deeper into non-ideal territory, as it were, not looking at the notion of asylum as reparation in principle, as I did in Parts I and II, but

rather at whether its possible or likely practical effects might be positive overall, or whether they would instead be sufficiently problematic for us to conclude that, however convincing the notion may be in principle and at the level of theory, we had better not try it in practice. Although, as I observed in the introduction, my theory has fitted largely within non-ideal theory from the outset, this section accords potential moral significance to considerations of political feasibility in a way that I did not in Part I.

Finally, it is important to note that – given that the specific notion of asylum as reparation has not been explicitly deployed, and implicitly reparative arguments have only patchily been made in relation to asylum to date – the discussion in the final two chapters necessarily and unavoidably possesses a strongly speculative dimension. I ask, given what we know about the general behaviour of states in the realm of asylum and refugee protection, what consequences would the implementation of the notion of asylum as reparation be likely to have? Of course, if it ever were to be so implemented, the effects may well turn out to be different or unforeseen but, equally, it would be somewhat rash to recommend the adoption of a moral idea in practice without first at least considering its likely effects. First, however, I turn to the task of applying the theory to the case of recent Iraqi refugees.

Chapter 6: The Case of Iraqi Refugees, 2003 – present

Debate over the plight of Iraqi refugees since 2003, and the predicament of Iraq more generally, has been strongly permeated by what Bukovansky *et al.* (2012: 1) describe as 'responsibility talk': commentators of various stripes have been concerned to allocate responsibility, and often blame, on various parties for the chaos and tragedy that has ensued within Iraq since the 2003 invasion. Applying my reparative approach to asylum to this case offers an opportunity to test the frequent claims made by commentators that the US, and, to a lesser extent, the UK and other military partners, bear a special obligation to offer asylum as reparation to Iraqi refugees, and to yield more nuanced and theoretically grounded judgements concerning responsibility for the refugee crisis than have been offered to date. As I explained in the introduction, my aim in this chapter is not to generate or test generalisable empirical hypotheses, but rather to explore the applicability of my theoretical framework. Although, as I observed earlier, academic literature in this area tends to depend on examples involving the US, and this case study does not buck this trend, it is – to my knowledge – the only detailed and theoretically informed investigation of the US's (and UK's) reparative responsibilities towards Iraqi refugees generated since 2003 to date. This case is also highly significant given its sheer magnitude, where the attainment of genuine solutions for millions of uprooted Iraqis depends, in part, on the distribution and acceptance of reparative responsibility towards them by states.

Iraq: A Brief History of Displacement

Since the establishment of the modern Iraqi state by Britain in the 1920s following the dissolution of the Ottoman Empire after World War One, displacement has been an integral part of Iraq's history and state-building (Marfleet 2011b: 96-97). As Charles Tripp (2007: 319) has argued, the conception of 'politics as discipline' held by Iraq's elites throughout the state's history has effectively presented Iraqis with a choice between 'submission and flight'. Saddam Hussein's Ba'athist regime, which held power from 1968 until 2003, precipitated large-scale displacement, for reasons ranging from its persecution of political opponents and forced population transfers as part of its Arabisation policy during the 1970s (Herring and Rangwala 2006: 23), to the impact of the Iran-Iraq War, the first Gulf War between 1990 and 1991 and the sanctions regime. On the eve of the invasion of Iraq in 2003, more than one million Iraqis were either IDPs or were in exile (Chatty and Mansour 2012: 99).

However, the decade since the invasion has seen the displacement of a further four to five million Iraqis (Chatty and Mansour 2012: 98), rendering the recent exodus from Iraq the largest within the Middle East since that of the Palestinians in 1948 (Banta 2008: 261). This process did not occur immediately, as the aftermath of the invasion in March 2003 saw relatively little displacement (Chatty and Marfleet 2009: 1). Around 190,000 Iraqis were initially displaced (Ferris 2008a: 9), including the flight of several thousand Iraqis who had close links with the former regime to neighbouring countries (Chatelard and Morris 2012: 5) and that of third-country nationals who had been residing within Iraq (Stevens 2013: 4-5). In fact, the early days of the post-invasion period saw the return of around 325,000 Iraqis (Banta 2008: 268) from both Iran and western countries (Marfleet 2011b: 103), although this return movement did

prompt some displacement as returnees reclaimed their homes (van der Auweraert 2011).

Nevertheless, displacement began to occur on a larger scale as a result of the coalition's military activities such as the assault on Fallujah in 2004, which displaced over 200,000 people (Samra 2007: 37). Displacement was also partly a consequence of the de-Ba'athification policy of the US-led Coalition Provisional Authority (CPA), which dismissed those associated with the former regime from their posts and dissolved the Iraqi army, leaving almost 30,000 Iraqis out of work (Sassoon 2009: 130), thereby causing many to leave to find alternative employment abroad (Otterman *et al.* 2010: 64). Members of Iraq's secular middle classes and professionals began to be targeted by emerging insurgent groups on the basis of real or perceived associations with the former regime (Ali 2011: 236), prompting a significant 'brain drain' (Sassoon 2009: 140), while Iraqis who were employed by the coalition forces also faced threats from those opposing the foreign military presence (see Packer 2007). This onset of displacement was also fostered by a steep decline in public services, as infrastructure failed and Iraq's citizens faced food insecurity and a lack of clean water and electricity (Chatelard and Morris 2012: 5), prompting what Marfleet (2007b: 404) has described as a crisis of 'basic capability'.

Displacement in Iraq began to take on a mass character as a result of growing sectarian violence largely between the country's two main religious communities, the Sunni and Shi'a. The arrest and execution of Saddam Hussein and his two sons in December 2003 sparked Sunni anger, given the former regime's ties with this group, resulting in an increase of violence (Tripp 2007: 285). Yet a major turning point, which marked Iraq's descent into full-scale civil war, occurred in February 2006 with the bombing of one of the most sacred Shi'a sites in Iraq, the al-'Askariyya shrine in

Samarra, which triggered ‘a vicious cycle’ of retaliatory attacks (Tripp 2007: 306). 365,000 Iraqis were displaced following the bombing, with the violence reaching its peak in October 2006 (Dodge 2012: 17). This cycle of violence became an identifiable process of ethnic cleansing, in which previously mixed areas of cities such as Baghdad became segregated and effectively ghettoised, as Shi’a and Sunni moved into separate areas (Stansfield 2007: 205). There is also evidence that government ministries and police commandos were heavily implicated in the sectarian violence (Dodge 2012: 62). Soon a ‘disintegrative cycle’ (Ali 2013a: 58) had been created, in which sectarian groups moved into the power vaccum and went on to weaken state authority yet further.

Such levels of violence and displacement began to decline from the second half of 2007 onwards; a development which has been attributed both to the ‘surge’ of American troops in Baghdad (Dodge 2012: 75) and tactical alliances between the US and Sunni groupings (Sassoon 2009: 13). Since the formal end of the US military presence in December 2011 (Dodge 2012: 13), such levels of violence have not re-emerged, although the resurgence of civil war and its attendant displacement remains a risk, given that the main drivers of the violence, such as persisting sectarian divisions and state weakness, have only partially been addressed (Dodge 2012: 203). Indeed, 2013 saw sectarian violence and suicide bombings following large-scale protests of Sunnis against the Shi’a-dominated government. 2014 has, so far, seen an intensification of Iraq’s longstanding violence and sectarian volatility. After insurgents captured Fallujah in January 2014, around 400,000 of Anbar’s population have fled to other parts of Iraq, and particularly to the Kurdish north (New York Times 2014a; 2014b). At the time of writing, although the Iraqi premier, al-Maliki, had won the most seats in Iraq’s parliamentary elections of 30 April 2014 after presenting himself as the

force to defeat the Sunni insurgency in Anbar, the country faced a potentially long period of negotiations to form a new government (Adnan and Arango 2014).

As a result of these violent developments since 2003, 1.7 million Iraqis are estimated to have become refugees, and 2.8 million as IDPs (Chatty and Mansour 2012: 98). Most Iraqi refugees have sought sanctuary in neighbouring countries, with over one million having fled to Syria, and around 500,000 in Jordan (Sassoon 2009: 5). Far smaller numbers have arrived in Western states to claim asylum, with Sweden and Germany accepting a particularly large number of these (Fandrich 2013: 4). It was reported that, as of April 2013, there were still one million Iraqi refugees in neighbouring countries, and 1.1 million IDPs within Iraq (IRIN 2013a). Despite the reduction in violence since 2007, the security situation within Iraq has remained precarious, and the returns which have occurred have reportedly been motivated by the difficulties of life in exile – including flight from the violence currently engulfing Syria (UN News Centre 2012) – rather than positive improvements within Iraq, and have tended to be circular rather than permanent (Chatty and Mansour 2012: 102). Returning to one's home as a displaced Iraqi is a difficult, if not impossible, undertaking, given the changes in the ethnic composition of cities such as Baghdad, and the occupation of homes by members of other sects (Chatty and Marfleet 2009: 10). With durable solutions still elusive for large numbers of Iraqi refugees, interest in their plight is dwindling (Chatty and Mansour 2012: 98; Ferris 2013), as attention has turned to the Middle East's latest massive refugee crisis emanating from Syria. The direction of movement and positions of hosts and guests have reversed, as 60,000 Syrian refugees had entered Iraq by January 2013 (UNHCR 2013a). As of June 2013, it was reported that, in the preceding two years, between 200 and 250 Iraqis had continued fleeing to

Jordan per month (IRIN 2013b). In 2013, Iraq was still one of the top five source countries for asylum seekers in the industrialised world (UNHCR 2014: 17).

Existing Attributions of Responsibility

The colossal scale of the violence and suffering that has characterised Iraq's refugee crisis since 2003 raises the question of which actors bear responsibility, and of what sorts, for what appear to many observers to be huge injustices. In recent years, one answer to this question has been frequently asserted by governments, human rights organisations, commentators and academics, to the extent that it may have become a 'consensus' (Fagen 2007: 25): the states which invaded Iraq bear primary responsibility for the displacement following the invasion, and have a special obligation to address Iraq's refugee crisis by offering asylum to many more Iraqi refugees than they have to date. An examination of the language used to articulate this claim shows that, for these commentators, the invasion of Iraq has, either directly or indirectly, *created, caused, generated, prompted, precipitated, catalysed, spawned, facilitated, spurred, triggered, engendered, escalated, unleashed, unlocked, contributed to, set in motion* or *created the conditions for* violence and mass displacement, with such displacement being a *by-product of,* or *the human fall-out from* the invasion. The role of the invading powers in this displacement is said to generate a *special, unique, major, particular, fundamental* or *heightened moral responsibility, obligation, duty or debt* towards Iraqi refugees.[198] In common with my approach in this thesis, the notion of a special responsibility is central to this claim but, in contrast, the word 'reparation' is not, to my knowledge, generally used when asserting this responsibility. As is to be expected in the political fray, these terms have been used somewhat imprecisely and

[198] These phrases are commonplace in the commentaries and works cited in subsequent paragraphs.

interchangeably, in contrast to the careful distinctions made by political theorists such as Miller that I discussed in Chapter 3. Part of my aim in this section is, with the help of the concepts that I laid out in Part I, to go some way to disentangling some of the overlapping, yet conceptually distinct, moral claims that have been made on behalf of Iraqi refugees since 2003. I hope to show that, to varying degrees, these claims correspond to the duties that underpin the various moral functions of asylum, which I identified in Chapter 1.

Assertions that the US bears a special responsibility to Iraqi refugees began to appear with greater frequency in the US towards the end of 2007 (Berman 2012: 126), as human rights organisations and their representatives began to draw on the sentiment in order to bolster their arguments for boosting the protection offered to Iraqi refugees.[199] Human Rights Watch – and especially the Director of its Refugee Programme, Bill Frelick – have made particular use of this claim (e.g. Frelick 2007a, 2007b; 2007c; Human Rights Watch 2006: 101). This was then mirrored in a series of op-eds and newspaper articles, largely concentrated in the US, but with some also appearing in the UK.[200]

In contrast to the initial refusal of the Bush administration to recognise the plight of Iraqi refugees (Libal and Harding 2007), this notion that the US bears a special responsibility towards Iraqi refugees was eventually taken up by certain politicians and officials in fora such as congressional hearings from January 2007 onwards (Rikoski and Finer 2009: 50) which, in a Democrat-held Congress, saw the situation of Iraqi refugees as 'one more indictment of the Bush administration's prosecution of the war'

[199] For instance, see Amnesty International (2008: 35); Ken Bacon (quoted in Rosen 2007a); Elizabeth Ferris (2008b); Human Rights First (2010: 2); International Crisis Group (ICG 2008: ii); Tom Porteous (2007); and Ben Sanders and Merrill Smith (2007: 24).
[200] For instance, see Morton Abramowitz (2008); Abramowitz *et al.* (2008); Greg Bruno (2008); Dawn Chatty (2010); Ferris (2007a); Financial Times (2007); George Packer (2007); Nir Rosen (2007a, 2007b).

(Seeley 2010).[201] Pressure intensified after two cables penned by the US Ambassador to Iraq, Ryan Crocker, in which he decried the long delays in screening Iraqi refugees for resettlement, were leaked to the *Washington Post* (Rikoski and Finer 2009: 50). Recognition of a special obligation towards Iraqi refugees was subsequently enshrined in the US *Refugee Crisis in Iraq Act* (United States 2008), which President Bush signed into law as part of the National Defense Authorisation Act for Fiscal Year 2008 (Travis 2009: 1031) and was then reiterated by President Obama following his election (Obama 2009). The Act states that

> …the United States has a fundamental obligation to help the vast number of Iraqis displaced in Iraq and throughout the region by the war and the associated chaos, especially those who have supported America's efforts in Iraq (United States 2008).

In singling out Iraqis who have supported the US as a category of individual worthy of particular concern, the Act is typical of discussions of special responsibilities towards Iraqi refugees (e.g. Carens 2013: 195; 2014: 17; Fowler 2009; Human Rights First 2009; Johnson 2011; Packer 2007; The List Project 2013). The notion of a special responsibility to Iraqis employed by coalition forces has appealed even to those who ordinarily take a strongly anti-immigrant position (e.g. Hastings 2007), and has been

[201] In some of these hearings, the question was raised as to whether the US bears a special obligation towards Iraqi refugees because its actions in Iraq were unjust and blameworthy, or whether it does so simply on account of the parlous situation into which their actions placed many Iraqis. For instance, in response to the assertion of a special obligation towards Iraqi refugees, one senator echoed the contrast between the broad and narrow conceptions of reparation discussed earlier, by asking rhetorically:

> Did we, arguably, do the wrong thing to give us some special obligation? Or did we act on the best intelligence we had and now find a terrible situation and ought to do our best to accommodate the refugees…but not to categorize it as a "special obligation" as if we were at fault here or the causative factor? (United States Senate 2007: 36-37).

A New York Congress representative, Gary L. Ackerman, also sought to separate the question of blame from the question of responsibility, by stating that:

> Whether you support the President's plan [for Iraq] or believe we need to bring our troops home, America has a clear moral obligation to the millions of Iraqis who have become refugees because of our actions, however well intentioned (United States Congress 2007: 2).

couched in the patriotic language of 'honour' and 'loyalty'. Within these debates, many have either explicitly or implicitly seen the US and UK as bearing the *strongest* special obligation to those Iraqis whom they have employed. For instance, Ambassador James Foley, who was named Senior Coordinator on Iraqi Refugee Issues in September 2007, claimed that those employed by the US are 'indeed the Iraqis to whom we have the highest obligation' (quoted in Ferris 2008a: 18). This view may stem from the fact that many see the US and UK as bearing an obligation to such employees not, or not only, on account of the harm caused to them as a consequence of that employment, but also due to two other forms of special obligation that I identified in Chapter 1. First, implicit in some discussions of responsibilities to Iraqi employees has been the idea that their employment has given rise to, in Scheffler's phrase, the kinds of 'associative duties' (Scheffler 2001: 49) that underpin asylum's potentially solidarist function. This, in turn, is either on the basis of the bonds formed through shared service with coalition troops, or due to the fact that some Iraqi employees aligned themselves with the ideals that were supposed to have motivated the invasion in the first place.[202] Many have seen Iraqis as becoming, as Walzer (1983: 49) famously wrote in relation to Vietnamese refugees, 'effectively Americanized even before they arrived on these shores', with one first lieutenant claiming that '[l]eaving an interpreter behind' is 'like leaving one of your soldiers back in Iraq and saying "Good luck, son"' (quoted in Mulcahy 2008).

Second, these harm-based and associative arguments have often been deployed in conjunction with assertions that the US bears towards Iraqi employees what the philosopher W.D. Ross has categorised as 'duties of gratitude' (Ross 2002 [1930]: 21)

[202] Indeed, this sense associative duty has been evoked by the use of the term 'friend' to describe the relationship between the US and its Iraqi employees (e.g. Johnson 2011).

which, as I observed in Chapter 1, underpin asylum's potential *desert-based* function.[203] On this view, priority should be given to Iraqi employees of the coalition forces because of their vital support to the war effort. The debate over US obligations towards Iraqis employed by coalition forces has melded together, and oscillated between, such reparative, associative and desert-based claims.

This view of a special responsibility towards Iraqi refugees has not only been articulated within the states which invaded Iraq in 2003, however. It has also been mobilised, either explicitly or implicitly, both by states hosting large numbers of displaced Iraqis as part of their push for greater international responsibility-sharing (Stevens 2013: 5), and by states resistant to accepting them. For instance, a Syrian official is quoted as saying that '[w]e keep reminding the U.S. that without this war there would be no refugees. The U.S. is not meeting its responsibilities'[204] (ICG 2008: 23), while Sweden's Migration Minister pointed out that Sweden's intake of Iraqi refugees is 'equivalent of [sic] the US taking in about 500,000 refugees' (quoted in Banta 2008: 262). Similarly, the Mayor of Södertälje, a Swedish town receiving large numbers of Iraqi refugees, stated that,

> We are a small town in a small country. We didn't start the war. It was the United States and Great Britain. They must now take responsibility for the refugees (quoted in Jordan 2008).

Moreover, Jordan's Secretary General of the Ministry of Interior has written, rather more tentatively and diplomatically, that '[t]he international community must take into consideration of [sic] the fact that host countries have not played a part in the

[203] Ben Juvinall (2013: 206), for instance, sees the prime purpose of Special Immigration Visas (SIVs) for Iraqi interpreters as being to '*reward* the sacrifices made by interpreters' (emphasis added).
[204] However, given the scale of displacement in pre-invasion Iraq, it would have been more accurate had that official said that "without this war there would not be *these* refugees", given that we can reasonably assume that Saddam Hussein's regime would have continued to generate refugees had it not been toppled in 2003.

circumstances that led to the humanitarian crisis' (Jamous 2007: 18). The reluctance of European states to protect many Iraqi refugees has been attributed partly to a conviction among these states that it is the responsibility of the US (Berman 2012: 131). It has also been voiced by Iraqi refugees themselves. A former Iraqi employee of the coalition, when testifying before a Sub-Committee of the US Congress, said,

> I think the United States need to help the Iraqis who ask for their help because we trusted the Americans, and we have been working with them, risking our lives and when it comes there are a lot of my colleagues are being threatened [sic]… (United States Congress 2007: 58).

This view of responsibility for Iraqi refugees has been replicated in some academic literature on the topic, again either implicitly or explicitly, although it has generally been asserted in passing, without any attempt to ground it in deeper moral argument or theory (e.g. Berman 2012: 131; Carens 2013: 195; 2014: 17; Chatty and Mansour 2012: 98; Cohen 2008: 339; Fagen 2007: 25; Hintjens 2012: 96; Marfleet 2007b: 415). In attempting such a grounding in this chapter, I argue that, in the case of many Iraqi refugees displaced by the US/UK invasion, the conditions of the theory of asylum as reparation developed in Parts I and II are clearly met, whether their displacement was caused by military operations, employment by coalition forces, or sectarian violence. I also observe the extent to which the actual response of the US and UK to Iraqi refugees has fallen far short of the moral demands of this theory.

However, I suggest that the special responsibilities of the US and UK are more complex and nuanced than the assertions discussed above imply. I contend that the US and UK bear stronger reparative obligations towards some Iraqi refugees than others, arguing that a focus on asylum should not lead us to lose sight of other important forms of reparation for displacement, such as compensation and opportunities for voluntary

repatriation, which the US, UK, other coalition partners, insurgents and other actors also owe to Iraqi refugees. In the sections which follow, I apply the case of Iraqi refugees to each of the conditions of the theory in turn.

Outcome Responsibility

As I argued in Chapter 3, for a state to owe asylum as reparation to refugees, it must bear outcome responsibility for causing their lack of state protection. In this section, I argue that, for many, if not all, Iraqis who have become refugees since 2003, this condition is met, and the US and UK are implicated in their displacement in a highly direct manner. Although, as I have already observed, the second Iraq War has been held up as a clear case in which an intervening power directly created refugees, I hope to show that the case displays the different types of causality that I identified earlier, and that the US and UK, in addition to directly causing a refugee crisis, have also in various ways *intensified* and *created the conditions* for one. As I shall now discuss, Iraqi refugees have been generated by the US and the UK's actions in three ways: (1) their military activities following their invasion; (2) their employment of Iraqis; and (3) their policies which led to the emergence of civil war. I shall now analyse each factor in turn.

US/UK Military Activities

As I mentioned above, contrary to the expectations of the international humanitarian regime, the invasion itself prompted relatively little displacement (Chatty and Marfleet 2009: 1). For most of the refugees from Iraq generated since 2003, then, the fact that there was an invasion in itself cannot lead to the conclusion that the US and

UK bear a reparative obligation towards them, given the key distinction between correlation and causation. However, in one of the most direct ways in which the US and UK have caused Iraqis to flee, their military operations went on to cause significant displacement. This occurred in the months immediately following the invasion, particularly in mainly Sunni areas of western Iraq, resulting in the displacement of 22,400 people by military operations by April 2007 (Samra 2007: 37). While displacement resulting from these operations has tended to be short-term, with many returning after fighting has subsided, others were afraid to return, and did not receive compensation which would allow for the reconstruction of their homes. In one operation on suspected insurgents in al-Qa'im, located in the west of Iraq, in May 2005, hundreds were displaced (Herring and Rangwala 2006: 182-183). In another incident, in the first week of May 2007, around 5,000 people were forced to flee their homes as a result of a coalition offensive in Diyala (Samra 2007: 37).

However, the military operation which appears to have prompted the largest-scale displacement is the assault by US forces on Fallujah throughout 2004, culminating in what was known as 'Operation Phantom Fury' in November 2004 (Mason 2010: 32). While the Iraqi Prime Minister, Ayad Allawi, warned Fallujah's residents in advance to evacuate the city (Tripp 2007: 294), thorough measures were not taken to ensure that this evacuation fully took place, given the US's haste in initiating the assault (Malkasian 2006: 435), which led to many civilian casualties.[205] Estimates of those displaced by the US military assault on Fallujah range from 150,000 to 300,000 (Marfleet 2007b: 411), with seventy to eighty per cent of Fallujah's population taking

[205] As I discussed in Chapter 4, evacuation before sieges is one putative instance of an intervening state being obliged *to* cause displacement, rather than being obliged to avoid it. However, as I argue later, given that the intervention did not meet the criteria of *jus ad bellum* and the manner in which it was carried out does not satisfy the principles of *jus in bello*, the displacement from the attempted evacuation should not have occurred.

flight (Tripp 2007: 294). The final seizure of Fallujah in November 2004 almost completely destroyed the city (Herring and Rangwala 2006: 35), wiping out 36,000 of Fallujah's 50,000 homes (Otterman *et al.* 2010: 65), and displacing almost the entire remaining population. Only half of the population had returned even two years later (Tripp 2007: 295), and few successfully claimed compensation for their losses (Herring and Rangwala 2006: 181). As I discuss below, the assault on Fallujah also alienated large numbers of Iraqis (Dodge 2006: 216; Malkasian 2006: 423), and contributed to its slide into all-out civil war.

Collaboration with the Coalition Forces

As I observed above, assertions of a special responsibility towards Iraqi refugees have tended to single out those who have been employed by the coalition forces, for instance as translators and interpreters, as being worthy of special concern by the US and UK, in a way that has melded together implicitly reparative, associative and desert-based moral claims. 70,000 Iraqis have worked for the coalition forces since the invasion (Ferris 2008a: 18). By working for these forces, many of these Iraqis have come to be seen as the enemy to many other Iraqis who have opposed the invasion. Like those displaced by military operations, the need for refuge of these individuals is a highly direct consequence of the actions of the US and the UK. As Joseph Sassoon (2009: 112) has put it, their 'affiliation automatically makes them targets', and the murder of such employees became common in the years following the invasion (Packer 2007). Following the British withdrawal from Basra in 2006, for instance, interpreters were reportedly killed (Arrango 2011).

However, it might be objected here that, while the US bears outcome responsibility for those displaced by its military activities, it does not bear it towards Iraqis employed by coalition forces. If this objection is accepted, then it would follow that these employees, despite the fact that the US and the UK bear *causal* responsibility for their flight, are nevertheless not owed asylum as reparation for it, but rather asylum on *solidarist* or *desert-based* grounds. This, it could be argued, is because these Iraqis consented, to varying degrees, to work for the coalition forces. If it could be shown that these Iraqis accepted the risks 'ahead of time' (Blake 2013: 117), it might be argued, then while the US might owe them residence on associative grounds or as a reward for their service, they do not owe them asylum as reparation, given a lack of outcome responsibility for their flight. Nor, it might be claimed, can the US and UK be seen as bearing any moral responsibility for these employees' displacement, given the principle of '*volenti non fit inuria*' ('to one who has consented, no wrong is done') (Linklater 2011: 45).

There is some evidence that at least some Iraqis made an active choice to be employed by the US and UK, given their values. For instance, in a hearing at the US Senate, one former employee expressed a sense of purpose and vocation upon working for the US:

> I agreed to help the Americans. I have absolutely no regrets. If I had to do everything over again, I would not change a thing. I am proud to have served as a translator for U.S. Forces (United States Senate 2007: 111).

Nevertheless, a strong case can be made that the US and UK bear outcome responsibility for the flight of these employees. Besides the possibility of a bias in the selection of interpreters to testify before the Senate on their motivations for working with the US, and the fact that many others may have taken up employment with the US

given the economic crisis and high unemployment within Iraq; more fundamentally, the fact that they consented to the dangers of working as an interpreter does not negate the existence of outcome responsibility on the part of the US and UK. By accepting a risk ahead of time, this does not mean that the US and UK did not bear such outcome responsibility for the heightened risk to which they were exposed. A contractual analogy can help to make this point. If, say, a mining company hires a team of miners to work in a dangerous shaft, all of which voluntarily accept the work despite its dangers, it bears responsibility to take all due care in minimising the risk to them. If it failed to provide adequate safety equipment, and an accident occurred underground, then by most accounts it would owe the victims of that accident compensation. Analogously, had the US provided adequate protection to employees that would have protected them from the threats which arose as a consequence of their employment, then asylum as reparation would not have been required. However, there is ample evidence that these employees were afforded less protection than that which was offered to US personnel. Interpreters and translators, for instance, were offered no body armour and were not given priority entry to the Green Zone to avoid vulnerability to suicide bombings, were frequently treated with suspicion within the zone's walls, and were not allowed to stay within it in order to avoid the danger outside. In order to continue their employment without falling victim to violence, these employees had to take different routes to work and seek to conceal their occupations from fellow Iraqis. Upon the departure of the US military presence, Iraqi employees were not provided with any protection (see Packer 2007). Therefore, the consent of the interpreters does not mean that the US and UK do not bear outcome responsibility for their flight.

Insurgency and Civil War

In contrast to the cases of military-induced displacement and Iraqis employed by the coalition, exploring the outcome responsibility of the US and the UK for the large-scale displacement resulting from the insurgency and civil war which had gripped the country by 2006 is a more complicated and controversial task. This is because the proximate causes of the displacement were the primary perpetrators whose violent actions were the largest cause of displacement in post-invasion Iraq have not been the US and UK at all, but – in a clear case of the problem of intervening agency that I discussed in Chapter 3 – rather have been Iraqi insurgents, militias and terrorist groups. It could be argued that these groups represent what is largely a force that is endogenous to Iraq itself, whether one traces the roots of this seemingly internal violence to what are often seen as 'ancient tribal antagonisms' between Sunni and Shi'a (see Banta 2008: 273; Ghosh 2007), or to the legacy of Saddam Hussein's rule. Even scholars who attribute significant responsibility to the US for the post-invasion chaos in Iraq have acknowledged this seemingly internal dimension, with Gareth Stansfield (2007: 205) arguing that, from 2006 onwards, 'rather than the US and occupying forces…being *directly* responsible for the catastrophically high number of Iraqi deaths, conflict in Iraq became *internalized* between Iraqis themselves' (emphasis added).

It is clear that the *primary* cause of the displacement resulting from the civil war which engulfed Iraq in 2006 and 2007 is the actions of the groups which perpetrated atrocities ranging from suicide bombings, attacks, kidnappings, hostage-taking, murder, extortion and deliberate forced displacement on the basis of sectarian affiliation. In contrast to the displacement caused by the US and UK, which was produced inadvertently – and, as I shall argue later, as a result of a negligent lack of planning – much of the displacement which occurred as part of Iraq's civil war was a fully

deliberate strategy. Much of the violence and persecution which prompted displacement was perpetrated on the basis of religious identity (Tripp 2007: 298), and was intentionally aimed at preventing post-war reconstruction (Herring and Rangwala 2006: 170). Anyone seeking to attribute complete outcome responsibility for displacement to the US and UK would have to argue that these forces were somehow *compelled* by the invasion to act in the way they did, and that there they had no alternative, thereby implausibly denying the intervening agency of these groups.[206]

Despite the fact that the US and UK were not the *primary* cause of displacement resulting from the civil war, and despite the intervening agency of the insurgents, a strong case can be made that the first condition of my theoretical framework is nevertheless fulfilled in this case, given that the US and UK strongly *enabled* these actors to perpetrate their atrocities and to generate displacement, and thereby bear outcome responsibility for it. Although Iraqi groups had the agency to decide whether or not to commit such violent acts, they would not have been in a position to make these decisions had the invasion not occurred. Drawing on the literature on post-invasion Iraqi politics, I shall now argue that the US and UK are heavily implicated in the displacement resulting from the civil war in three key respects. First, they presided over the collapse of the Iraqi state, which allowed for a climate of lawlessness into which insurgents could move, and led to a re-communalisation of Iraqi political life in the absence of a strong central state. Second, they actively facilitated the insurgency through military operations in Fallujah in 2004, and the lustration of officials and the

[206] Such a position would also ignore the fact that, as Toby Dodge (2006: 211) has put it, '[t]he chaos and violence that greeted regime change have their roots in the legacies that Saddam's government bequeathed to Iraq'. This is because, although the former regime was ostensibly secular and nationalist in character, it contributed to sectarian enmity in the post-invasion period, given that it was sustained by Sunni support and worked to the disadvantage of Iraq's majority Sh'ia population, many of whom it persecuted (see Dodge 2012: 35). A more nuanced assignment of causal responsibility for the violent civil war may even also go further back and examine the ways in which pre-twentieth century Ottoman rule privileged the Sunni population of Mesopotamia over the Shi'a, and also how the British colonial period ossified such power relations between the two groups (see Tripp 2007: 45).

dissolution of the army. Last, they created a new political system which institutionalised sectarian schisms, thereby contributing to sectarian enmity. In the argument that follows, I seek to balance recognition of US and UK responsibility for the displacement resulting from civil war with full acknowledgement of the responsibility borne by the primary perpetrators and the former Ba'athist regime.

The Collapse of the Iraqi State

The collapse of the Iraqi state following the 2003 invasion allowed for the development of the civil war in various ways (Dodge 2012: 55) and all its attendant displacement. The US and UK entered Iraq expecting to encounter a robust set of state institutions when, in reality, these institutions had been driven to the point of collapse by both the Iran-Iraq and Gulf Wars and the international sanctions regime which had been in place during the years prior to the invasion (Herring and Rangwala 2006: 207). As the former US Secretary of State, Condoleezza Rice, commented, '[t]he concept was that we would defeat the enemy, but the institutions would hold, everything from ministries to police forces' (quoted in Dodge 2003: xxiii). This proved to be simply false. The flight of the Ba'athist administration following the invasion led to a power vacuum which could not be filled by the relatively low coalition troop numbers, while widespread looting dismantled the state's physical infrastructure.[207] The extent of state collapse was then deepened by the CPA's de-Ba'athification decree, which effectively removed the last remaining pillars of the Iraqi state. If, as Tripp (2007: 1) has argued, '[t]he modern history of Iraq is a history of the ways in which the people who found

[207] While the US and UK brought about state collapse, outcome responsibility for the continuation of this collapse should also partly be assigned to insurgents themselves, given that such groups' violent actions prevented reconstruction from fully occurring, and insurgent action was 'designed not only to discourage Iraqis from working for the new state but also to stop the growth of its institutions' (Dodge 2006: 219).

themselves living in the new Iraqi state were drawn into its orbit', then the 2003 invasion arguably ushered in a new period in which the state lost its monopoly over the regulation of Iraqi society and has since been engaged in efforts to re-establish that monopoly and bring Iraqis back within its orbit once more.

The first consequence of this collapsed state was a climate of lawlessness which allowed for the development of an insurgency (Sassoon 2009: 30). The invasion led, according to Tripp (2007: 288), to a 'sharp increase in criminality', as prisons were opened just prior to the invasion, the police disappeared and borders were left unguarded and became highly porous. Another response to the collapse of the Ba'athist regime was widespread looting on the part of the Iraqi population, which was met with a passive reaction by the US, and was even encouraged by some within the CPA (Ali 2011: 233). The opportunities for looting rendered an insurgency relatively easy to organise, for weapons stockpiled by the previous regime across Iraq meant that such arms became easily accessible to those who went on to become insurgents (Dodge 2012: 60). This lawlessness was then perpetuated, rather than addressed, by the US in its decision to hand over military control to Iraq in September 2006, despite the Iraqi army's weakness, with Dodge (2012: 79) seeing this decision as 'a major contributing factor to Iraq's slide into civil war during 2006'.

A second consequence of this state collapse was the re-communalisation of Iraqi political life which occurred in its absence. The ostensible nationalist secularism of the Ba'ath regime had been the surface of what was a regime which had managed, manipulated and kept a lid on complex sectarian and tribal identities. Whereas both sets of identities were present in both pre- and post-2003 Iraq, the balance of power between them, so to speak, and their relative strengths over time shifted: secular nationalism was more salient in the context of a strong, authoritarian state, whereas communal identities

became more prominent in the absence of the state.[208] Behind this formal state, Tripp (2007: 259) has argued, lay a '"shadow state", formed by networks of associates, chains of patrons and clients, circles of exclusion and privilege emanating from the office and person of the president'. When the 2003 invasion removed this formal state, only the shadow state and all of its particularist allegiances and power dynamics remained (Stansfield 2007: 158; Tripp 2007: 275). The power vacuum that characterised Iraq in the immediate aftermath of the invasion was filled by these communal forces, creating 'the space for both ethnic entrepeneurs to mobilise society and the purveyors of violence to exploit lawlessness' (Dodge 2012: 36). In a climate of scarcity in which the infrastructure and provision of basic services was badly affected by the invasion, access to resources was increasingly dependent upon such particularist links and allegiances (Marfleet 2007b: 410), and allowed 'radical groups of all sides…to pose as both protectors and providers to the most vulnerable' (Al-Khalidi and Tanner 2007: 7). Even when state capacity was recovered to some extent – leading Eric Herring and Glen Rangwala (2006: 267) to argue that, three years after the invasion, Iraq was better understood as a 'fragmented' rather than a 'failed' state – this re-communalisation of political life was left uninterrupted, paving the way for deliberate strategies of displacement based on sectarian affiliation.

[208] Indeed, sectarian identity in Iraq can be understood partly as an instrumental, strategic resource which is deployed and becomes prominent in different times and in different contexts (Ali 2013b). It is therefore not the case that sectarian conflict is the inevitable outcome of 'ancient hatreds' or that it was entirely absent before 2003; rather, the invasion gave sectarian identity a renewed salience which had huge consequences in terms of displacement. As Peter Harling (quoted in Ali 2011: 236-237) has put it, '[t]he invasion revealed, enabled, and exacerbated pre-existing phenomena more than it generated them in and of itself…Some of the more dramatic recent developments in Iraq stemmed from undercurrents largely unnoticed during the former regime, which only accelerated as the post-invasion power structure evolved'.

Facilitating Insurgency

In addition to enabling the onset of civil war by causing the collapse of the Iraqi state, the US and UK actively *facilitated* its development (Dodge 2006: 214). We have already seen the ways in which the US assault on Fallujah directly prompted significant displacement. However, it also contributed to much larger-scale displacement in more indirect ways. In addition to alienating large swathes of Iraqi opinion who viewed the assault as a heavy-handed and unjust act, it set in motion a process which would contribute to the emergence of civil war. Given that Fallujah was left unsurrounded, many insurgents left and then regrouped in other locations, such as Mosul and Baghdad (Herring and Rangwala 2006: 35). Those who regrouped in the western Sunni suburbs of Baghdad then proceeded to drive Shi'a families out of the area, kick-starting the process of ethnic cleansing which would lead to Iraq's descent into civil war (Allawi, cited in Otterman *et al.* 2010: 65; Dodge 2012: 57-58).

The de-Ba'athification decree, by targeting employees who had occupied even low-level positions (Marfleet 2011b: 103), put almost 30,000 Iraqis out of work (Sassoon 2009: 130); a decision which not only left Iraq bereft of institutions without a communal basis (Stansfield 2007: 168), but also created a large and disaffected group of unemployed Iraqis who were available for, and were subsequently recruited by, insurgent groups (Dodge 2006: 215). Coupled with the availability of lootable arms, units of the former Iraqi army regrouped as insurgent forces (Tripp 2007: 287). As Toby Dodge (2003: xxvii) has put it, '[t]he growing perception among Iraqis that U.S. troops were not in control of the situation helped turn criminal violence and looting into an organized and politically motivated insurgency'.

Entrenching Communalism

A third way in which the US and UK indirectly caused displacement resulting from Iraq's civil war was by entrenching communalism into a new political system. Again, despite the superficial secularism of the Ba'athist regime, Saddam Hussein's rule had had a significant communal dimension, especially during its final years as a result of the sanctions regime, which led it to reach out for support from tribal leaders in what has been described as a 'retribalization' of the Iraqi state (Gee 2006: 226; Stansfield 2007: 157). Yet, rather than seeking to forge an inclusive national Iraqi politics after 2003, the US institutionalised the communal differences which had resurfaced following its invasion. For Marfleet (2007b: 410), 'within two years of invasion the U.S. had created a novel communalist system', which has been characterised by Dodge (2012: 47) as an 'exclusive elite bargain' which has effectively 'demonised…the whole Sunni section of society' and entrenched a Shi'a dominated political system. The US also allowed sectarian politics to infiltrate the ministries of the Iraqi government, presiding over a system in which such ministries 'became partisan fiefdoms, farmed out by powerful factions, made more powerful by their ability to command militias that were used to terrorise political enemies' (Tripp 2007: 277). For instance, the Ministry of Interior came to control Special Police Commandos run by Shi'i militias, which committed violence, torture and extra-judicial executions against Sunnis (Dodge 2012: 63). In addition to its role in founding what became essentially a sectarian state that became heavily implicated in the production of refugees, there is some evidence that the US was even involved in sectarian violence itself. An investigation undertaken by *The Guardian* strongly suggests the involvement of the US in the torture carried out by Special Police Commandos, alleging that the US set up secret interrogation and torture centres, establishing practices which were subsequently

continued by the Ministry of Interior. The investigators have suggested that, given this role, the US made a direct contribution to Iraq's slide into civil war (Mahmood *et al.* 2013).

All these considerations strongly suggest that, despite primary outcome responsibility for the displacement resulting from Iraq's civil war being borne by the direct perpetrators of violence, the US and UK also bear some such responsibility for the displacement. This case can be made without ignoring or downplaying the outcome and moral responsibility of other actors, past and present, in creating the conditions in which a violent insurgency could emerge. For instance, civil war was rendered more likely by the entrenchment of a culture of violence under the Ba'ath regime, fostered by the militarisation of Iraq (Rosen 2007a) as a result of its war with Iran in the 1980s, and then against Kuwait and the US in the early 1990s, and as a result of the international sanctions regime (Dodge 2012: 32).[209]

Before proceeding further, it is necessary to engage with one objection that has been made to the notion that the US and UK bear outcome responsibility for causing the displacement of Iraqis. This objection states that, given the significant continuity between displacement before the invasion and the displacement following it, the US does not bear outcome or moral responsibility for this displacement. Sassoon (2009: 2-3), for instance, considers the potential argument that 'Iraq's exodus and brain drain after 2003 is just a continuation of the pre-invasion period and thus is not a real "crisis"', whereas Blake (2013: 116) evaluates a variation of it, noting that the 'United

[209] Attribution of partial responsibility for the post-2003 Iraqi refugee crisis to the architects of the pre-invasion sanctions regimes might be resisted on the grounds that it was not reasonably foreseeable that the sanctions would have this effect. Without entering into debate over the justifiability of the sanctions regime, it can be argued that the regime rendered Iraq's state institutions more vulnerable to external shock. While the invasion of Iraq may well not have been reasonably foreseeable when sanctions were originally enforced, the greater vulnerability to shocks (including, but not limited to, invasions) *was* arguably foreseeable.

States…did not create the humanitarian emergency in question. Iraq, in a moral sense, was already a humanitarian emergency; the world community simply refused to notice this fact'. Indeed, some officials within the Bush administration have sought to justify their response to criticism of their policy towards Iraqi refugees by stating that Iraqi displacement 'predates the current conflict' (quoted in Berman 2012: 125), with the former head of the US Department of State's Bureau of Population, Refugees, and Migration, Ellen Sauerbrey, claiming that 'the [post-invasion] refugee problem is one caused by [Saddam Hussein's] repressive regime' (quoted in Rikoski and Finer 2009).

However, while there are indeed significant continuities and commonalities between pre- and post-2003 displacement that can be identified from a social-scientific perspective (see Chatelard 2010b), these commonalities do not make a difference to the task of identifying outcome or moral responsibility for the displacement since 2003. Had Saddam Hussein's regime not been toppled, that regime would have borne moral responsibility for the displacement which we can reasonably suppose would have continued to occur (alongside external actors if, say, the sanctions regime had continued to contribute to displacement). However, the displacement which did in fact occur after 2003 was, as we have seen, caused in significant part by the invading powers. The Ba'athist regime produced displacement for a set of reasons and as a consequence of a set of policies; the US produced displacement for other reasons and as a consequence of other policies. The invasion of Iraq did not intensify a pre-existing pattern of displacement, as NATO's bombing of Kosovo arguably did, but rather set a new and distinct pattern, driven by different dynamics. The fact that post-2003 displacement fits into a longer history of displacement, therefore, does nothing to alter the distinct responsibilities for different refugees that have existed at various points in Iraq's recent history.

Unjustified Harm

The second condition of my theoretical framework, it will be recalled, is that an external state must have caused refugees unjustified harm, or to have put them at risk of unjustified harm, in order to owe them asylum as reparation. In applying this condition to the case at hand, the first step is to identify the ways in which the flight of Iraqis caused them harm in the first place. That their flight caused them harm is a fairly uncontroversial proposition for, as Banta (2008: 274) has put it, '[t]he injury done to the human rights of displaced Iraqis is rather self evident'. However, in substantiating this assertion, it is useful to distinguish between the harms and human rights violations experienced by Iraqis in the situations leading up to their flight, the harms they underwent during their flight, and the harms encountered after being displaced, either inside Iraq or abroad.

Iraqis and the Harms of Displacement

To begin with the harms experienced by Iraqis before their flight, my discussion so far has made clear the kinds of situations which forced so many Iraqis to flee: fear of death and injury from coalition military activities; attack, kidnapping, extortion, torture or murder at the hands of insurgents and sectarian militias on account of religious affiliation or collaboration with coalition forces, or falling victim to indiscriminate violence such as suicide bombings. Given these existential threats, Sassoon (2009: 3) draws on the definition of the refugee offered by Zolberg *et al.* (1989) as an individual with a 'well-founded fear of violence' to diagnose the fundamental predicament of Iraqi refugees.

The displacement of many Iraqis was sudden and clear-cut, if in response, say, to a specific threat or warning from a sectarian group. The witnessing of targeted attacks and threats on others by Iraqis produced what Marfleet (2011b: 109) has described as 'demonstration effects', leading others to flee pre-emptively to prevent the same happening to them. For many others, however, displacement was a 'cumulative' process (Chatelard and Morris 2012: 5), in which threats piled up and life *in situ* became progressively less tenable. In addition to the threat of violence, socio-economic strains, prompted by the collapse of basic services and infrastructure, also pushed Iraqis to leave (Marfleet 2007b: 397). Marfleet (2011b: 108) has identified a stage of what he calls 'pre-displacement', in which millions of Iraqis adjusted to the re-communalisation of Iraqi society with measures such as taking different routes to work and other locations in order to remain safe, and restricting their own movements with what amounted to self-imposed curfews as a precaution. This stage of pre-displacement involved a large degree of constant fear, insecurity and risk.

Once the decision to flee was made, many Iraqis experienced significant harms during their flight either to other locations within Iraq or to other states. Although the land route to Syria had been highly dangerous before the invasion (Sassoon 2009: 64), there were reports of Iraqis being intimidated by militias and criminals who set up impromptu checkpoints as they fled towards the Syrian border (Ferris 2007b), as militias and armed groups 'exploited the refugee crisis for self-enrichment and war racketeering' (ICG 2008: 28). Those fleeing further afield also undertook highly dangerous and clandestine overland journeys into Europe which involved paying large sums to smugglers and being hidden in trucks for days on end (Sassoon 2009: 100).

Moreover, many Iraqis have been both IDPs and refugees since 2003, first fleeing within Iraq but then becoming refugees after having failed to find security

within the country (Marfleet 2011b: 99). Yet, despite these harms experienced by IDPs and refugees alike, the harms experienced by each nevertheless merit separate discussion.[210] This is partly because those who have been internally displaced have tended to be the poorest and least advantaged, and therefore the least able to flee to another country (Marfleet 2011a: 282-283). Particular harms and vulnerabilities facing IDPs have included extreme poverty, proximity to ongoing violence, and lack of access to basic services. In a 'life on the margins', many impoverished IDPs have been forced to live in public buildings or improvised housing, where they have risked eviction by landowners or the authorities (Marfleet 2011a: 283). In order to eke out their subsistence, many IDPs have been forced to work illegally, including as sex workers, which has rendered them vulnerable to exploitation (Marfleet 2011b: 111). Having already been displaced, IDPs can also be vulnerable to 'secondary displacements', whereby they have been forced to move again, having found themselves unable to secure access to basic services in their first new location (Marfleet 2011a: 285). The possibility of return for such IDPs has been stymied by the dramatic transformation of Iraqi cities such as Baghdad due to the ethnic cleansing which took place during the civil war, and many returning IDPs have found few opportunities for property restitution or compensation (Sassoon 2009: 160-163).

Post-invasion Iraq has also visited harms both on existing refugee populations in Iraq and on Iraqi returnees, at times uprooting them for a second time, causing them effectively to become 'double refugees' (Rosen 2007a). In addition to the re-

[210] Although I make no distinction between refugees and IDPs in my theoretical framework – instead drawing on Shacknove's influential approach which does not view refugeehood as contingent on the crossing of an international border (Shacknove 1985) – and consider that asylum as reparation can be owed to both refugees and IDPs, in this chapter I do make this distinction, in order to highlight the variegated harms experienced by Iraqis, depending on whether they have been internally displaced or have fled abroad. Although the distinction has no moral significance for the theory of asylum as reparation, it is nevertheless significant from a social-scientific perspective in this context to at least some extent.

displacement of Iraqi exiles who had returned to Iraq from Iran after the invasion (Margesson *et al.* 2010: 74), Palestinians in Iraq have suffered reprisals by Shi'a militia, given that these Palestinians had received subsidised housing under the Ba'athist regime (Sassoon 2009: 27). They have often been unable to leave Iraq for, although Syria has hosted huge numbers of Iraqi refugees, it denied entry to a handful of Palestinians, forcing them to reside in a border camp (Sassoon 2009: 75).

Those who were able to leave Iraq have also faced significant harms in exile. This harm has occurred despite the fact that Iraqi refugees have in many cases been better off materially than both Iraqi IDPs and refugees from other states, and have been able to rely on their own savings to sustain themselves abroad. Moreover, the lack of preparedness on the part of the international humanitarian regime for their arrival in 2006 and 2007 had the one advantage that Iraqi refugees have largely been spared many of the harms often experienced as a result of being warehoused in refugee camps (Sanders and Smith 2007: 26), such as the particular vulnerability to violence and lack of freedom of movement which, as I noted in Chapter 1, encamped refugees often endure (Crisp 2003: 11-12).

The harms of exile have been least pronounced in the case of the wealthiest Iraqi refugees. As I noted earlier, the early days of the US presence saw the flight of wealthy and well-connected Ba'athists to Jordan – the so-called 'Mercedes refugees' (Sassoon 2009: 36) – who, according to Chantal E. Berman (2012: 125), fled 'in comfort' and have since given off 'overt signs of refugee opulence' (ICG 2008: i). In addition to this group, some Iraqis have reportedly become successful business people within their host states (Sassoon 2009: 48), with some having been able effectively to purchase the right to residence (Seeley 2010).

However, this affluence has been far from uniform across the Iraqi refugee population (Chatelard 2010a: 60), and has dwindled over time as refugees' savings have run out, leading the International Crisis Group (ICG 2008: i) to identify the 'growing pauperisation of Iraqis' in neighbouring states. Despite their relative affluence vis-à-vis other refugee populations, the situation of Iraqi refugees in neighbouring countries such as Syria and Jordan has been characterised by significant strain for, as savings have run dry, they have faced unemployment and uncertainty (Sassoon 2009: 47). Iraqi refugees have suffered setbacks to their careers, with many Iraqi doctors 'working below their qualifications' or remaining unemployed (Sassoon 2009: 47, 77).

A number of other harms have awaited Iraqi refugees in neighbouring countries. First, although they have been permitted access to the Jordanian education system, many Iraqi refugees in the country have not enrolled their children into Jordanian schools, as the process involved supplying addresses, which many feared would have left them vulnerable to deportation (Sassoon 2009: 41). The same concern led many Iraqis in Jordan not to apply for health insurance. In Syria, although Iraqi children have been allowed to enrol in Syrian schools, there has been a low enrolment rate owing to lack of space, lack of correct documentation, and the same fear of deportation (Sassoon 2009: 69). In consequence, many Iraqi refugees have had their rights to health and education left unfulfilled.

Second, Iraqi refugees in neighbouring countries have been vulnerable to exploitation. As a consequence of the pauperisation of Iraqi refugees in neighbouring countries, child labour has become more widespread, with Iraqi boys working in markets and girls as housemaids (Sassoon 2009: 71). Many women have been destitute, many engaging in sex work, including girls who have worked as prostitutes to gain income for their families (Sassoon 2009: 67).

A frequent serious harm that is experienced by many Iraqi refugees as a consequence of their displacement is psychological trauma, with depression, anxiety and post-traumatic stress disorder being commonplace (Sassoon 2009: 72, 93; see also Stevens 2013: 26). Having experienced threats of violence or the loss of loved ones, many require psychological assistance which has often been lacking in their host states (Sassoon 2009: 44). In addition, such trauma offers a further partial explanation of why enrolment levels of Iraqi children in Syrian schools have been low (Sassoon 2009: 70).

The policies of states hosting Iraqi refugees have both benefited and harmed these refugees. On the one hand, the approach of neighbouring states such as Syria and Jordan has provided physical security to large numbers of Iraqis, drawing on a deeply embedded Arab tradition of hospitality (Chatty 2013). On the other hand, these neighbouring states have only welcomed – or rather tolerated – Iraqis as temporary 'guests', where there is no refugee law to regulate their stay (Stevens 2013: 23). Those engaging with state bureaucracy in order to secure protection have faced uncertainty, stress and limbo as they await a decision on their claim. Iraqis in neighbouring countries who have applied for resettlement in the US have faced long delays in the processing of their applications owing to rigorous security screenings (see Human Rights First 2010). Other Iraqis who have applied for asylum in Western countries have frequently faced a long and uncertain wait as they proceed through the often unwieldy RSD procedures of these states. For some, such as those stuck in the UK's backlog of 'legacy' cases, this wait has persisted for several years. Those who have had their asylum claims refused have had this liminality drastically deepened. In the UK, for instance, refused Iraqi asylum seekers have been made destitute, with their entitlement to state support withdrawn in an effort to force their departure (Hintjens 2012).

Even for those Iraqis who are fortunate enough to be granted refugee status or obtain a resettlement place in the West, the ensuing security of status is certainly not sufficient to erase the harms of flight, and can mark the beginning of a new set of difficulties, as Iraqis have attempted to integrate in their host states. According to a report by Georgetown University Law Centre (2010: 1), 'recently resettled Iraqi refugees [in the US] face odds so heavily stacked against them that most end up jobless, some even homeless', and many have had mental health problems which persist into their new lives abroad (Ott 2011: 21). Iraqi refugees in Sweden have also faced difficulties in finding employment, with some older Iraqis being told to stay on welfare benefits until they reach retirement age rather than undergo extensive language and other training required to equip them for work, thereby cutting short their careers (Sassoon 2009: 103).

Was the Harm Unjustified?

Having shown that the flight of millions of Iraqis clearly caused them severe harm, the next question to be considered when applying my framework to this case is whether or not that harm can be seen as justified. In Chapter 4, I distinguished, following Butt (2009: 85), between unjustified *actions* and unjustified *situations*. On any plausible moral theory, the harms sketched above clearly fall into the category of those which should not morally be allowed to persist, and so can be appropriately classified as unjustified situations. On the one hand, it might be thought that this conclusion suffices to show that this condition of my theoretical framework is fulfilled in this case. On the other hand, however, it is necessary to engage with the question of whether the US acted justly or unjustly in Iraq. This is because, as I expressly argued in

the previous chapter, if a state produced refugees justifiably as part of a justified humanitarian intervention, then considerations of fairness are such that the principle of reparation should be overridden, and the costs of refugee protection should instead be shared among the international society of states. In engaging with this question, it is not, however, necessary to delve into the hotly debated question of whether the initial invasion of Iraq itself was just overall, or whether there was a just cause underlying it (see e.g. Bellamy 2006; Cushman 2005; Romaya 2012; Walzer 2004: 143-168; Weeks 2010), or the question of whether displacement was a reasonably foreseeable consequence of the initial invasion.[211] Instead, my case that the US caused Iraqi refugees unjustified harm not only in terms of the situations into which they were placed but also in terms of the US's actions, can be rested on the argument that, regardless of whether or not the initial invasion was justified, the US's post-invasion policies during its occupation of Iraq – which, as we have seen, set in motion processes of mass displacement – were negligent and unjustified. Thus, *even* if it could, for the sake of argument, be shown that the initial invasion of Iraq was justified, this would mean that only those displaced *directly* as a result of it would not be owed reparation by the US, but should rather be protected as part of a multilateral international initiative. As Walzer (2004: 163) has put it, 'you can fight a just war, and fight it justly, and still make a moral mess of the aftermath'. The US's duty of reparation towards Iraqi refugees can be grounded in its failures of transition alone. If one believes that the

[211] Indeed, some commentators did presciently foresee post-invasion displacement. For instance, Human Rights Watch (2003: 2-3) warned that a war in Iraq would 'produce new refugee outflows to neighboring countries', and Loescher (2003) stated that '[g]iven that Saddam has no obvious successor, it is…possible that violent conflicts will break out and lead to population movements among Iraq's polarised majority Shi'a, Kurdish and Sunni communities, and its minority Turkomen, Chaldean and Assyrian Christians or its fragmented exile opposition groups', seeing a 'disintegration or fragmentation of the state' as conceivable (Loescher 2003). In an article published with Arthur Helton soon after the invasion, Loescher also stated that the invasion may prompt 'civil war, resistance to external rule and mass population movements' (Loescher and Helton 2003).

initial invasion was also unjust, then the case that the US owes asylum as reparation to Iraqi refugees generated since 2003 is only strengthened.

The ground has already been laid in the previous section for the argument that post-invasion US policy was negligent and unjustified. Policies such as de-Ba'athification and the communalisation of Iraqi political life had deleterious effects that were certainly foreseeable given the context in which they were taken. Moreover, initial failures associated with the invasion were carried over into the occupation. Many commentators have cited a lack of planning for the post-invasion period, which meant that measures which could have been taken to prevent and mitigate any refugee movements were not taken (e.g. Ferris 2008a: 17; Marfleet 2011b: 101; Stansfield 2007: 218; Tripp 2007: 278-279). This lack of planning meant that insufficient troop numbers were provided (Herring and Rangwala 2006: 52), which contributed to the emergence of Iraq's climate of lawlessness during the occupation; a state of affairs that continued until the 'surge' of US troops in 2007.

Moreover, Dodge (2003: xi) has shown that the paucity of fluent Arabic speakers and expertise on Iraq within the CPA led directly to its 'inability to establish meaningful communications with Iraqi society', and created the risk that, as Dodge (2003: 159) has put it, it would 'grasp aspects of the shadow state as authentic representations of the Iraqi polity', thereby 'reproducing the very structures set up by Saddam Hussein to guarantee his own grip on power'. Others have argued that, in place of any sustained analysis of the social and communal fault-lines underlying Iraqi society, both the initial decision to invade Iraq, and subsequent US policy in Iraq, was made on the basis of the neo-conservative view that the sole obstacle to the emergence of a vibrant, capitalist democracy in Iraq was Saddam's regime (e.g. Marfleet 2011b:

102; Stansfield 2007: 165), thereby underestimating the latent strength of communalism within Iraqi society.

Reparative Fittingness

In Chapter 5, it will be recalled, I defined reparative fittingness in large part in relation to the preferences of the refugees in question, laying down a principle of refugee choice that holds that, if reparation is to fulfil its aim of restoring the dignity and agency of those subjected to unjustified harm, then it should be tailored in accordance with their choices. The fittingness of asylum as a form of reparation for the unjustified harms of flight from Iraq depends, on my account, on whether asylum in the responsible state is chosen by the Iraqi refugees in question. As might be expected, there is evidence that the preferences of Iraqi refugees concerning the protection they receive vary. For some Iraqis, especially those who strongly opposed the invasion and view it as an unjust war, may find the notion of asylum in the states which precipitated their plight inappropriate, with Chatty and Mansour (2011: 15) finding among the respondents in their study an 'unwillingness of many refugees to relocate to the USA'. Despite an apparent preference among Iraqi refugees for resettlement in Europe rather than in the US, the places available have not matched this preference, for 58,811 Iraqis have been resettled in the US since 2007, whereas only 8,400 Iraqis were resettled in European states between 2007 and 2009 (Stevens 2013: 28). Others may have ambiguous feelings about the prospect of asylum in the US or UK. For instance, one Iraqi is quoted as saying that

> In 2003, we had applied to go to America. I felt very bad that I was going to the country that invaded us. I was happy when they refused us! I was also angry when they refused us. I feel this now. Maybe they read my face that I don't want them (cited in Otterman *et al.* 2010: 84).

Other Iraqi refugees have clearly desired asylum or resettlement in either the UK or US, by either applying for resettlement in the US, or by spontaneously arriving in the UK to claim asylum. This may be the case especially for those employed by the US or UK, who may (but not necessarily) have been motivated by support for the invasion and the values of the invading countries. When Kirk Johnson, a former employee of the US Agency for International Development, set up a list of Iraqis employed by the US to campaign for their admission to the US, he was contacted by such Iraqis clamouring to be included on it (Packer 2007). Some Iraqis have been explicitly motivated by the cause of their flight to seek asylum in the US. A former Iraqi employee explained before a committee of the US Senate that

> We had family in America, and since my assistance to American soldiers was partly responsible for my family's persecution, we decided to flee Iraq for the United States (United States Senate 2007: 22).[212]

If Iraqi refugees decide that they do not desire asylum as a form of reparation, then what reparation should be offered instead? Many Iraqi refugees do indeed feel that they are owed reparation for their displacement, with Chatty and Mansour (2012: 103) finding that many of the respondents in their study feel that 'the Western states had an obligation to fulfil as an outcome of their roles in the war on Iraq'. For those who have developed social ties and acquired some measure of stability in their places of residence within their countries of first asylum and wish to remain in those states, the offer of compensation to those refugees is more fitting. Stevens (2013: 37-38) sees the contributions of the US and UK both to UNHCR and to states hosting Iraqi refugees as

[212] Clearly, these examples provide only anecdotal evidence of the range of preferences for protection held by Iraqi refugees. Detailed surveys would need to be undertaken in order to ascertain the extent to which they are, or are not, representative of the Iraqi refugee population as a whole.

'undoubtedly a form of compensation to Jordan by those involved in the 2003 invasion for bearing the burden of displacement', although it is debatable whether the support provided to date has been sufficient and, in any case, it has not been accompanied by acknowledgement of responsibility, thereby precluding it from acting as a form of satisfaction. As I argued in Chapter 5, moreover, contributions to UNHCR generally have a low reparative capacity, especially if they are unaccompanied by such acknowledgements of responsibility.

In some cases, moreover, *in situ* compensation may be the more fitting form of reparation for displaced Iraqis. For instance, Iraqis internally displaced by US forces, such as those who fled Fallujah around a decade ago, who have either returned or may have established themselves elsewhere, need not uproot themselves in order to access asylum as reparation. Their situation, however, is very different from the far larger numbers of Iraqis who were displaced by the civil war from 2006 onwards, for many of whom return may be almost impossible given the transformation of the ethnic composition of cities such as Baghdad, and who may require a durable solution outside Iraq.

In addition to offers of compensation, the US and UK bear a supplementary responsibility to ensure that the full range of durable solutions are available to Iraqi refugees. This includes an obligation to contribute to the creation of the conditions which would allow for the voluntary repatriation of Iraqi refugees through *in situ* interventions, should they desire that option. In order to ensure that such return is durable and sustainable, the US and UK (alongside the Iraqi government and other actors) must ensure that other reparations and transitional justice mechanisms, such as truth-telling exercises, are fostered, enabling refugees and IDPs to access property restitution or compensation. Although the conditions for return should be created by the

US and UK, the principle of refugee choice which is so crucial when offering them reparation should prevent states from over-emphasising return at the expense of other durable solutions for Iraqis, as they have consistently been wont to do (see Chimni 2004: 55), especially if this approach is motivated primarily by a desire to claim that Iraq's crisis has passed and that peace has been restored (see Chatelard 2011: 17). In line with this principle of refugee choice, repatriation must be voluntary in order for it to constitute a genuine form of reparation, which instantly rules out practices such as the forcible removal of Iraqi asylum seekers by the UK.

Avoiding Morally Undesirable Side-Effects of Asylum as Reparation in Iraq

As I observed in Chapter 5, the reparative fittingness of asylum may be compromised by the fact that it can have the side-effects of deepening a damaging 'brain drain', reinforcing the effects of ethnic cleansing and, by itself, leaving the root causes of refugee movements untouched. Given that the conflict in Iraq has deepened a brain drain and mass ethnic cleansing occurred, a commentator adhering to the standard hierarchy of durable solutions might insist that voluntary repatriation for Iraqi refugees would be the most fitting form of reparation overall. Would the granting of asylum as reparation to many more Iraqi refugees by the US and UK have these side-effects, and would they be serious enough to render asylum an unfitting form of reparation?

To begin with the issue of 'brain drain', in the case of Iraq, concern over such a 'brain drain' forms the basis of one argument against the notion that the US and UK should provide asylum as reparation to significantly larger numbers of Iraqi refugees than they have to date. As I mentioned earlier in this chapter, Iraq's 'brain drain' – which pre-dates but has been greatly exacerbated by the 2003 invasion – has decimated

Iraq's middle-classes and held back both reconstruction and, arguably, the development of a genuine Iraqi democracy, given that some hold that the presence of a secular middle-class is necessary for such democratic development (see e.g. Sassoon 2009: 149-150). The presence of a strong middle-class in Iraq may also have a role to play in preventing any future slide back into civil war given that Iraq's 'middle class probably represents Iraq's best bulwark against sectarian politics' (ICG 2008: 29). This anti-brain drain argument for promoting, and even enforcing, return has indeed been made by states which have grown weary of providing sanctuary for Iraqis in the absence of an equitable system of international responsibility-sharing. Swedish officials, for instance, have sought to justify a returns policy on the grounds that 'it is of major importance for the country's future that is not drained of its most skillful [sic] citizens' (Carlsson and Billström 2007: 22). This argument amounts to a plea to balance the need to provide asylum to Iraqi refugees with the obligation not to hold back Iraq's much-needed reconstruction by facilitating the flight of those best able to staff it, given the impact on Iraqis who have remained.

This is a legitimate concern, for there is no reason why the obligation to provide reparation to Iraqi refugees should automatically trump the need to reverse the ill effects of the brain drain, especially when its impact on Iraqi stayees is taken into account. On the other hand, given that both are morally important goals, there is also no reason why the need to reverse the brain drain should trump the obligation to provide asylum as reparation either, or why we should necessarily conclude that a legitimate solution to this brain drain is to enforce return. States which have accepted Iraqi refugees, such as the US and UK, must explore potential means of realising both goals simultaneously. While the details of such measures go beyond the scope of this thesis, they could potentially include the training of Iraqis who have remained in Iraq, rather

than enforcing the return of Iraq's professionals. The question of whether the prevention of the 'brain drain' is a goal which is capable of justifying restrictions to refugees' choice between different forms of reparation raises a host of complex moral questions surrounding the putative special obligations of citizens to their states of origin and what these states can legitimately expect of them.[213] Suffice it to say here that, although host states might legitimately *encourage* Iraq's skilled professionals to return in order to counteract the brain drain, it would be morally more problematic for them to *enforce* their duty, if it exists, to assist their compatriots. Given the relatively 'feeble' impact of the amounts provided by the responsible powers towards Iraq's reconstruction (Sassoon 2009: 133), they would also run the risk of hypocrisy in forcing Iraq's professional classes to return in order to bring about reconstruction while at the same time not discharging their own obligation to do so fully, especially given that the need for reconstruction in the first place is partly a consequence of their actions, both as a result of their imposition of the sanctions regime and their subsequent invasion. If the US and UK were to force Iraqi professionals to return for the sake of Iraq's reconstruction, this would amount to an attempt to shift a remedial responsibility that the US and UK clearly bear to those who have fallen victim to their actions.

As for the concern that granting asylum as reparation to large numbers of Iraqis might entrench the effects of the sectarian violence and ethnic cleaning undertaken by Iraqi insurgent groups during Iraq's civil war from 2006, this provides a reason for Iraq and external states also to engage in carefully chosen *in situ* interventions designed to create the conditions which would allow for refugees' voluntary repatriation, rather than not to offer them asylum as reparation at all. To refuse to offer asylum on these grounds would be effectively to leave many Iraqi refugees as IDPs within Iraq; a population

[213] For a discussion of such issues in relation to the migration of health workers from the global 'South' to the 'North', see Kieran Oberman (2013).

that, as I observed earlier in this chapter, are especially vulnerable and impoverished. This is because the ethnic composition of Iraq's cities has been dramatically transformed by the displacement induced by the civil war, such that formerly mixed neighbourhoods have become homogeneous, leaving them 'unrecognisable' to returnees (Chatty and Mansour 2012: 98). Given the lack of opportunities for compensation or property restitution (Sassoon 2009: 160), many would find the resumption of their lives before their displacement to be simply unfeasible. Whereas the reversal of the effects of ethnic cleansing should be – insofar as it is possible and would not provoke even greater injustice or a renewed cycle of displacement – a longer-term project, asylum as reparation is clearly required in the interim.[214]

Capability

In Chapter 5, I recognised that the obligation to offer asylum as reparation can be constrained, or put on hold, by the genuine resource constraints of a state. However, the integrative ability of the US and UK – two of the world's wealthiest states – to provide reparation to the large numbers of Iraqi refugees is hardly in doubt. These two countries have had the resources to expend on a vastly expensive war in Iraq – which is estimated to have cost the US three trillion dollars (Stiglitz and Blimes 2008) – and they also have the resources to provide reparation to those uprooted by it, even over the course of a period of significant economic downturn.[215] Nor is the potential political obstacle of justifying the expense of a large-scale reparations programme for Iraqi

[214] For the same reasons, grants of asylum as reparation to Iraqis would need to be supplemented by attempts at tackling the 'root causes' of the displacement and sectarian enmity, however that would best be pursued.

[215] Many have pointed out the 'trifling' amount of money poured into assistance for refugees compared to the huge cost of continuing the US military presence in Iraq (e.g. Sassoon 2009: 110). For instance, while the US spent $200 million on displaced Iraqis in 2007, it had expended $280 million per day since the beginning of the conflict (Sanders and Smith 2007: 24).

refugees to what would likely be sceptical and recession-conscious British and American publics a plausible excuse for inaction: just as the US and UK governments vigorously argued for the invasion of Iraq with all means at their disposal, even disregarding significant public opposition and protest, they are able to make the case for asylum as reparation for those displaced by it. Iraqi refugees also pose little threat to the cultures of the two states, given that they already have a strongly multicultural character.[216] In short, unlike many states in the developing world, the resource constraints that may potentially justify a departure from the principle of refugee choice that I laid out in Chapter 5 are simply not present in the case of the US and UK. Instead, the principles of reparation and of capability both point in the same direction in this case: the two states should offer asylum to many more Iraqi refugees than they have done so to date.

Nevertheless, it should be recognised that demanding that the US and UK provide asylum as reparation to *all* four to five million of those displaced, either internally or across international borders, may be excessive, even for such wealthy and powerful states. Indeed, the wording of the 2008 *Refugee Crisis in Iraq Act* in the US seemingly attempted to pre-empt the kind of 'floodgates' arguments which are often heard in response to calls for generous asylum policies, qualifying its commitment to protect Iraqi refugees by stating that 'the United States cannot resettle all of Iraq's refugees in the United States' (United States 2008). However, the task of arriving at even a broad figure of how many Iraqi refugees the US and UK should be willing to accept goes beyond the scope of this work, for it would require analysis of complex empirical questions concerning the genuine absorptive capacity of the two states (and

[216] In the case of the US, admitting outsiders can even be seen as part of its national self-definition for, as Matthew Gibney (2004: 139) has discussed, many have subscribed to 'the idea that the US had a duty to…displaced persons based on its immigration traditions' (see also Scanlan and Kent 1988: 86).

not simply the preferences of the populace), as well as the difficult normative question of how much strain or disruption on American and British society and services can legitimately be required in order to provide reparation to displaced Iraqis.[217] It is far from unreasonable to assume, however, that the US, given its far larger size and lesser population density compared to the UK – would be required to take more Iraqi refugees than the UK. After the number of Iraqis whom we can reasonably expect the US and UK to admit had been calculated and the two countries had reached this limit, they would then be justified in providing alternative means of reparation to those Iraqi refugees whom they legitimately could not accommodate, such as compensation or opportunities for voluntary repatriation, provided that the available places had been prioritised justly on the basis of criteria such as vulnerability. It would also be under an obligation to progressively fulfil its reparative obligations to Iraqi refugees, seeking to expand its resources yet further and open up the necessary political space to allow for large-scale Iraqi resettlement. Given that many Iraqis have signalled a preference for protection in states other than the US and UK, it is by no means a foregone conclusion that this limit would be reached in any case. Whatever this numerical limit might turn out to be, it is clear that it would be high, particularly for the US, given that it already has a history of permitting large-scale resettlement.[218]

[217] Some have kept their numerical recommendations vague, with Ferris (2007a) claiming that the US 'should welcome far more than 7,000 Iraqis in its current resettlement programme', while others have identified a figure; for instance, Packer (2007) claimed that 'as many as a hundred thousand should be brought here [the US], especially if Iraq begins to resemble Cambodia in 1975 or Rwanda in 1994'.

[218] In recent decades, the US has 'taken 1 million refugees from Vietnam, 600,000 from the former Soviet Union and 157,000 from Kosovo and Bosnia' (Raghavan 2007). Indeed, a comparison with the speed and scale of the resettlement of Vietnamese refugees has been often made by advocates for a more generous entrance policy towards Iraqi refugees within the US (e.g. Sanders and Smith 2007: 23; Sassoon 2009: 113). As Hannibal Travis (2009: 1034) has observed, 'U.S. policy towards Iraqi refugees between 2003 and 2006 compared unfavourably to its responses to refugee crises unleashed by past wars in which the United States took a leading part'.

The Actual Response

Having established that asylum as reparation is owed by the US and UK to large numbers of Iraqi refugees, it is important to ask, at least briefly, whether the actual response of these two countries has met the moral demands of the theory of asylum as reparation laid out in Parts I and II; that is, whether they have granted the most fitting form of reparation to Iraqi refugees that it is available to them. What is clear is that, during the years of the Bush administration following the invasion, the response was pitifully inadequate from the standpoint of the theory of asylum as reparation, given that a tiny number of Iraqis gained asylum in the US or were resettled.[219] Although the then US Secretary of State, Colin Powell, propounded the so-called 'Pottery Barn rule', that if 'you break it, you own it', reportedly warning President Bush that, upon invading Iraq, the US would come to 'own' the country and its problems (Safire 2004), the implications of this rule for the plight of Iraqi refugees in the following years were ignored by the US state. Indeed, the special obligation borne by the US was not recognised, and was even flatly denied, meaning that any asylum offered to Iraqis could not constitute a form of satisfaction. John Bolton, the former US ambassador to the UN, insisted that the Iraqi refugee crisis had

> …absolutely nothing to do with our overthrow of Saddam…Our obligation was to give them new institutions and provide security. We have fulfilled that obligation. I don't think we have an obligation to compensate for the hardships of war…Helping the refugees flies in the face of received logic. You don't want to encourage the refugees to stay. You want them to go home (quoted in Banta 2008: 261).

[219] Between April 2003 and the end of 2006, only 466 Iraqi refugees were admitted to the US (Sassoon 2009: 110).

Moreover, one State Department representative stated in March 2007 that 'the U.S. did not distinguish between the Iraqi refugees and other caseloads' (quoted in Cohen 2008: 317). This was, for the several years following the invasion, indeed the case. Dawn Chatty and Nisrine Mansour (2012: 103) have commented that the 'roles and responsibilities' of Western countries 'with regard to the Iraq War do not seem to have played a part in determining national resettlement quotas for Iraqi refugees'.[220] Instead, resettlement of Iraqi refugees by the US has largely been an 'element of foreign policy, defined by strategic objectives in Iraq and the surrounding region' (Berman 2012: 123).

Various commentators have criticised this stance – with some characterising it as a 'state of denial' (Libal and Harding 2007) – and have attributed it to the fact that to acknowledge any special responsibility to remedy the refugee crisis, or even to draw attention to its existence, would be to concede that the invasion had failed (e.g. Banta 2008: 277; Cohen 2008: 320; Sanders and Smith 2007: 23; Sassoon 2009: 110).[221] Within US asylum hearings, many judges ignored evidence of conditions within Iraq to argue that Iraqi asylum claimants faced only 'random' violence, not targeted persecution, and that the fall of the Ba'athist regime had rendered Iraq safe (Travis 2009).

However, some measure of recognition of the crisis and US responsibility for it was eventually forthcoming, as evidenced by the passing of the *Refugee Crisis in Iraq*

[220] This is evident not only when comparing the numbers of refugees taken by the US with those protected within neighbouring states and in Sweden, but also in the fact that, unlike the US, Denmark took all Iraqis who had worked with their forces in Iraq (Sassoon 2009: 109), granting asylum to 228 interpreters and their families in 2008 and providing employment, training and language schooling to them (Juvinall 2013: 212).

[221] Indeed, a US diplomat, Barbara Bodine, stated that '[w]hen you affirm you have refugees and IDPs you are admitting that the average Iraqi has little or no expectation that [the US] can reverse a security situation that has spun utterly out of control' (quoted in Banta 2008: 277).

Act in January 2008, which I cited earlier.[222] The Act created 5,000 Special Immigrant Visas (SIVs) per year for Iraqis who had been US government employees and who had given 'faithful and valuable' service for at least a year. Following the passage of the Act, Iraqi resettlement increased significantly, by nearly ten times over between 2007 and 2008 (Berman 2012: 126). In 2013, 84,902 Iraqi refugees had reportedly arrived in the US, out of 142,670 interviewed and 199, 202 approved for resettlement (US Citizenship and Immigration Services 2013).[223]

Nevertheless, there are grounds for viewing this response, despite these improvements, as still lacking in some key respects. First, from the perspective of a theory of asylum as reparation, the requirement within the Act that the employee has provided 'faithful and valuable service' for at least a year is problematic given that, as I observed when discussing asylum's potentially desert-based function in Chapter 1, entitlement to asylum as reparation hinges either on an unjustified harm suffered or a risk of future unjustified harm, rather than being contingent on an individual's conduct. If an Iraqi became at risk of unjustified harm as a consequence of a day, or even an hour, of poor service to the US then, on my account, he or she is owed reparation by the US.[224]

Second, while the hurdles for entry should be lowered for those to whom a state owes asylum as reparation, the US has 'impose[d] conditions that surpass in difficulty those governing asylum applicants from elsewhere' (ICG 2008: 35), as Iraqi refugees

[222] The US Department of State has also stated that, 'because of its unique role in Iraq, the United States has recognized the need to take the lead in mitigating the effects of this humanitarian [refugee] crisis' (quoted in US Government Accountability Office 2010: 4).

[223] However, the future of the SIV programme became uncertain. When due to expire in 2013, it was extended at the last minute until the end of the year, and has since been extended again, with the programme due finally to close once all 2,500 visas have been issued (US Department of State 2014).

[224] The inclusion of this condition within the Act may be the result of the fact that the special obligation towards Iraqis employed by the coalition has been seen in the US as stemming not only from the need to rectify an unjustified harm caused to them, but also from duties arising from association and from gratitude. This may be an example of recognition of an associative or desert-based special obligation effectively *diluting* a reparative one in practice.

have faced rigorous security screenings which have delayed their resettlement or even prevented it from occurring in the first place. In its review of the implementation of the Act, the NGO Human Rights First (2009: 3) found it hampered by low arrival rates, low application rates for SIVs and long processing times. This increased after it was found that an Iraqi man located in Kentucky had been involved in roadside bombing within Iraq (Bennett 2011), which led to a *de facto* freeze on the issuing of visas for Iraqis (New York Times 2011). Iraqi employees, such as interpreters and translators, have been effectively excluded from the *Vow to Hire Heroes* Act of 2011, which provides incentives to businesses to employ American veterans of the Iraq War, and a parallel piece of legislation which would have offered such support to them did not pass within the House of Representatives (Juvinall 2013: 209). Despite this progress, Carens (2014: 17) has nevertheless judged that '[i]t is a deep moral failure that Americans have done so little' to meet their special obligation towards Iraqi refugees.

The Response of the UK

While the US response, despite its failings, has included some acknowledgement of responsibility and the protection of a significant number of Iraqi refugees, the UK's reaction to Iraqi refugees to date has fallen pitifully short of the moral demands of the theory of asylum as reparation. Although some commentators have argued for a special responsibility towards employees of British forces in Iraq (e.g. Fowler 2009; Hastings 2007), the UK's response to the danger faced by its Iraqi employees has been very slow, with some citing pressure to take an alternative one-off payment of £3,300, and other applications being rejected on grounds such as absenteeism (Sassoon 2009: 108). As a result, only 364 interpreters and their

dependants had arrived in the UK as of 2011 (Mir 2011). The UK has, unlike the US, only an extremely limited resettlement programme, which permits up to 750 refugees to enter each year (UKBA undated, b).

For the Iraqis who have travelled to the UK under their own steam, the non-entry measures which prevent the legal entry of all asylum seekers to the UK have forced many to undertake dangerous and clandestine journeys. Upon their arrival in the UK, Iraqis have, like all asylum seekers, been subjected to sustained hostility from politicians, the state and the public alike. Facing a well-documented 'culture of disbelief' and denial (see Souter 2011a) among asylum decision-makers, even at the height of Iraq's civil war 83 per cent of Iraqi refugees had their asylum claims refused between 2006 and 2007 (Hintjens 2012: 89). In February 2007, moreover, the UK Home Office stated that a 'general state of insecurity in Iraq did not by itself amount to a reason for granting refugee status' (quoted in Fandrich 2013: 9). As I commented above, this refusal leads to the end of their entitlement to state support, an act which renders them destitute. Refused Iraqi asylum seekers have lived in fear of detention and deportation. This threat of deportation has been very real, for the UK has been the EU state which has spearheaded the deportation of Iraqis in recent years (Hintjens 2012: 90), with the UK becoming the first EU member state to agree a Memorandum of Understanding with the Iraqi Interim Government in 2005 on returns of Iraqi asylum seekers (Fandrich 2013: 14). The blanket hostility towards asylum seekers of significant swathes of the British public can be morally criticised on various levels, but one of its shortcomings is that it fails to recognise that asylum seekers may arrive as a consequence of events for which the UK bears full or partial responsibility.[225] When a link between the UK's intervention in Iraq and Iraqi asylum seekers has been made, it

[225] This has not always been the case for other kinds of entrant for, as I observed in Chapter 2, a campaign for the Nepalese Gurkha regiment of the British army has led them to be granted residency rights in the UK.

has tended to disregard the chaos which the invasion unleashed. For instance, the British Prime Minister, David Cameron, has stated that

> It is important to remember that one of the reasons that our brave servicemen and women fought and died in Iraq was to try and make that a more stable country and a country that people who had fled it would be able to return to…in general we are here to offer people asylum when they are fleeing torture and persecution, but if we help to make their country safe they should be able to go home (quoted in Hintjens 2012: 89).

In short, the UK has helped to produce refugees whom it has subsequently gone on to deny refuge. This amounts to an abrogation of both a humanitarian obligation towards Iraqi refugees and a strong special responsibility to provide them with asylum as reparation. If Butt (2009: 176) is correct to argue that 'the ongoing failure to fulfil restitutive and compensatory obligations itself constitutes an ongoing act of injustice' then, in contrast to the US, which has partly, though inadequately, discharged some of its reparative obligations to refugees, the UK has committed a *double* injustice: its original contribution to the flight of Iraqi refugees, followed by its ongoing refusal to meet its reparative obligations towards them.

Other Responsibilities

In this chapter, I have argued that both the US and UK owe asylum as reparation to large numbers of Iraqi refugees. The two countries bear both outcome and moral responsibility for the unjustified harms experienced by Iraqi refugees as a consequence of their flight. Moreover, asylum as reparation in the US or UK is the most fitting form of reparation for many, but by no means all, Iraqi refugees. However, it may be that, if a process of prioritisation would need to be undertaken, those who were displaced most directly by the US or UK have the strongest right to asylum as reparation. Such a prioritisation should only be made if it turned out, after complex calculations of

absorptive capacity, that there were more Iraqi refugees in need of asylum as reparation than places available.

It may be that, now the US and UK have withdrawn from Iraq, the responsibility of these two countries towards any newly displaced Iraqis is weaker than its responsibility to those displaced in the years immediately following the invasion. The directness of the causal link between the actions of the US and the UK and the further flight of any refugees may now be more tenuous, given that their involvement in Iraq has decreased, and it is now the responsibility of the Iraqi government to prevent displacement. However, if the sectarian violence which has emerged in 2013 and 2014 so far does go on to produce further substantial displacement, the US and UK would still nevertheless bear *some* not insignificant measure of responsibility for that displacement. This is because, as I have established, the US and UK presided over a new communalist political system which has further polarised Iraq's Shi'a and Sunni communities. The US and UK will continue to bear at least some degree of responsibility for any displacement, as well as any harm more generally, which arises as a result of sectarian strife into the future.

It would also appear that the US has an obligation to protect *more* refugees than the UK. This is partly because, as I discussed earlier, of the relative sizes and absorptive capacities of the two states. Yet it is also due to the size of the two countries' contributions to the chaos and displacement in Iraq. The US, after all, was the primary actor which pushed forward the invasion, and had a larger military presence and greater involvement in the establishment of its new political system. Whereas the US had between around 100,000 and 150,000 troops in Iraq and were based in Iraq's political heartland, the number of British forces peaked at 46,000 (BBC News 2011) and were concentrated in the south of the country. As Banta (2008: 262) has commented, 'the

Iraqi forced displacement was uniquely linked to the actions of the intervening forces – namely the US; even the British were deemed a "junior partner" in the invasion'. This does not mean, as some commentators appear to have done (e.g. see Bettis 2010: 286-287), that the role of the UK should be discounted or the unilateralism of the US's actions should be overstated, however. The analysis should also be broadened to discuss the responsibilities of the other contributors to the coalition, such as Australia, Poland and Denmark, whose share of the overall responsibility will be smaller still.

To conclude this chapter, I want to argue that recognition of this special obligation on the part of the US and UK towards Iraqi refugees needs to be balanced with, and should not obscure, a range of other obligations borne by both the US and UK and a variety of other actors. The special responsibility to offer asylum as reparation should not be asserted at the expense of other important duties borne by a range of actors, or be used to seek to exonerate others. To begin with other obligations borne by the US and UK, as I have argued, the obligation to provide asylum as reparation needs to be balanced by recognition of their responsibility to provide *other* durable solutions to Iraqi refugees should they be a more fitting form of reparation for the harms they suffered.[226] Given that the invasion also caused incalculable harm to the Iraqi population as a whole – in terms of civilian deaths, life lived in fear, the destruction of the state and its infrastructure, and so on – reparation in the form of reconstruction and *in situ* intervention should be provided by the invading powers to Iraq's non-displaced population, as well as potential returnees, with a view to allowing the return of Iraqi refugees, should they desire that option. The US and UK also owe host states compensation for taking such large numbers of refugees without their support. In

[226] As I briefly discussed in Chapter 2, it may be the case that the US and UK bear an obligation to allow residence to Iraqi refugees even once the danger to their lives in Iraq has lapsed, and that they owe them additional opportunities for immigration or citizenship as a form of reparation.

addition, acknowledgement of these other reparative obligations on the part of the US and UK should not cause us to lose sight of the *non*-reparative obligations of these two countries, such as their broader humanitarian obligations towards other refugee populations from other parts of the world. Given that 'special responsibility talk' – based on the idea that 'with power comes responsibility' – emanates from the highest echelons of the US government (Bukovansky *et al.* 2012: 1), there is a clear case to be made that developed states such as the US and UK bear special obligations to refugees on account of their resource capabilities.

The special responsibility of the US and UK should also not obscure the responsibilities of other actors, both reparative and non-reparative. The Iraqi state bears a strong remedial responsibility towards its displaced citizens, on account of the bond of citizenship between them, which many believe has been far from fulfilled. The Iraqi Ministry of Displacement and Migration has been criticised for its weakness (e.g. by Sassoon 2009: 29), and the Iraqi government has largely withheld assistance to its citizens displaced abroad in order to encourage return (US Government Accountability Office 2010: 7), and even encouraged Syria to introduce its visa requirement in order to encourage would-be refugees to remain within Iraq (ICG 2008: 30).

As I discussed earlier, the insurgent groups which pushed forward Iraq's descent into civil war through their campaigns of murder and intimidation also owe reparation in other forms to the victims of the conflict, which may include external actors who have supported some insurgent groups, such as Iran (see ICG 2005). The Ba'athist regime also bears strong responsibility for the harms caused to the Iraqi population during the preceding dictatorship, and for creating the conditions which were conducive to the chaos following the invasion, although enforcing this obligation would be challenging given the execution of Saddam Hussein and the subsequent dispersal of

those within his regime after 2003. The United Nations and its constituent states also bear some measure of responsibility for the situation in Iraq given, as I noted earlier, the role of the sanctions regime in creating the conditions for the post-invasion chaos, as well as causing a great deal of harm during the sanctions period itself. Most problematically, some may also argue that the roots of the violence lay in the formation of the Iraqi state itself by Britain in the 1920s, if Iraq is considered to be an 'artificial state' which can only be realistically held together by the use of violence (see Stansfield 2007: 28-29).[227] However, this is a highly indirect form of responsibility, and clearly does not absolve future Iraqi leaders of their responsibility to find ways of governing Iraq without recourse to the violence which they have so frequently deployed in the past, or to explore alternative political possibilities to foster greater co-existence between Iraq's various communities.

Finally, it is important to note that all these responsibilities, direct and indirect, should not obscure the important humanitarian responsibility of other states who had no part in the invasion of Iraq towards Iraqi refugees, especially if the invading states are unwilling to discharge their responsibility towards these refugees. This stands in contrast to the approach of other states, who have often argued that the Iraqi refugee crisis is a problem of the US and the UK, and that they therefore have no responsibility towards those refugees (see Berman 2012: 131; Chatelard 2011: 6). However, given the desperate need of many Iraqi refugees, bystander states should provide asylum to Iraqi refugees while at the same time pushing the states responsible for the crisis to take the lion's share or to provide them with compensation. In short, the argument that the US and UK owe asylum as reparation to Iraqi refugees, important as its implications for US

[227] As I observed at the close of Chapter 2, a separate argument could be made that a special obligation to offer asylum to refugees on the basis of a historical connection such as past colonial rule can be made out, such that the British role in laying the foundations for later repression in Iraq is sufficient to establish a special obligation to offer them asylum.

and UK asylum policy are, should not undermine recognition of this plethora of other duties.

Chapter 7: Asylum, Reparation, and Domestic Politics

In this thesis so far, I have occasionally peppered my discussion with examples of how reparative arguments concerning refugees have been deployed on the domestic level: that a sense of being implicated in Kosovan refugees' situation may have partly motivated citizens' welcoming reaction to them in Western European states (Gibney 1999), and that the 2008 *Refugee Crisis in Iraq Act* in the US accepted a special obligation to Iraqis on account of the US's role in their plight. However, the implications of my approach for the policy and politics of asylum on the domestic level remain to be systematically examined. Given that, as Butt (2009: 33) observes, '[q]uestions of rectificatory justice…are questions which concern the distribution of benefits and burdens', conceptualising asylum as a potential form of reparation will have important implications for how responsibilities for refugees should be distributed. My account of asylum as reparation has ramifications for international distributive justice insofar as its application would affect the distribution of such benefits and burdens – that is, the benefits of protection for refugees, and the costs of offering it for receiving states.[228]

I begin this chapter by looking at one potential problem which may arise if the principle of reparation were incorporated into states' RSD procedures, or if they were faced with a mass influx which they were ill-equipped to deal with effectively: that of how to prioritise refugees with reparative claims for asylum vis-à-vis refugees with claims on other grounds, such as those of humanitarianism or solidarity. In the second part of this chapter, I then move to consider the implications of my approach for

[228] For more detailed discussion of the relationship between rectificatory and distributive justice, see Butt (2009: ch. 2).

political debates over asylum in liberal democratic states, assessing its ability to act as a resource for advocates and refugees in making a moral claim for asylum in such states.

The Problem of Prioritisation

We have seen in this thesis so far that asylum can assume a range of moral functions, including the humanitarian and the reparative, and also that states' resource constraints may genuinely limit their ability to offer asylum, whether on reparative grounds or not. As I explain in this chapter, this creates a potential moral tension, or even conflict – which I dub 'the problem of prioritisation' – that can arise between these two moral functions. This potential tension appears to have been brushed over by scholars in their brief treatment of the idea underpinning this thesis, with Carens (2013: 196) simply asserting that the rationales for admitting refugees that he identifies – including those of 'causal connection' and 'humanitarian concern' – are 'complementary'. I begin by briefly exploring the relationship and potential moral tension between humanitarian duties and reparative obligations in the abstract, before examining the ways in which this tension could potentially play out in the case of a state's asylum system, and exploring ways in which such tension or conflict might be addressed, mitigated, or even resolved.

Humanitarian Duties and Reparative Obligations[229]

As I outlined in Part I, humanitarian duties and reparative obligations fall into clearly distinct moral paradigms for, whereas the former can be characterised as

[229] Although the terms 'duty' and 'obligation' are often used interchangeably, here I follow Scheffler (2001: 49) in using the term 'obligation' to refer 'more narrowly....to moral requirements deriving from promises or agreements, or from voluntary acts', including those which result in harm to others. I therefore write of humanitarian *duties* and reparative *obligations.*

impartial and *general*, the latter are instead *partialist* and *special* in character. More than this, reparative obligations (as well as special obligations more broadly) are widely believed to be weightier than humanitarian duties, with Kagan (1988: 293) observing that common-sense morality views special obligations to those one has harmed as being 'significantly more strenuous' (see also Miller 2007: 50; Pogge 2002a: 207). Indeed, reparative obligations clearly have a sharper focus than more 'open-ended' or indeterminate humanitarian duties (Pogge 2002a: 26), so to speak, being owed only by perpetrators of harm to their victims. One indication of the intuitively greater strength of reparative obligations is that they do not seem to be so easily diminished by appeal to the self-sacrifice that fulfilling them would entail for the duty-bearer. Whereas, as I observed earlier, humanitarian duties to refugees are often seen as holding only when the costs of fulfilling them are low (e.g. see Gibney 2004: 231), reparative obligations appear binding even when their fulfilment imposes highly significant costs.[230] As Bukovansky *et al.* (2012: 219) have articulated this point, 'for those capable agents who are relatively blameless other competing demands reasonably gain more weight as their own culpability lessens'. As I discuss in Chapter 8, this will have implications for the way in which reparative obligations should be distributed vis-à-vis humanitarian ones on the international level, and how states' absorptive capacities should be calculated.

One clear consequence of this hierarchy between humanitarian duties and reparative obligations is that, if the scarcity facing an agent means that he or she is genuinely unable to fulfil both sets of duties simultaneously for whatever reason, then the fulfilment of the latter should take priority. As Scheffler (2001: 87) has argued, 'part

[230] For instance, Nagel (1991: 171-172) argues that, whereas 'the deprivation of liberty imposed on slaves by slaveowners is such an evil…that the impersonal demand to end it renders irrelevant the personal sacrifice by slaveholders', affluent Western citizens can legitimately resist a radical international redistribution of wealth because of the sacrifice that would involve, at least – contra Pogge – 'on the plausible assumption that…underdevelopment…is not due primarily to Western imposition'.

of what it is to have…[special] responsibilities…is to be required, within limits, to give their interests priority over the interests of non-associates, in cases in which the two conflict'.[231] In fact, the fulfilment of a reparative obligation might seem in all cases to inevitably limit an agent's ability to fulfil his or her humanitarian duties, given the time and resources which the provision of reparation requires (see Goodin 1985: 13).

Others, however, may seek to reject this hierarchy and assert the moral force of impartial egalitarian values. This is the thrust of what Scheffler has dubbed the 'distributive objection' to special obligations, which states that special obligations are 'unjustifiable whenever the provision of these additional advantages works to the detriment of people who are needier' (Scheffler 2001: 58). Scheffler writes that

> …if the participants in rewarding relationships have associative duties, then they must give higher priority to one another's claims than they would otherwise have been expected to do. But, by the same token, they must also give lower priority to the claims of non-participants. Thus…non-participants lose out twice: in addition to missing out on the other rewards of participation, their claims on the participants for assistance become weaker (Scheffler 2001: 73-74).[232]

While Scheffler outlines this objection in relation to associative duties to friends, family, colleagues, compatriots and so on,[233] some aspects of the distributive objection also have implications for reparative obligations, insofar as the objection highlights the ways in which special obligations, of whatever sort, privilege and prioritise some over others, and can work to the disadvantage of others, which can lead

[231] Although Scheffler is here referring to associative duties, the same can be said of reparative obligations.

[232] Similarly, Samuel C. Wheeler (1997: 317) has argued that '[w]hat reparations consist of, from an impartial, universalist standpoint, is unjustified discrimination. Among those equally needy or deserving, some with a special distinction which they have done nothing to deserve are awarded benefits'.

[233] In contrast, Scheffler (2001: 50) only acknowledges the existence of reparative obligations in his discussion in passing.

to doubts as to whether special obligations, whether associative or reparative, may be at root inegalitarian and unfair.[234]

Another view of the relationship between humanitarian duties and reparative obligations is not to claim that one trumps the other when they conflict, but to see them as equally strong. It could be argued that each heralds from a distinct yet equally fundamental moral perspective: reparative obligations stem from a partialist standpoint, whereas humanitarian duties arise from an impartial position (see Nagel 1991). On this view, it might be thought that this tension presents something of a moral impasse, in which agents face incommensurable moral imperatives which admit of no rational resolution, leaving only tragic choices between intractably competing values. In situations of scarcity, humanitarianism says to prioritise on the basis of severity or urgency of need, or to prioritise in such a way as to maximise harm reduction, whereas reparative justice says to prioritise those one has harmed. If both principles are equally strong, then they pull us in incompatible and irreconcilable directions.

Nevertheless, before drawing this somewhat pessimistic conclusion, it may well be possible to chart a middle course between them and to achieve their simultaneous fulfilment to at least some extent. This kind of middle course is already to be found within common-sense morality. The priority that this morality grants to reparative duties over humanitarian obligations is not absolute or unlimited, but is rather circumscribed by other important moral considerations. In Scheffler's formulation,

[234] It might be thought that refugees whose plight has been caused by an external state have an advantage that those whose flight was not so caused lack. Indeed, Matthew Gibney (1999: 29) has stated that, given the difficulty of Western European states to deny their special obligation to Kosovan refugees, they 'had something going for them which other refugees from Ethiopia or Sierra Leone do not'. Cast in this light, the prioritisation of a refugee within a receiving state on the basis of having been caused to flee by that state might seem arbitrary or unfair, and perhaps generating resentment from the perspective of the refugee herself: "why should he be prioritised just because our state of asylum happens to be responsible for his flight but not for mine?" Nevertheless, viewed impartially, the refugee in question could view this prioritisation as morally intelligible, or even, in Scanlon's terms, as a reason she 'could not reasonably reject' (Scanlon 1982; 1998).

cited above, special responsibilities have priority only 'within limits'. Pogge, furthermore, observes that '[i]t is generally acknowledged that a higher moral reason can be outweighed by a lower, *if more is at stake in the latter*' (Pogge 2002a: 291, emphasis added).[235] Therefore, if an individual whom one has not harmed is in a significantly needier state than an individual whom one has harmed, and it is only possible to assist one of them, then prioritising one's humanitarian duty over one's reparative obligations may be justifiable.[236] The normal hierarchy can be overturned by significantly greater need. In what follows, I apply this abstract discussion to the notion of asylum as reparation.

Asylum, Reparation and Prioritisation

Some theoretical discussions of asylum have recognised this putative hierarchy between humanitarian duties and reparative obligations. For instance, when comparing his reparative Harm Principle (HP) with his humanitarian Basic Rights Principle (BRP), Mark Gibney (1986: xiii) views the BRP as a 'weaker principle than the HP'. Along similar lines, Matthew Gibney (2004: 213) writes that '[i]f it is clear that refusing entry will result in the loss of a person's life…then a strong case can be made by governments for entry. The individual's claim will be *even harder to resist* if…the applicant's parlous situation has been brought about by the state he or she is attempting to enter' (emphasis added). Nevertheless, the tension between them has been seldom recognised, and means of reconciling them have not been explored. Given that the

[235] Pogge (2002a: 292) adds that 'it is widely acknowledged that a positive duty can still win out when much more is at stake…: one may usually break a promise, violate a just property regime, or injure an innocent when doing so is necessary to save a human life, for example'.

[236] It is another question as to whether the hierarchy is also overturned if the individual whom one has not harmed is not significantly, but is rather only *slightly*, needier than the individual whom one has harmed. While it intuitively seems that the ordinary hierarchy can be upset if the first individual is *significantly* worse off than the second, it may be that the force of the principle of reparation trumps the principle of humanitarianism when the two individuals' levels of need are not substantially different.

absorptive capacity of even the most large and powerful states is obviously finite, there is a clear trade-off between humanitarian and reparative forms of asylum, for the following reason. If a state were to operate an asylum system on purely humanitarian grounds, then it would devote all the resources that it had allocated for refugee protection on either assisting the neediest refugees, or on reducing as much harm experienced by refugees as possible. If, however, that state *also* aimed to offer asylum as reparation to refugees for whose flight it was responsible, then it would inevitably have fewer resources to devote to the neediest refugees. The lower the absorptive capacity of a state, and the greater the extent to which asylum is a 'scarce resource' (see Martin 1991), the more acute problems of prioritisation will become.[237] As I observed in Chapter 1, the severity of the clash between humanitarian duties and reparative obligations will also depend in part on how refugees are defined, for the maintenance of the current legal definition would limit the numbers eligible for asylum and therefore render problems of prioritisation far less grave in comparison to an adoption of a broad, Shacknovian definition, which would vastly expand them. While it is conceivable that, by contingent coincidence of the sort I envisaged in Chapter 5, the neediest refugees might also happen to be those for whose flight an external state is responsible, this coincidence can by no means be depended on in practice. Therefore, in any kind of state it is likely to be the case that, in the realm of asylum, reparative obligations and humanitarian duties are, to draw upon Scheffler's words, '*practically competitive* in the sense that institutions and practices that serve to recognize or foster one of them sometimes undermine or erode the realization of the other' (Scheffler 2001: 79, emphasis in original).

[237] This may explain why issues of prioritisation appear to arise most frequently in relation to third-country resettlement of refugees, as states' resettlement programmes operate with highly restrictive quotas which cover only a small fraction of the world's refugees (Carens 2013: 197).

Given that the problem of prioritisation here arises as a consequence of the linkage between asylum and reparation that I have proposed in this thesis, it might be argued that one way of eliminating this problem is simply to sever the link I have proposed between the two after all, and to pursue the goals of offering asylum and reparation separately. After all, the more pluralistic and heterogeneous an organisation or state's aims, the more likely that conflicts will break out among them. Avoiding difficult dilemmas of this sort could be achieved through the adoption of what Myron Weiner (1998: 443) has dubbed in this context 'monistic humanitarianism'. If consistency and clarity of purpose and decision-making were taken to be the overriding desiderata of an asylum system, then this monism, in which only humanitarian goals (or whichever type of goal one preferred) would be pursued, would be preferable.[238] Given that, as I observed in Chapter 2, a *purely* reparative system of asylum would be highly unjust overall then, if a state were faced with a choice between dispensing with the humanitarian or reparative function of asylum, it would be the latter that would have to go.

Could it be that separating asylum and reparation is preferable for this reason? I believe, probably unsurprisingly by this stage of the argument, that the answer here is negative: to the extent that a state is obliged, all things being equal, to offer the *most fitting* form of reparation to those it has harmed, whether displaced or not, then, if asylum is indeed the most fitting form of reparation for refugees in different cases, then

[238] However, it is one thing to say that *within* an international organisation, such as UNHCR, focusing on one objective will be more effective (and this is Weiner's focus), although even this is contestable, as in practice international organisations do have diverse 'distributive commitments' (see Rubenstein 2008). It is quite another to say that a *state* should adopt purely monistic principles for the sake of avoiding conflicts between different values. For one thing, this would change the character of liberal democratic states beyond recognition, given that the inclusion of different and potentially competing norms is constitutive of this character, as they routinely seek to balance, as I observed earlier in this thesis, popular democratic demands and embedded liberal norms**.** Even if it were ultimately decided that separating asylum and reparation would be the most coherent strategy, the tension would no longer exist *within* a particular state institution, but would remain *across* different state institutions.

it is asylum that must be offered. Keeping asylum and reparation apart for the sake of avoiding conflicts of values would entail the most fitting form of reparation from *not* being on offer to those refugees who are owed it. This means that a state of asylum is actively *obliged* to incorporate reparative goals into its asylum system, whether this sets up moral tensions or not. That state could not resist this obligation by appealing to the tension it would set up, unless this tension would be so severe as to immobilise its asylum system and prevent it from fulfilling any of its duties to refugees, which appears hypothetical and highly unlikely at best.

There may also be a more *intrinsic* reason for incorporating reparative goals into states' asylum systems, regardless of the resulting tensions. Just as, at the theoretical level, fidelity to our moral values may be preferable to a reductive and artificial systematicity (see Nagel 1979b), so too, at a practical level, institutions reflecting the full range of a state's values and obligations are preferable to those in which values are excluded by fiat for the sake of ease of implementation. If partiality and impartiality represent fundamental yet irreducible parts of human nature and morality, as Nagel claims, then it is entirely unsurprising that the tension between them may have some reflection in political institutions such as asylum.[239] If we cannot resist the linkage proposed in this thesis between asylum and reparation given the moral tensions it would create, then we are left with the task of seeking to balance and simultaneously fulfil these values as best as is possible.[240]

[239] While Nagel (1991) sees this division between partiality and impartiality as creating the challenge of how to create political institutions which combine the demands of impersonal morality with the space for individuals to lead their own lives, the challenge in this context is how to combine humanitarian duties and reparative obligations within a workable asylum system.

[240] As Weiner (1998: 448) has suggested, one option is to abandon attempts to *maximise* the fulfilment of the requirements of every norm but rather to seek 'to *satisfice*, that is, to pursue a course of action to achieve the minimum requirement of both norms' (emphasis in original).

The problem of prioritisation therefore remains. This being so, one might adhere to the widespread hierarchy and argue that reparative duties should take precedence, follow Scheffler's distributive objection in arguing the reverse, or see this tension as symptomatic of an irreconcilable moral conflict that permits of no resolution. Nevertheless, it is important not to be excessively awed by the challenge this question of prioritisation poses to a theory of asylum as reparation, for extremely difficult issues of prioritisation are hardly peculiar to this theory, but rather abound in the context of asylum and immigration. Theoretically, questions of priority may be among the most difficult and important which theories of asylum and migration must grapple with. On a practical level, both states and international organisations such as UNHCR face dilemmas or a 'clash of norms' as a matter of course in their work (see Weiner 1998), and have developed more or less settled criteria which attempt to resolve these issues of prioritisation.[241] Indeed, issues of prioritisation are so fundamental to refugee protection that the category of refugee itself may ultimately be an artefact of the need to prioritise potential entrants that results from immigration restrictions. As Zolberg *et al.* (1989: 3) state:

> The need for precise categories did not arise under conditions of unlimited immigration…However, given the growing numbers, restrictive immigration policies, and limited availability of aid, criteria must be established for distinguishing a set of persons deserving priority with respect to asylum and assistance. *Refugee* has become a category on which basis international organizations and individual states engage in a process of worldwide triage. Refugee status is a privilege or entitlement, giving those who qualify access to certain scarce resources or services outside their own country ahead of a long

[241] For instance, the 1951 Convention and the practice of states mainly limit refugees to the persecuted, and refugees are in turn prioritised for entrance over other kinds of immigrant (Gibney 2004: 12). One consequence of the principle of *non-refoulement* is that refugees who reach a territory under their own steam are prioritised (see Gibney 2000: 315-316) over both IDPs and those unable to flee in the first place. Moreover, UNHCR's *Resettlement Handbook* provides a list of criteria for prioritisation, with vulnerability being chief among them (UNHCR 2011: chs. 5-6). The institution of asylum also creates a separate issue of how the claims of refugees and those of citizens are to be balanced (see Ray 2012), with cosmopolitan and communitarian moral theories differing over whether priority should be granted to compatriots over foreigners (Gibney 2004: chs. 1-2).

> line of claimants, legal protection abroad, and often some material assistance from private or public agencies' (emphasis in original; see also Zolberg 2012: 1219).

Nevertheless, pointing out other equally difficult problems of prioritisation in the context of asylum and immigration hardly provides grounds for sidestepping the issue at hand. In the remainder of this section, therefore, I draw further on the abstract discussion with which I opened this section and seek to explore possible ways in which the tension or conflict between humanitarian and reparative asylum can be potentially navigated, mitigated or even resolved.

Before doing so, a couple of clarifications on the kinds of case I am *not* concerned with are in order. Indeed, there are a variety of permutations of the problem of prioritisation, not all of which can be discussed here. First, I will explore how states should prioritise their humanitarian duties and their reparative obligations to *all refugees they might protect.* I do not consider the possibility that a state might consider a group of refugees whose flight it has brought about for asylum as reparation but, finding that the numbers exceed its legitimate limit, prioritise the neediest within that group. I also leave aside the questions of how states should balance their responsibilities towards refugees for whose flight they are outcome responsible with their obligations to assist refugees remaining in their regions of origins for whom those states bear no such responsibility, and how states should prioritise refugees vis-à-vis the non-displaced, such as the extremely poor who remain in their places of origin.

Reconciling the Humanitarian and Reparative Forms of Asylum

We might make a first attempt at closing the gap between humanitarian and reparative forms of asylum by observing that these two forms of asylum are not, or should not be, *substantively* different, in that the *content* of asylum does not depend on whether it is humanitarian or reparative. As I argued in Chapter 1, whatever moral functions asylum assumes, at its core it is the protection of refugees' basic human rights in another state. Instead, the distinction between humanitarian and reparative asylum refers to the reasons and motivations for granting a refugee asylum: humanitarian asylum exists to protect individuals purely from serious harm, whereas reparative asylum provides this protection from serious harm *for an additional moral reason*, and thereby possesses a distinct moral significance. If a state were to provide some form of 'deluxe' asylum to those for whose flight it is outcome or morally responsible, then that really would be unfair.[242] In both cases, the content of asylum is the same, but asylum as reparation concerns the *allocation* of a humanitarian duty. This of course does not eliminate the tension between humanitarian duties and reparative obligations in the realm of asylum, but it does show that they are nevertheless in some respects closely related, and are not completely separate and as opposed as might be thought.

In order to attempt to navigate the problem of prioritisation, the following cases can help to bring our intuitions into sharper focus. Imagine that a state can, for fully legitimate reasons regarding the limits of its absorptive capacity, only accept two more refugees for asylum in its territory.[243] One of these refugees fled because of an unjustified harm she suffered for which the receiving state bears outcome or moral

[242] As I observed earlier, however, it may be that states need to go beyond asylum in order to fully discharge their reparative obligations to refugees.

[243] There is no alternative to hypothetical thought experiments in this case, given that there is no real-life situation I know of in which a state's obligations to refugees are so finely balanced. It is also worth reiterating that, as I argued in Chapter 5, if this kind of scenario ever did exist, the state of asylum would be under an obligation to *seek to* open out asylum space so that it *could* provide asylum to both refugees.

responsibility, say, owing to its recent military intervention. The other refugee fled for reasons unrelated to any actions of the receiving state due to, say, a transgression of local religious law. How might the differing need and vulnerability of these two refugees make a difference to how they should be prioritised? Setting aside the practical question of how states would seek to ascertain refugees' relative need, for the sake of argument I draw on two rather crude proxies for need: the severity of the harm they risk experiencing upon their return to their states of origin (such that torture is taken to be more severe than low-level discrimination), and the availability of other opportunities to gain protection or residence either in the same state, or elsewhere.[244]

> *Case 1:* Both refugees are in equal need; that is, they both face equally severe harm (say, torture) in their states of origin, and both have no viable alternative destinations where they might claim asylum, or any other basis on which they might claim to stay in the state they have arrived in.

> *Case 2:* The refugee for whose flight the receiving state is outcome responsible is the one who is most in need (let us say that the other refugee has family members in a neighbouring state which could form the basis for a successful application for family reunification in that state, or faces discrimination, rather than torture, in his or her state of origin).

[244] However, to be clear, I am *not* advocating the use of these criteria in routine RSD, but see these factors as potentially relevant in cases of significant scarcity, in which agonisingly tough choices would need to be made.

Case 3: The refugee for whose flight the receiving state is *not* outcome responsible is the one of the two refugees who is in significantly greater need. In this scenario, it is the refugee for whose flight the receiving state is outcome responsible which has alternative means of gaining asylum elsewhere, or is at lesser risk in his or her state of origin.

It appears to me that, intuitively, in Case 1 the only justifiable way to prioritise the two refugees is to offer asylum to the refugee for whose flight the state of asylum bears outcome responsibility. This is because, if the two refugees have exactly the same level of need, then we can no longer simply appeal only to the principles of humanitarianism or impartiality. This principle enjoins the receiving state to accept both refugees, yet it legitimately cannot do so. We need, therefore, a different basis on which to make this agonising choice. Drawing again on Miller's 'connection theory of responsibility' (Miller 2007: 97-104), we can identify alternative grounds *other* than need and vulnerability on which to make this choice. An obvious candidate is whether the receiving state is morally or outcome responsible for the refugees' flight. As this is the case for one of the two refugees, then it seems unavoidable that the receiving state should accept her. There is one reason to accept the refugee whom the receiving state has not harmed (her need), but there are two reasons to accept the refugee whom the receiving state has harmed (her need, in addition to the fact that the state is outcome responsible for bringing about this need).

Case 2, in contrast, is straightforward, and does not involve the conflict between humanitarian duty and reparative obligation that is under discussion here. If the refugee for whose flight the receiving state is outcome responsible is also the one who is in

greater need, then both the principle of humanitarianism and the principle of reparation recommend the same course of action: prioritising this refugee.

Case 3, however, is trickier. The conflict here is real and apparent: the principle of humanitarianism enjoins the receiving state to prioritise the needier refugee, even though that state bears no outcome or moral responsibility for her flight, whereas the principle of reparation seems to enjoin the state to provide asylum as reparation to the other refugee, despite the fact that she is less needy.[245] Here I believe that a strong case can be made for departing from the principle of reparation and prioritising the needier refugee, even if her flight was not caused by the receiving state. Recall what can be dubbed the principle of 'circumscribed priority', implied in the work of both Scheffler and Pogge, which is that the normal hierarchy between reparative obligations and humanitarian duties can be overturned if the stakes are sufficiently high. While the life and freedom of the needier refugee is on the line, given her inability to find asylum elsewhere or the gravity of the risk to her on return, the other refugee *is* able to find protection elsewhere. In this case, it seems justifiable to prioritise saving a life and preventing awful suffering in the *short-term*, and then seeking to provide reparation to the other refugee if and when the state gains the capacity to do so, either by providing other benefits to that refugee in her other state of asylum, or offering immigration as reparation at a later date. The need to offer reparation may need to be put on hold to allow the receiving state to respond to an overridingly pressing and immediate need.

All this suggests that it may not be possible to provide a *general* account of whether one of the principles of reparation and humanitarianism trumps the other in

[245] Again, it might be thought that talk of 'needy' refugees smacks of the somewhat demeaning conception of refugees as passive victims that I briefly discussed in Chapter 4. Nevertheless, the fact that refugees are in need in itself says nothing about the agency they possess: one can have unmet needs, yet exercise one's agency in seeking to meet them oneself; a point to which self-settled refugees the world over attest.

cases where they conflict, but that states bear different obligations to refugees depending on a complex interaction between their level of need and whether they bear outcome and moral responsibility for their flight. It is, therefore, not necessary to conclude that they are inherently irreconcilable and incommensurable, leaving states of asylum with only an arbitrary choice between them, for these two moral forms of asylum effectively constrain each other. While states have *prima facie* reparative obligations and humanitarian duties, it is possible to find a way of jointly realising them, which generates duties and obligations to refugees *all things considered*. While I have not shown how all possible problems of prioritisation which could arise as a result of a system of asylum as reparation can be addressed or even resolved, this conclusion should provide at least some sense of how the tension between reparative obligations and humanitarian duties to refugees may be navigated in a way that gives the moral force of both sets of duties their due.

Reparation and Asylum Politics

States often adopt policies only as a result of internal and external political pressure. As with other norms, such as human rights, which have developed in modern domestic and international politics, states have had to be persuaded, pressured or socialised into compliance with them by citizens, activists, advocates, networks and organisations on the local, national and transnational levels (see Keck and Sikkink 1998). As I described in Chapter 6, recognition of the US's special responsibility towards Iraqi refugees generated since 2003 came only as a result of intensive lobbying – both within the US government, and by NGOs and commentators – whereas there has been a relative lack of reparative-style arguments concerning Iraqi refugees in the UK,

and no official acknowledgement of the UK's role in their flight. Even if it were eventually concluded (a possibility that I explore in the following chapter) that the institutionalisation of a system of asylum as reparation would do more harm than good in practice, might there still be a role for reparative arguments as a normative resource for advocates, and refugees themselves, to draw upon in political debates over asylum? What are the implications of the inclusion of asylum within a broader 'reparations politics' (Torpey 2006), how might a reparations-based mode of asylum politics operate, and would it be an effective means of achieving greater respect for the right to asylum?[246]

In this section, I move towards an answer to these questions in the following way. First, I situate the notion of asylum as reparation in the context of existing modes of asylum politics which exist in liberal democracies such as the UK and are used by international NGOs, which encompass both universalist, human rights-based arguments, and particularist claims which are based on a link between the refugee and the receiving state, or the conduct or character of particular refugees.[247] I then move to explore some of the strengths and weaknesses of a reparations-based form of asylum politics vis-à-vis these existing moral claims for refugees' rights. I identify such strengths and weaknesses by comparing these forms of asylum politics in terms of (a) whether their implicit or explicit representations of refugees are morally appropriate, and (b) how effective they are likely to be in garnering support for more inclusive asylum policies.[248] Although I have argued that the notion of asylum as reparation

[246] I understand the term 'asylum politics' as including, but not being limited to, advocacy efforts for or against certain asylum policies – which can be defined as efforts to 'plead the causes of others or defend a cause or proposition' (Keck and Sikkink 1998: 8) – and as encompassing the interventions of politicians, civil society actors and NGOs, individual citizens, and activist lawyers.

[247] In this chapter I restrict my focus to liberal democracies given that, in non-democratic states, the opportunities for asylum politics as defined here to thrive would be far more restricted, and asylum policy would be far more a matter of top-down decision than an issue for public deliberation.

[248] Given the moral force of the humanitarian case for asylum that I discussed in Chapter 1, and the relatively short shrift given to this case by hostile publics and politicians in Western liberal democracies,

offers a compelling theoretical framework for understanding one important source of states' obligation towards refugees, it might be that its deployment as a form of asylum politics weakens the overall case for an inclusive asylum policy.[249]

Existing Claims within Asylum Politics

As is often observed, asylum and immigration have become two of the most contentious issue-areas in the politics of Western liberal states in recent decades. Both the proponents and opponents of an inclusive domestic asylum policy draw on distinctly moral claims, concerning the rights of both the state's citizens and those of the refugees seeking protection within it. Each of these moral claims has both strengths and weaknesses in terms of their appropriateness and effectiveness. While each claim could potentially form the basis of a distinct mode of asylum politics, they overlap frequently in practice, are often used by the same actors at once, and can at times be difficult to disentangle from one another precisely. Of course, carefully distinguishing between different moral claims is far more important to political theorists than it will be to refugee advocates and others in the fray of asylum politics, who readily draw on whichever combination of arguments they judge will help to make their case most effectively. Given that the implementation of the notion of asylum as reparation, at least

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in this chapter I assume the moral desirability of creating these more inclusive policies. However, my discussion here may still be of some value for those who hold the opposite view, given that I envisage how the notion of asylum as reparation may affect asylum politics, and therefore ask whether or not it would be of use, or is something to be resisted, by those who favour the status quo of Western asylum policy.

[249] It might be objected that deciding what kind of argument to use on the basis of what would have maximum public resonance is problematically 'manipulative' (Carens 1991: 28). However, there are at least two possible responses to this complaint. First, a decision to frame the issue of refugee protection in one way or another for the sake of maximum resonance need not be undertaken manipulatively, in the sense of providing only selective information or making misleading arguments, but can instead aim to *convince*, by appealing to citizens' existing set of values. Second, even if such framing could only be manipulative, this might be thought of as justified given the pressing need to create more inclusive asylum policies. Indeed, given that *all* public campaigns arguably involve some degree of manipulation of sentiments, the argument that such campaigns should be entirely unmanipulative seems to amount to an argument for abolishing all such campaigns.

when deployed in conjunction with a robust humanitarian case for protecting refugees, would be very likely to be inclusive in its effects, I focus here on other arguments that can be made in favour of more inclusive refugee protection through asylum.

These moral claims that are deployed in debates over asylum mirror the different moral functions of asylum that I laid out in Chapter 1 of this thesis. As with those different moral functions, these moral claims can be divided into *universalist* and *particularist* varieties.[250] Universalist claims are made on behalf of *all* refugees who might seek to enter a state, based on claims of human rights or the principle of humanitarianism.[251] This is the strategy of international human rights organisations, such as Amnesty International and Human Rights Watch, and also of the British Refugee Council, drawing on Article 14 of the UDHR in asserting in its publicity materials that 'Asylum is a Human Right' (Refugee Council 2013). According to this claim, our common humanity is taken to be the basis of states' duty to protect refugees.

Particularist claims, in contrast, concern only *certain* refugees, and are implicitly made on the basis of special associative or solidarist duties to those refugees, which in turn are founded on either some link between those refugees and the receiving state, or on the conduct or characteristics of those refugees. One variety of particularist claim is communitarian, and is based on the 'social membership' (see Carens 2009; 2013: ch. 8) which many refugees develop through extended residence in their host state, often during the processing of their asylum claims, many of which are eventually refused. Such claims often form the basis of anti-deportation campaigns (see Anderson *et al.* 2011: 557-560). A second variety of particularist claim is *desert-based*, and is

[250] This is obviously not to suggest that the protagonists within asylum politics themselves would use these philosophical labels to describe their own claims.
[251] In discussing these universalist claims, I set aside the open borders movement (see Hayter 2000) which is on the fringes of mainstream debates and, in any case, does not concern refugees specifically, but rather any migrant who might seek to enter a state.

founded on a special obligation of gratitude for a migrant or refugee's contribution to the host state, such as the case of Iraqis employed by the US and UK that I discussed in Chapter 6.[252] A third particularist claim also emphasises refugees' contributions, but in terms of the economic, social or cultural benefits that these contributions accrue to the host state as a result of their residence. In the UK, for instance, one advocacy report asserted that,'[t]o the exiles who stayed we owe a deep enrichment of our cultural and economic life, including classic British institutions: Marks and Spencer, fish and chips, and the Mini' (Independent Asylum Commission [IAC] 2008: 6). As Pupavac (2008: 272) has commented, this contribution-based argument has led to depictions of refugees as 'exceptionally talented' individuals, with UNHCR highlighting the fact that 'Einstein was a Refugee' (see UNHCR 2005).

What ties these more particularist claims together is that, if taken by themselves, they implicitly render asylum conditional on refugees' conduct, character traits or contributions, or on the existence of special associative duties towards them. In this way, they play into and reinforce the dichotomy between 'good' and 'bad' migrants which characterises current political and tabloid rhetoric over asylum and immigration, in which entrants must prove their worthiness to enter what Bridget Anderson (2013: 2) has described as the nation's 'community of value'.[253] Anti-deportation campaigns have been based on an insistence that the potential deportees are model citizens who contribute to their community as 'hardworking students, devoted church congregants,

[252] Such campaigns, in a far cry from the universalism of human rights-based arguments for asylum, are steeped in the language of patriotism and honour. Indeed, the media 'hook' used to highlight the delivery of a petition calling for the right to remain of Afghan interpreters who have served with British forces in Afghanistan in August 2013, and the element emphasised in its media coverage, was the fact that it was delivered by the great-grandson of Winston Churchill, Alexander Perkins (Guardian 2013).

[253] As Anderson (2013: 6) has put it, '[m]igrants and their supporters are usually eager to differentiate themselves from failed citizens with whom they are often associated. Assertions that refugees are not criminals, or that migrants do not claim benefits, are attempts to counter these associations by affirming the community of value. Migrants and refugees are fit to belong because they have the right kind of values, unlike criminals and benefit scroungers'.

conscientious colleagues and/or valuable local volunteers' (Anderson *et al.* 2011: 558).[254] Campaigns for interpreters have effectively cast asylum as a reward for allegiance and dedicated service, or in terms of re-paying a moral debt.[255] Contribution-based arguments effectively imply that we have a stronger moral reason to admit talented and economically capable refugees than their unskilled or uncreative counterparts.[256]

To be sure, these implicitly desert-based arguments may have utility in harnessing greater public and political support for more inclusive asylum policies. However, they should certainly not be deployed in isolation from universalist claims for refugees' rights, lest refugees who are at equal risk in their states of origin find themselves deemed unworthy to enter the 'community of value' merely on account of being unsociable, lacking community spirit or bravery, being untalented or uncreative, lacking cultural fit with the host society, or simply being unable to contribute economically given illness or old age (Anderson *et al.* 2011: 560; Pupavac 2008: 285, 291). Given that, as I argued in Chapter 1, the fundamental purpose of asylum is to protect individuals from serious harm, it would be highly morally dubious to seek to use the institution of asylum as an exercise in selecting morally desirable individuals for membership in a polity. As a basic human right, asylum is simply not something that can be earned. As I suggest later in this chapter, one advantage of a reparations-based mode of asylum politics is that it avoids this problematic desert-based approach.

[254] It is, however, not inevitable that anti-deportation campaigns should portray potential deportees as model citizens, for they could, like Carens (2009), argue against deportations on the simple basis of their period of residence, which can be seen as a proxy for social ties.

[255] When delivering the aforementioned petition to Downing Street, Perkins asserted that '[t]hese interpreters are brave men, they stood up and helped us…and now it's a case of us doing the same for them' (Guardian 2013).

[256] This, however, is likely to be an unintended implication of this contribution-based argument, for it is standardly deployed in an attempt to dispel widespread misconceptions about the cost of protecting refugees and the impact on the host population rather than to portray certain refugees as being especially deserving. As Sam Ray (2012: 15) has argued, this attempt at 'myth-busting' often dismisses, rather than engages with, citizens' concerns over asylum.

Both these universalist and particularist claims can be further bolstered by the protagonists within asylum politics in at least two ways. First, refugee advocates typically seek to generate *sympathetic identification* with refugees. This strategy seeks to harness the motivational force of sentiments such as compassion, which is often stronger than rationalist appeals to abstract principles such as human rights which, in any case, have acquired highly negative connotations among significant swathes of the populace in states such as the UK. As Richard Rorty (1993: 130) has argued, 'sentimental education' through the telling of sad stories may have a more powerful role in cementing a human rights culture than foundationalist claims concerning the inherent dignity of humankind.

Nevertheless, this sympathy-based approach has clear pitfalls. Given that refugees' need is not the only determinant of sympathy, but also their conduct and character, this sympathy-based approach can degenerate into yet another implicitly desert-based form of asylum politics. Thus, claimants who are 'endearing' (Pupavac 2008: 284) on the basis of their innocent vulnerability or politically correct views may elicit far greater sympathy than refugees who appear threatening or have an illiberal worldview.[257] A now-orthodox critique of humanitarian representations of refugees argues that emphasis on refugees' suffering and vulnerability at the expense of their agency, resilience and adapatability can lead to a 'de-politicized and de-historicized image of refugees' (Rajaram 2002: 247) which, as I briefly observed in Chapter 2, arguably casts them as 'passive victims' (Turton 2005: 278; see also Marlowe 2010). Sympathy and compassion (which, etymologically speaking, connote suffering *with* another) can also easily degenerate into pity, which is arguably a hierarchical and

[257] Sympathy can be generated on the basis of morally irrelevant criteria such as gender and generation, such that seemingly apolitical women and children (Fiddian-Qasmiyeh 2009: 323) may generate more sympathy than a troubled young male refused asylum seeker with a criminal record, despite the fact that all may be at great risk in their states of origin.

patronising emotion which entails some degree of contempt for those being pitied (Douzinas 2007: 75; see also Naylor 2011).

Second, these claims can be bolstered by what Crawford (2002: 25) has described as 'identity arguments', which 'work by producing or calling upon previously existing identities and differences among groups and claiming that specific behaviours are associated with certain identities'. While identity arguments, whether based on the principle of communal self-determination or simple xenophobia, are more commonly deployed to justify the exclusion of refugees and migrants (e.g. see Walzer 1983: 62), communitarian beliefs can also at times motivate the adoption of more inclusive asylum and immigration policies. In the asylum context, such identity arguments assert that a state must protect refugees in order to uphold its own values and to affirm its own national identity. For instance, arguments around asylum in France have drawn heavily on the foundational republican concepts of the rights of man and the notion of solidarity (see Allsopp 2012) whereas, in the UK, recent advocacy has been based around the notion of Britain's 'proud tradition of sanctuary' which stresses Britain's past protection of refugee groups such as Huguenots, Jews and Bosnians (IAC 2008: 6).

This identity-based approach has the motivational advantage of drawing on strong values and beliefs which are already firmly embedded within nation-states, rather than imposing thin, abstract and universalist claims from the outside (Scanlan and Kent 1988: 86).[258] On the other hand, it can, rather self-centredly, shift the focus of asylum away from its fundamental rationale of protecting refugees from serious harm to validating the identity of the receiving state. Moreover, given the patchy historical record of protecting refugees in nearly all liberal democratic states, assertions of a

[258] For the argument that motivation for generous asylum policy is most effectively generated by partialist or communitarian arguments, see Christina Boswell (2005).

'proud tradition' of sanctuary are bound to rely upon myth to some extent, and to function as potentially useful fictions in efforts to improve asylum policies. They are also bound to be unstable, for historians and other commentators may contest somewhat self-congratulatory narratives of states' tradition of asylum with inconvenient counter-examples.

Towards a Reparations-Based Form of Asylum Politics

As I have discussed, reparative arguments have played *some* role in debates over asylum to date. Implicitly reparative arguments are also sometimes used to bolster the general humanitarian case for protecting refugees. For instance, the Australian activist and writer, John Pilger (2013), adds to his indictment of what he sees as the 'barbarism' of Australia's refugee policy the observation that among the refugees seeking entry to Australia are 'people fleeing wars and their aftermath, such as Afghanistan and Iraq, for which Australia and its US mentor bear responsibility'. Nevertheless, reparations-based claims have not been used to their full potential by refugee advocates in asylum debates. For instance, as I observed earlier, in contrast to the US, there has been little use of implicitly reparative arguments concerning the protection of Iraqi refugees in the UK, besides a few scattered opinion pieces in centre-left broadsheet newspapers.

If a reparations-based claim were to be harnessed to its full potential within asylum politics, what would its strengths be, in terms of both appropriateness and effectiveness? First, it avoids the pitfalls of other particularist claims discussed above. It is not desert-based in character, for asylum as reparation is owed to any refugee for whose flight the receiving state is outcome or morally responsible, and their conduct or character is not taken as relevant. It also conceives of asylum as a right and a matter of

justice, rather than a discretionary act, and frames refugees as political actors rather than passive victims. While humanitarian representations of refugees have been critiqued for being 'de-politicized and de-historicized' (see Rajaram 2002: 247), viewing the triggers of displacement almost as natural disasters, the elaboration of reparative arguments involve concerted engagement with the complex political, social and economic processes which lead to refugees' flight, and attributions of responsibility for that flight.

Second, as I observed in the introduction, there is some evidence that reparative arguments exert a stronger psychological pull over publics and policy-makers than purely humanitarian ones (Butt 2009: 16; Tan 2007: 286), as the examples of Kosovan refugees in the 1990s and the protection of Iraqi refugees in the US, that I discussed earlier, appear to attest. Third, using asylum as reparation may have value simply as a means of 'covering all bases', as it were, when seeking to generate public support for more inclusive asylum policies. Just as Pogge has admitted that, in contrast to philosophers such as Peter Singer who argue that we have positive duties to aid the poor, his decision to frame obligations to alleviate poverty as negative duties was partly strategic – as a means to 'reach the people Peter Singer cannot reach' (quoted in Berges 2007) – the notion of asylum as reparation can be aimed at those impervious to the other moral claims canvassed above, who are sceptical of the existence of humanitarian duties to aid refugees or of refugees' contributions to their host states. Reparative claims could also form the basis of refugees' greater involvement in claiming their own rights. If the struggle for redress can be a goal of successful repatriation campaigns by returning refugees in Guatemala (see Bradley 2013: ch. 4), then refugees could also potentially mobilise to claim their right to asylum as reparation.

What, in contrast, are the practical shortcomings of the reparations-based approach to asylum politics? First, while reparative arguments may indeed exert a strong psychological pull if the causal links on which the argument is based are clear, their force may be considerably weaker if the causal links between a state's action and a refugee's flight are more indirect, diffuse and difficult to identify. If, in order to make a case for protecting refugees, one has to elaborate a complex and subtle causal history which only tenuously links the actions of a state with some refugees' flight, then that case is unlikely to be persuasive, compared to the force of simpler and more direct humanitarian arguments. As Margaret E. Keck and Kathryn Sikkink (1998: 27) have argued, 'problems whose causes can be assigned to the deliberate (intentional) actions of identifiable individuals are amenable to advocacy network strategies in ways that problems whose causes are irredeemably structural are not'.[259] Given entrenched moral biases – which may cause us to downplay the need to react to injustices far away – publics are unlikely to be convinced to help refugees on the basis of a long causal chain of events stretching far into history or across the world. While there is psychological evidence that in small-scale, interpersonal interactions, the principle of compensation for intentional, negligent or reckless behaviour is firmly entrenched (see Darley and Pittman 2003), it may be that – just as a sense of obligation to assist the distant needy is often weaker than the impulse to assist those nearby – global reparations for actions undertaken far away may exert a correspondingly weaker psychological pull.

Second, the reparations-based approach obviously applies only to those refugees for whose flight the receiving state is outcome or morally responsible. For the notion of asylum as reparation to be an acceptable substitute for universalist, humanitarian

[259] Indeed, the case studies used by Keck and Sikkink suggest that successful transnational advocacy campaigns have highlighted 'bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility' (Keck and Sikkink 1998: 27).

arguments for refugee protection, one would have to endorse the extreme externalist position that I discussed in Chapter 3, and it would have to be the case that *all* refugees were generated by external states. Making this case may well sap the reparations-based approach of its potential political power, for elaborate causal histories would have to be presented which, as I discussed above, are likely to be far less convincing than simple humanitarian appeals.

Third, although the principle of reparation is deeply entrenched in common moral thought, one predictable public response to a reparative argument will be that it simply does not apply to their state. Just as politicians and the media in the UK – in what Matthew Gibney (2004: 229), drawing on Stephen Krasner's concept, has described as 'organized hypocrisy' – disingenuously affirm the principle of asylum while at the same time seeking to limit its applicability by denying that those who claim it are in need of it, states and publics may well affirm the norm of asylum as reparation, yet simply deny that they generate refugees. In Matthew Gibney's words, '[m]ost people accept that states are responsible (to at least some degree) for the harm they do and that refugees are the victim of harm. They simply deny that *their* Western state is responsible' (Gibney 2004: 51, emphasis in original). As Butt (2009: 16) has argued, reparative arguments may constitute an affront to people's sense of 'integrity' and identity, such that the cognitive dissonance that may be created by an accusation of responsibility for a harm may be resolved through denial of that responsibility rather than acknowledgement of it.[260] Reparative arguments concerning refugees might invite the same facile rejoinders to which states may resort to on the international level, as I discuss in the following chapter which, despite their lack of justification, may

[260] For instance, as Bradley (2013: 219) has noted, 'the suggestion that Israel should accept some moral responsibility for the Palestinians' displacement is often conflated with challenges to the legitimacy of the Jewish presence in the Middle East' and the state of Israel itself. This appears to be an example of how identity arguments can work to the detriment of reparation for refugees.

nevertheless find currency among publics. For instance, general duties and special obligations to refugees might be seen as mutually exclusive, and the notion of asylum as reparation might be distorted into the notion that states have an obligation *only* to protect those they have harmed, and that any refugees generated by other external states are simply not their responsibility.

Fourth, it might be doubted whether reparative arguments are capable of motivating support for more inclusive asylum policies alone, or whether they need to be deployed in conjunction with other arguments in order to have any real influence. Surveying examples in which implicitly reparative arguments have been used in recent history, such arguments have typically been deployed alongside other claims, such that it can be difficult to identify which arguments are really doing the work in generating public support for admitting certain refugees. As I have shown, for example, the case for protecting such foreign employees is also thoroughly bound up with notions of associative duties, reciprocity, and patriotism. Given that even those who ordinarily take a strongly anti-immigration stance support the right to residence of such interpreters (e.g. see Hastings 2007), it might be thought that it is actually the more patriotically-tinged sentiments which are in many cases generating the support, rather than the implicit notion of reparation *per se*. To return to the example of Kosovan refugees seeking sanctuary in Western Europe in the late 1990s, their popularity was not solely motivated by a sense of being implicated in their plight, but also by feelings of 'regionality' and 'relatedness', given the common European heritage between the refugees and the receiving state (Gibney 1999: 29-30). However, although it may well be true that reparative arguments have only limited power by themselves, this is not necessarily problematic, for the suggestion is not that reparations-based arguments supplant or replace all other modes of asylum politics, but rather than they supplement

and bolster them. If reparations-based arguments can strengthen claims for refugee protection by being added to the mix of existing claims then, on a practical level at least, they will have done their job successfully.

The Operation of a Reparations-Based Form of Asylum Politics

Having identified some of the potential strengths and weaknesses of a reparations-based form of asylum politics vis-à-vis existing modes of such advocacy, I now turn to the question of how this reparative mode might operate in practice. While reparations-based campaigns for refugees could take many specific forms, it appears that any attempt to pressure states into offering refugees asylum as reparation will have to include what Keck and Sikkink (1998: 16) have referred to as 'information politics', 'symbolic politics' and 'accountability politics'.

Information politics, for Keck and Sikkink (1998: 16), is the 'ability to quickly and credibly generate politically usable information and move it to where it will have the most impact'. For a reparations-based form of asylum politics, this would involve gathering evidence of who is responsible for refugee movements in any given situation. This may be as simple as pointing to already known facts (when, say, media reports have presented compelling and unambiguous evidence that an external state has produced refugees), or engaging in detailed investigations on the ground and compiling them into detailed and somewhat legalistic reports such as those produced by human rights organisations such as Amnesty International and Human Rights Watch.

Moreover, protagonists within asylum politics would have to successfully frame the events in question in order to generate support for the idea that a state or states owes asylum as reparation to certain refugees through symbolic politics. As Price (2009: 81)

has argued, asylum is an 'especially effective framing device', given that 'asylum seekers are individuals, not abstractions', and whom 'norm entrepeneurs can use to generate public interest in abusive practices abroad'. While Price's focus is of course on asylum as a political form of condemnation of refugees' states of origin, the notion of asylum as reparation may also act as a potentially effective framing device, by generating public interest in illegitimate refugee-producing actions perpetrated abroad by the receiving state itself, and encouraging states to reckon with their own actions. Indeed, Price (2009: 14-15) recognises that 'an expressive asylum policy can provoke reflection and dialogue in receiving states about their own political values and about whether their foreign policy corresponds to those political values'.

Finally, participants in asylum politics would also have to draw on accountability politics, which can be defined as the 'effort to hold powerful actors to their previously stated policies or principles' (Keck and Sikkink 1998: 16). This can involve capitalising upon historical precedent, drawing on states' previous statements on their own responsibility to refugees (for instance, the acceptance of a special responsibility within the 2008 US Act which I discussed in Chapter 6), or by taking the principles of compensation and reparation which are strong in the domestic realm and extending them to the international realm (see Crawford 2002: 99). Just as a government which makes claims to impeccable conduct within a particular policy domain, such as human rights or the environment, is open to charges of hypocrisy in the light of evidence to the contrary, so too are states which uphold the principle of asylum as reparation, either implicitly or explicitly, yet claim that they do not produce refugees. In short, the acceptance of a reparative obligation to a certain set of refugees by a state could be used to criticise its indifference towards other refugees it has had a hand in creating.

Chapter 8: Asylum, Reparation, and International Responsibility-Sharing

Having explored some of the implications of the notion of asylum as reparation for domestic asylum systems and asylum politics, its possible ramifications for the international politics of refugee protection, global refugee policy and, more specifically, international refugee responsibility-sharing schemes, remain to be drawn out.[261] As Bukovansky *et al.* (2012: 1) have noted, 'special responsibility talk' has already become a staple of the international politics surrounding issues such as nuclear proliferation, climate change and global finance. In this chapter, I ask what effects an extension of this talk into the realm of asylum and refugee protection might have on the prospects for international cooperation on refugee protection.

In developing a provisional answer to this question, I begin by exploring what a responsibility-sharing scheme which sought to incorporate the notion of asylum as reparation as one principle for distributing responsibilities for refugees among states might look like. Building on my prior discussion of the tension or conflict which may potentially arise between the humanitarian and reparative functions of asylum in the last chapter, I then move to explore some of the incentives and moral hazards that the implementation of a system of asylum as reparation might create, and identify trade-offs that might conceivably have to be made between the various functions of asylum on the international level. Again, this discussion is unavoidably speculative; a feature it holds in common with existing debates over the merits of academic proposals for

[261] I have chosen to follow Tally Kritzman-Amir (2009: 356) in referring to international 'responsibility sharing' rather than the standard phrase of 'burden-sharing' in order to avoid the latter's 'potentially prejudicial connotation' (Thielemann 2003a: 226), and to reflect the fact that, in the longer term, 'burdens may mutate into resources' (Noll 2003: 237), given the contributions that refugees often bring to their host states. Although, as Matthew Gibney (2007: 74) has noted, it is possible to distinguish between refugees as *themselves* being burdens, and refugees as imposing *objective* costs on states, in practice it is easy to slide from the latter to former as shorthand.

responsibility-sharing schemes, which have tended to turn on which set of speculations about the likely effect of the schemes and the incentives they might set up are most plausible (e.g. Anker *et al.* 1998; Hathaway and Neve 1997; Schuck 1997).

Responsibility-sharing, in this context, can be defined as a procedure which apportions states' collective responsibility to protect refugees among those states, whether that involves offering physical protection on states' territories or bearing the financial costs of refugee protection. From the perspective of each state, whereas asylum concerns the protection of refugees who have arrived on its territory, responsibility-sharing relates to the protection of refugees who are in *other* states (Betts 2009b: 2-3).[262] In practice, international refugee responsibility-sharing is subject to a very weak and 'essentially…hortatory' normative framework (Schuck 1997: 272), achieved largely through discretionary resettlement programmes and *ad hoc* international negotiations.[263] However, in order to bring out the ways in which a system of asylum as reparation might influence responsibility-sharing schemes, I will begin by envisaging the operation of such schemes in situations of full compliance, before shifting to look at its possible effects in the far more likely situations of partial compliance.

[262] Although responsibility-sharing can also be a domestic issue within states of asylum, given the existence of policies which disperse asylum seekers to different areas of such states (Boswell 2003), I restrict my focus here to the international plane.

[263] This weakness stands in stark contrast to the strength of the norm of asylum, which is based on the binding principle of *non-refoulement* (Betts 2009b: 3). As a result, refugee protection has been characterised more by responsibility-*shifting* than responsibility-sharing, with states often willing to free-ride on the contributions of other states (Suhrke 1998: 400), and erecting non-arrival measures which effectively force refugees to seek asylum elsewhere and contain them within the global 'South'.

Situations of Full Compliance

If international responsibility-sharing were to operate in a purely humanitarian manner, and all states were willing in principle to cooperate in a binding scheme for responsibility-sharing, then responsibilities for offering asylum to refugees would be divided among states in something like the following way.[264] First, a list of states which sit above a threshold of basic capability would be drawn up, which would most likely include all states but the most fragile or failed ones. This could either occur on the global level, or through what Hathaway and Neve (1997: 143) describe as regional 'interest-convergence groups', which may be based on stronger feelings of solidarity or associative duties among neighbouring or regionally bound states, with the CEAS being an example of the latter. Second, the absorptive capacities of all the states above this threshold for a given length of time, such as a year, would have to be ascertained, according to some of the criteria for judging integrative ability that I discussed in Chapter 5. Third, the number of refugees in need of asylum would have to be identified. Finally, these refugees would have to be divided among the states capable of offering them asylum, in accordance with both their absorptive capacity and the refugees' choice.[265] The result, if undertaken properly, would be that each state is allocated a fair share of the world's refugees to protect.[266] In this purely humanitarian scheme, this

[264] The principle of humanitarianism may not only be a guiding consideration for the design of a responsibility-sharing scheme, but it may also motivate the design of one in the first place for, as Matthew Gibney (2004: 246) has commented, 'a state committed to humanitarianism should encourage international cooperation when this will boost the availability of protection for refugees'. For the suggestion that states are under an indirect duty to bring about a system which allows for the right to asylum to be fulfilled for all entitled to it, see Owen (2010: 111) and Kuosmanen (2013a: 36).

[265] Peter Schuck (1997: 277), for instance, outlines his 'proportionality principle', which 'demands that a state's share of the burden be limited to its burden-sharing capacity relative to that of all other states in the international community'. In more abstract terms, James C. Hathaway and R. Alexander Neve (1997: 201) take their 'allocational principles' as being based on 'a theory of "common but differentiated responsibility"'.

[266] Here I leave aside practical issues concerning how such a scheme would respond to the continued spontaneous arrival of refugees to particular states, and also regarding what should be done if the number of refugees in need of protection exceeded the number of places available according to a calculation of

result would be reached independently of any consideration of whether external states owe reparation for any of the refugees' flight. While host states might also press states responsible for the flight of the refugees whom those host states are protecting to create the conditions which allow for those refugees' voluntary repatriation, each state's quota would not reflect any complicity that certain states might have in the generation of certain refugees. While this humanitarian arrangement has the practical advantage of eliding controversial questions of outcome and moral responsibility – engagement with which could slow down or even paralyse attempts at reaching agreement on responsibility-sharing – it also seems to contain a strong element of unfairness, given that states may end up protecting refugees for whom *other* external states bear such responsibility.[267]

If, however, this humanitarian form of responsibility-sharing were abandoned and the *only* allocational principle used were that of reparation, then the result would be very different indeed, and would in practice result in far fewer refugees being protected. This would effectively involve the adoption of a far narrower criterion of 'fair shares', which would be defined purely by reference to the reparative responsibilities of external states towards refugees.[268] On this model, refugees would be protected *only* by the state

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states' absorptive capacities. For discussion of the limits of states' obligations to refugees, see Carens (1992b; 2013: 218-221) and Walzer (1983: 51).

[267] It might be objected here that this fairness-based argument implicitly treats refugees as burdens after all, despite my recognition earlier of the fact that this is by no means the case, given the strong social, economic and cultural contributions often made by refugees to their states of asylum. However, it is possible to recognise these contributions while also attending to the fairness or unfairness of distributing the objective costs associated with refugee protection among different states. Indeed, it can be argued that the problem is not in viewing refugees as being potentially burdensome *per se*, but rather in reductively defining refugees as *only* being burdens, without also recognising their frequent contributions.

[268] In contrast, the notion of 'fair shares' is often linked directly to humanitarian duties. Mark Gibney (1986: 85), for instance, sees duties under what he calls the Basic Rights Principle as being limited by the notion of 'fair share', whereas he believes there is 'no such limit under the HP [harm principle]', viewing the principle of fair shares in this humanitarian manner: 'Under the notion of Fair Share, nations would agree in advance to provide a certain amount of assistance to those in serious need that these nations were not responsible for causing' (Gibney 1986: 104). The fact that a particular state bears reparative obligations towards certain refugees is sometimes seen as justifying a departure from the distribution of responsibilities to protect those refugees according to a doctrine of fair shares. Bill Frelick (2007c), for instance, claimed in the case of the US and Iraqi refugees, that '[t]he usual formulas for international

which owes them reparation. If a refugee's flight were caused by an external state, then that refugee would be owed asylum as reparation by that state. If, however, the refugees' state of origin bore full outcome or moral responsibility for their flight, then that refugee would have no claim for protection outside his or her state, and the only protection they could find would be from their state of origin, which is precisely the actor that precipitated their flight, either by actively violating their rights or failing to protect them from serious harm. It seems uncontroversial to see this purely reparative approach to responsibility-sharing as highly unjust, insofar as it ignores an important humanitarian duty to refugees given only their need and suffering.[269] Only an extreme externalist – who saw outcome and moral responsibility for the generation of refugees as *always* lying with external states – would be satisfied with this arrangement.

If we are impressed by the apparent unfairness of a purely humanitarian system on the one hand, and the injustice of a wholly reparative system on the other, then the obvious alternative would be to seek to combine the principles of humanitarianism and reparation into a workable responsibility-sharing system. While some have claimed that the question of who bears outcome or moral responsibility for refugee's flight should be one factor in responsibility-sharing schemes (Barutciski and Suhrke 2001: 109-110; Gibney 2007: 66; Hathaway and Neve 1997: 194; Schuck 1997: 273), there has, to my knowledge, been little, if any, discussion of how the principle of reparation should be so incorporated into such schemes.

This kind of hybrid humanitarian-reparative scheme would begin in the same way as a purely humanitarian scheme, with a list of capable states drawn up, and the

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burden sharing do not apply because other governments see the Iraq war as having been a largely unilateral undertaking and have not (and will not) come forward with adequate contributions to meet the humanitarian emergency'.

[269] As Bukovansky *et al.* (2012: 220) have noted, '[i]f we restrict taking responsibility only to those who are directly causally responsible and/or culpable, then some harms suffered by innocent victims may never be addressed at all'.

number of refugees in need of asylum identified. The absorptive capacities of each capable state would then be drawn up. If, however, a reparative element were to be incorporated into an international refugee responsibility-sharing scheme, it would be a mistake to assume that states' absorptive capacities should be seen as identical, regardless of whether the states in question were offering asylum on reparative grounds or for humanitarian reasons. As I suggested in Chapter 5, if the notion of absorptive capacity is understood as being inherently normative – with 'capacity' viewed in terms of what can legitimately be expected from an agent – then the absorptive capacities of states bearing only humanitarian duties towards refugees would be different from states also bearing reparative obligations towards them. Recalling from Chapter 2 that, in comparison to humanitarian claims, reparative obligations are not so easily diminished through appeal to the self-sacrifice that fulfilling them would entail for the duty-bearer, it can be argued that states bearing reparative obligations towards refugees should be more prepared to sacrifice their own projects and other valuable social goals than if they bear only humanitarian duties towards them. To insist that states' absorptive capacity should be calculated by reference to the same criteria regardless of whether they bear reparative obligations or humanitarian duties towards refugees would be to oblige all states to fill their absorptive capacities regardless of whether they bear any responsibility for the refugees' flight, with the only difference between asylum as reparation and asylum on humanitarian grounds as becoming the question of *which* refugees should be protected, rather than how many. This is not to suggest that *any* degree of self-sacrifice is required in order for a state to offer asylum as reparation to all refugees who are owed it – given, as I observed in Chapter 5, its primary duties towards its own citizens – but rather that *more* self-sacrifice is required than if that state bears only humanitarian duties towards those refugees. This is also not to imply that the

distribution of refugees partly in light of states' reparative obligations towards them should invariably lead responsible states to accept a greater level of self-sacrifice, for the numbers of refugees whom they owe asylum as reparation might be small enough for it to be provided to those refugees without any such self-sacrifice whatsoever. Nevertheless, it is important to recognise that this cannot be counted on in all cases.[270]

In this stage of proceedings, refugees owed asylum as reparation will be allocated in the first instance to the states bearing the obligation to offer it to them. However, as I also discussed in Chapter 5, refugees' choice must be taken into account in order to ensure that the reparation offered to them is fully fitting. If they prefer to receive protection in another state, then their initial allocation to the responsible state may be overturned, and the responsible state will have to offer reparation indirectly, by compensating both the refugee and their chosen state of asylum.[271] However, if their preferred state is *not* willing to protect them and receive compensation from the responsible state, and they have no preference for any other state, or all states which they prefer over the responsible states are unwilling to take them in exchange for that compensation, then the initial allocation may have to hold.

As Matthew Gibney has argued, 'the determination of burdens should occur *only after* allocating the special responsibilities of states to particular groups of refugees, notably those that they have harmed or otherwise played a part in generating' (Gibney 2007: 66, emphasis added). Once refugees owed asylum as reparation had been

[270] As with the issue, discussed earlier, of how direct the causal link between a state's action and a refugee's flight must be for the former to owe reparation to the latter, it would be difficult to precisely specify in the abstract how much greater self-sacrifice a responsible state should accept when meeting its reparative duties towards refugees than a state bearing no such responsibility. This idea would need to be applied to concrete cases in order to yield a more precise answer.

[271] In this way, a system of refugee responsibility-sharing that incorporated the principle of reparation would involve not only *physical* responsibility-sharing, but also a *compensatory* scheme of financial responsibility-sharing. For a typology of these two schemes, along with an analysis of a controversial third, market-based form of burden-sharing advocated by Schuck (1997), see Kuosmanen (2013b).

allocated to the responsible states, or an indirect compensatory arrangement had been reached, the remaining numbers of refugees still in need of protection would be altered, for there would then be *fewer* refugees in need of asylum overall, and the remaining absorptive capacities of the states which have already been allocated refugees on reparative grounds would also be lower, even if its absorptive capacity were set in a more demanding manner than it would be for a state bearing only humanitarian duties towards refugees. There may be cases in which a certain state would have exhausted its absorptive capacity after being assigned the refugees to whom it owed reparation or it could be, if the number of refugees a particular external state had generated were particularly large, that the number of refugees owed asylum as reparation by that state would exceed the number it can genuinely take given its absorptive capacity, and that a portion of those refugees would have to be returned to the pool of remaining refugees in order to be allocated to other states on humanitarian grounds, and would perhaps have to receive another form of reparation instead from the responsible state, such as monetary compensation.[272]

Following the allocation of refugees on reparative grounds, the exercise would be repeated, but now on a humanitarian basis: each state would be assigned a certain number of refugees according to its absorptive capacity. This means that states which do bear reparative obligations towards certain refugees and which find that meeting these obligations does not exhaust their absorptive capacities, more demandingly defined, will also have to take other refugees on humanitarian grounds up to the limit of their absorptive capacity, while those states which do not bear any reparative

[272] In contrast, Wilcox (2007: 288) observes in passing that '[i]t may be necessary to assess a country's fair share of humanitarian-based admissions duties independently of its harm-based duties in order to prevent countries that have produced widespread human rights deficits abroad from avoiding their humanitarian-based duties on the grounds that they are unable to accommodate both those prospective immigrants they have harmed and those who need humanitarian aid'.

obligations towards refugees would be obliged to offer asylum on humanitarian grounds to those refugees up to the limit of this less demanding absorptive capacity.

In effect, even if a more demanding conception of absorptive capacity were imposed on states bearing reparative obligations to refugees, under this scheme such states would inevitably have *reduced* humanitarian obligations towards other refugees for whose flight they were not responsible and, if their absorptive capacity were exhausted by the allocation of those refugees to them, these humanitarian obligations may even be extinguished altogether, with the remaining refugees for whose flight they were responsible allocated to other states, and with them perhaps bearing a responsibility to offer alternative forms of reparation to those refugees that they *would be* in a position to offer, such as monetary or material compensation directly to the refugees in question.[273] This appears to be an inevitable consequence of accepting special responsibilities, including reparative obligations for, as Robert E. Goodin (1985: 13) has put it, such an acceptance 'necessarily entails some watering down of our general moral responsibilities: our limited stock of time, attention, and resources must now be divided among some extra claimants; and honouring our special obligations therefore means defaulting to some greater or lesser extent on our other more general ones'. However, in such a scheme, the refugees whom the state bearing responsibility for their flight genuinely cannot offer asylum will still be offered asylum on humanitarian grounds elsewhere.

In cases of joint responsibility for the generation of refugees, the issues to be worked out in this humanitarian-reparative scheme would be yet more complex. States would all have to agree that (a) they bear joint responsibility in the first place; (b) agree

[273] If a state is genuinely unable, given its absorptive capacity, to offer asylum as reparation to all refugees for whose flight it is responsible then, as I observed in Chapter 7, it may have to prioritise the neediest refugees *within the class of those refugees for whose flight it is responsible.*

on the gradations or degrees of this responsibility borne by each of the states; (c) agree on what these varying gradations of moral responsibility might mean for the type(s) of reparation that each state should offer, whether asylum, another durable solution, monetary compensation or a mere apology. If a state voluntarily accepted its outcome or moral responsibility for generating refugees, but saw that it was not the only one bearing responsibility, then it might – out of a sense of fairness or proportionality – push the other states it saw as responsible to offer their fair share of reparation. This would mean that, in addition to the criterion of absorptive capacity which would be central to a responsibility-sharing scheme which ran on purely humanitarian grounds, the degree of causal directness between a state's actions and the production of refugees would also become highly relevant to the distribution of reparative responsibilities.

Situations of Partial Compliance

This, then, offers – in a rather abstract and idealised way, doubtless with many details which would need to be ironed out if it were ever to be implemented – an outline of how a system of international responsibility-sharing could seek to include and harmonise the principles of reparation and of humanitarianism, in which states would discharge their reparative obligations to those refugees as far as they would be genuinely able, while the remaining refugees would be assured asylum elsewhere on humanitarian grounds. However, it should go without saying that current responsibility-sharing arrangements are a long way off from this. My use of the passive voice in this discussion so far has conveniently sidestepped the issue of *who* it is that would, and should, undertake the identification and assignment of reparative responsibilities. One

possibility is that states could do so voluntarily, which is entertained in passing by theorists such as Carens (2003: 100), Hathaway and Neve (1997: 195), and Miller (2007: 227). However, in the absence of any broader mechanism for enforcing these responsibilities, this would be unlikely to take us beyond *ad hoc* acceptance of reparative obligations when it suits the interests of particular states. It would also provide no guidance on how disputes over responsibility would be adjudicated.

A second possibility which would address these concerns is that an international body – perhaps mandated by a treaty on refugee reparation which built on existing soft law provisions such as the 2005 UN Reparations Guidelines, the *Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons*, and the 1992 Cairo Declaration of Principles of International Law on Compensation to Refugees – could be charged with allocating responsibility. As Luke T. Lee (1986: 552) has put it, 'there is no intrinsic reason why the [UN] General Assembly cannot create a special body to collect, process and distribute compensation funds due refugees worldwide, or assign this task to an existing body'. This could conceivably be undertaken in a quasi-scientific, technocratic manner, in which teams of experts were deployed to refugee-producing sites in order to seek to ascertain which states bear outcome responsibility for the generation of refugees in any given instance, and country of origin information reports were compiled in an extension of that which currently occurs as part of current domestic RSD procedures in liberal democratic states. It could also be pursued in a more deliberative, democratic manner (see Chimni 2001) in which states make submissions based on their own assessments of where responsibility lies, debates and hearings are held, and refugees also submit their own assessments. In response to the problem of the indeterminacy of reparations – which may be most acute in the case of compensation, given the difficulty or even impossibility of quantifying damages –

ultimately the only way of seeking to ascertain both fittingness and proportionality is to create a fairly administered system with the input of all affected, with special weight given to the views of refugees themselves, and which treats all like cases alike. As Peter van der Auweraert (2012: 145) has observed in this context, '"adequate and fair" is a contextual yardstick that faces its ultimate test in victims' perceptions'. As I discuss below, one practical shortcoming of this approach is that it would be highly time-consuming, especially if there were some form of appeals mechanism through which states could contest assignments of responsibility to them.

If UNHCR were to take on this role, then this would have significant implications for its mandate and operation. Within UNHCR, refugee protection has been given a classically humanitarian rationale, with the intention that its work will proceed in a politically neutral manner, independently of contentious questions such as who bears responsibility for causing refugees' flight. As Karin Landgren (1998: 420) has put it, '[r]efugee protection is not concerned with attributing international responsibility for persecution. It implies no prospect of redress or reparation, and refugee law does not engage those responsible for the wrong'. Indeed, UNHCR's Statute states that its work in 'seeking permanent solutions for the problem of refugees' is to be of a 'humanitarian and social' and 'entirely non-political character' (UNHCR 1950: 6). Lee (1986: 567) has asserted that '[s]o long as the objective of the UNHCR remains "humanitarian" and "entirely non-political"…an organ other than the UNHCR must be found and entrusted with the mandate of fulfilling the right of refugees…to compensation'.[274] On the other hand, shifting to a more politically engaged and 'solidarist' brand of humanitarianism which is willing to condemn rights violators (see

[274] There are other, pragmatic reasons for UNHCR maintaining neutrality on responsibility for refugee movements, such as the need to 'secure permission from countries of asylum to operate within their territories [for relief operations]' and to fundraise through states, thereby preventing it from 'unduly criticizing either host or donor governments' policies towards refugees' (Loescher 1989: 19). Such considerations of access and funding render neutrality expedient to at least some extent.

Weiss 1999: 3) and assign responsibility for refugees would not be such a radical leap for UNHCR in practice: as Loescher (2001: 2) has convincingly argued, UNHCR's work is inescapably political and has involved challenging and pressuring states to fulfil their obligations towards refugees (Weiner 1998: 435; see also Forsythe 2001). In contrast to the insistence of the ICRC on the importance of the classically humanitarian principles of impartiality and neutrality, UNHCR has, as Betts (2009a: 114) has put it, 'frequently compromised its principles in order to pragmatically respond to the realpolitik of humanitarian situations'.

In common with existing international law in general, the provisions of any treaty on asylum as reparation, or the recommendations of any treaty body created to uphold them, would be weak in the absence of any enforcement mechanism. If such a mechanism were put in place, it would most likely be implemented in a selective manner according to the priorities of the most powerful states. Given the limited compliance of states with existing international human rights norms, it would be thoroughly naïve to expect that a responsibility-sharing scheme which incorporated the principle of reparation would find full adherence and that all refugees in need of protection would gain it. This pessimism is shared by theorists such as Carens (2013: 15), who considers that 'there is such a big gap between the ideal refugee regime…and what democratic states are actually willing to do, that there is no realistic chance of the ideal refugee regime being implemented'. This raises the question of what states should do in response to other states defaulting on their responsibilities to protect refugees. It may be tempting to claim that, once responsibilities have been allocated, each state is bound only to meet its own quota and not to go beyond it, given the unfairness of having to do so. However, given the frequently dire need of refugees, the humanitarian imperative to provide protection beyond one's quota (up to a limit set by each state's

genuine absorptive capacity) seems to trump this concern for fairness (Kuosmanen 2012: 50), meaning that other states may be required to 'take up the slack' for non-complying states, while perhaps seeking 'to persuade, cajole or force the non-compliers to make their fair contribution' (Miller 2011b: 237).

For the remainder of this section, I continue to assume the reality of partial compliance with the norm of international responsibility-sharing. It is highly likely that, first, states will not create a global humanitarian-reparative responsibility-sharing scheme any time soon; and, second, that, even if they did so, they would not all adhere to it all, or even much, of the time. Given this reality of only partial compliance, I seek to envisage some of the incentives which might be created by the introduction of the notion of asylum as reparation into debates over refugee protection and responsibility-sharing on the international level, and assess how morally problematic they might be.[275]

Incentives

The fact that the creation of a system of asylum as reparation would be very likely to create certain incentives and encourage trade-offs with asylum's humanitarian function, which may be negative overall in terms of refugee protection, raises the question of whether a system of asylum as reparation should be implemented in the first place, or whether it should be abandoned once implemented, if it is foreseeable, or it

[275] As I noted in the introduction to this thesis, my discussion here is not wedded to any of the mainstream theories of international relations, whether neo-realist, liberal institutionalist or constructivist (see Betts 2009a: ch. 1). Indeed, the evidence of state behaviour in the negotiation and implementation of refugee responsibility-sharing does not wholly fit any one paradigm. On the one hand, states have often behaved as self-interested actors, as realism would predict, when they have engaged in free-riding on other states' contributions (Suhrke 1998) and have only been brought to commit to responsibility-sharing when issue-linkages with other issue areas in which they have a strong interest (see Betts 2009b). On the other hand, Eiko Thielemann (2003b: 270) has argued that European states' attitudes to burden-sharing have been influenced by a mixture of interests and norms such as equity and solidarity, which are 'not mutually exclusive'. If scholars of a more constructivist orientation are correct in asserting the causal power of norms and moral argumentation in world politics (e.g. Crawford 2002; Finnemore and Sikkink 1998), then there is no reason in principle why states cannot also be socialised into acceptance of the norm of asylum as reparation.

has turned out, that it would be counterproductive or self-defeating. If the side-effects of a system of asylum as reparation were significantly negative, then this might provide grounds for, in the international sphere at least, deciding ultimately to keep asylum and reparation apart after all. If combining the two ultimately undermines the practical achievement of both, then it would be morally preferable to keep their provision separate, and to call on states to offer reparation to refugees in other ways, perhaps through compensation. After all, as I also recognised when discussing the possible impacts of the notion of asylum as reparation on the domestic level, were we to conclude that asylum as reparation were too practically counterproductive in the international sphere to be worth implementing, and chose therefore to abandon it in practice, then we would not be relinquishing any of our basic moral values or norms, but would rather be relinquishing only a certain contingent linkage between them. The norms of asylum and of reparation respectively would remain intact, so to speak, and would have to be pursued separately. It would, however, be unnecessary to relinquish the norm at the level of theory; the challenge instead, I believe, would be to create the conditions under which the norms *could* be implemented without creating these negative incentives. Given that incentives exist in part because of actors' interests in goods other than the norm, these interests would need to be changed over time so that the norm could be implemented without being accompanied by these incentives.

In undertaking my discussion, I draw on Pogge's sophisticated discussion of the incentive structures which moral codes can set up in his essay, *Loopholes in Moralities* (Pogge 2002b). Drawing on Pogge's discussion, it is particularly important to distinguish between incentives which genuinely arise from a moral theory, and those incentives which only arise after a moral theory has been distorted by those institutionalising it. Pogge distinguishes between various types of incentive that can be

created by a moral code. First, he distinguishes between *concrete* and *ideal* incentives: whereas the latter are those that would be discerned by a code's '*ideal adherents*, that is, agents who are fully rational, who fully understand the code and interpret it correctly', the former are those incentives discerned by 'fully specific agents who actually do or will exist' (Pogge 2002b: 79-80, emphasis in original). Pogge also distinguishes between *compliance* and *reward* incentives: regarding the former, 'ideal adherents are motivated solely by their commitment to do what the code requires or suggests', whereas regarding the latter, 'ideal adherents are motivated by other, code-independent interests of theirs insofar as these can be pursued without violating requirements of the code' (Pogge 2002b: 80). Lastly, Pogge distinguishes between *internal* and *external* incentives: whereas the former 'may affect even persons sincerely committed to the relevant code', the latter affects only those who are uncommitted to it (Pogge 1990: 650). As we shall see, the most problematic possible incentives created by asylum as reparation are *concrete, reward* and *external* incentives: those considerations which move states to comply with the norm of asylum as reparation based on extrinsic, self-interested factors.[276]

It is a feature of moral norms and codes generally that their implementation may create certain incentives which may be 'regrettable by the code's own lights' (Pogge 2002b: 78). This is also true of norms within the international refugee regime, such as the principle of *non-refoulement*.[277] These can be highly positive, in the case of ideal, compliance incentives, by significantly enhancing compliance with the norm and deterring violations of it. On the other hand, the incentives created by the

[276] Furthermore, I restrict my focus here to incentives that are created *unintentionally*, and set aside the moral issues associated with deliberately and intentionally creating incentives, such as the risk of paternalism or manipulation (see Grant 2006).

[277] States clearly do seek loopholes in international refugee norms for, as Betts (2009a: 112) has put it, 'at times, states have sought to minimize their commitments to refugee protection insofar as it has been possible to do so without openly transgressing international rules'.

implementation of moral norms can be highly negative, counterproductive or even self-defeating, in several potential ways. First, a norm might create incentives which lead to outcomes which are directly self-defeating, by precluding the achievement of the norm's goal. This could occur either in the short-term, or in the longer-term, if the interest to which the incentive appealed ended up changing the character of the norm in a negative manner, by eroding, distorting, corrupting, demeaning or having a 'corrosive effect' upon its character (Grant 2006: 36; Sandel 2012: ch. 2).

Second, an incentive might be compatible with the achievement of the norm's goal, but yet also create another injustice as a by-product which is sufficiently serious to outweigh the value of achieving the norm's goal; a possibility I considered in Chapter 5 when discussing how offers of asylum may, for instance, deepen the 'brain drain' or entrench the effects of ethnic cleansing. If an incentive were to rest on a damaging or harmful interest, then pursuing the norm through this incentive might well reinforce the interest, with highly negative consequences in the long-run. In short, while there might be good short-term reasons for using, or tolerating, concrete, reward and external incentives in order to ensure compliance with a norm, it is also important to be alert to the possible longer-term effects of those incentives.

How might incentives arising from the implementation of the norm of asylum as reparation create these counterproductive results? While it may be highly expedient to capitalise upon states' reluctance to accept refugees in order to incentivise or induce compliance, the principal danger regarding asylum as reparation appears to be that the interests underlying the incentives created by it are likely to be highly restrictionist in character, and concerned with minimising the number of refugees the state will protect. As I discuss in the next section, asylum as reparation could conceivably be adopted by states as a form of 'refugee insurance', aimed at minimising the numbers of refugees it

will have to protect in the long term. In the short-term, those adopting a realistic perspective contend that there is a need to draw on, and to work with, states' existing preferences when seeking to maximise refugee protection. Schuck (1997: 283), for instance, argues that 'although reformers cannot count on changing either states' motivations or states' heterogeneity, they *can* devise mechanisms to guide states' self-interest into channels conducive to humanitarian goals' (emphasis in original).

However, the incentive which motivates short-term compliance with the norm might *reinforce* a highly problematic interest which a state simply should not have. It will also take us only so far: states will be prepared only to accept refugees if they see that in doing so they are reducing the numbers they will be obliged to take in the long-term, and therefore stops short of offering a solution to one of the main problems facing the refugee regime; that is, the mismatch between the number of refugees in need of asylum, and the numbers that states are prepared to accept. Furthermore, if states are motivated to provide asylum as reparation because of ultimately restrictionist goals, then this may actually affect their treatment of the refugees they do accept, and adversely affect the quality of protection that they offer to them.[278] As Schuck (1997: 294) himself recognises, it is a 'genuine risk' if 'states that have traditionally volunteered to protect refugees tend to treat them better than states that agree to do so for the first time and in exchange for compensation'. In short, the danger is that, by capitalising on states' reluctance to protect refugees and seeking to channel it into a responsibility-sharing scheme, they end up *reinforcing* or even *legitimising* it.

[278] For instance, on the domestic level, the incorporation of the principle of reparation into RSD processes might tempt states to introduce additional and more demanding evidentiary standards, such as the need to prove that one's flight is the responsibility of the state to which one is now applying for asylum, thereby setting the bar for acceptance higher, so to speak. However, this would be unjustified, for as UNHCR (1992: 32) has stated in its Handbook on procedures and criteria for determining refugee status, the duty to 'ascertain...all the relevant facts' is jointly held between the decision-maker and the asylum seeker.

Incentive 1: 'Refugee Insurance' and Moral Hazard

States motivated by a desire to control and limit the influx of refugees onto its territory may well be attracted to the notion of asylum as reparation as a potential form of 'refugee-crisis insurance'.[279] It has already been recognised that refugee responsibility-sharing schemes may well have this insurance-like function. Hathaway and Neve (1997: 191), for instance, have pointed out that '[i]nternational cooperation generally develops from a perception of a shared risk that can be attenuated by a collective response', whereas Schuck (1997: 249) suggests that states 'might be attracted to burden-sharing for the same reason that many individuals are attracted to catastrophic health insurance: States may rationally prefer to incur a small and predictable protection burden now in order to avoid bearing large, sudden, unpredictable, unwanted, and unstoppable refugee inflows in the future'.

The same logic might motivate states to use asylum as reparation as a form of refugee insurance: states might prefer to agree to protect any refugees whom they generate, knowing that other states will be obliged to protect any refugees whom they generate. However, the incentives would not be equally strong for all states.[280] It is a fact common to all responsibility-sharing schemes that, as Thielemann (2003b: 256) has noted, 'such a scheme will only be agreed upon when contributions reflect the differences in the relative risk perception of each participant'. It is likely that states which are vulnerable to influxes of refugees but which are not strongly implicated in the production of those refugees, would be very likely to be strongly attracted to the

[279] I am grateful to Alexander Betts for first suggesting this possibility to me.

[280] Hathaway and Neve (1997: 189) discuss what they call the potential 'variants of affiliation' of a burden-sharing scheme which depend on the strength of states' interest in joining it, distinguishing between an 'inner core' of participating states which are most likely to border refugee-producing states, an 'outer core' of states less affected or concerned by refugee movements which may be motivated to make fiscal contributions rather than large commitments to physical burden-sharing, and mere 'situation-specific involvement' depending on more transient interests or obligations based on ties to particular refugees.

scheme, for it would entail that many of the refugees whom they are currently obliged to protect would instead be the responsibility of the state which generated them. It is, after all, no coincidence that proposals for responsibility-sharing schemes have typically come from states that have perceived themselves as being saddled with the task of protecting a disproportionate amount of refugees for whom they do not bear moral responsibility (Suhrke 1998: 397). Conversely, states which do not currently receive many refugees but *are* clearly outcome or morally responsible for generating them would have far less of an incentive to participate, given that the result would be accepting an obligation to protect far more refugees than they are accustomed to. Other states may, as Anker *et al.* (1998: 301) note, find that 'over the long term…they can self-insure against occasional crises' without the need to join a responsibility-sharing scheme.

The fact that a system of asylum as reparation might be seen as offering an opportunity by restrictionist states for undertaking refugee insurance raises the question of whether such insurance might carry with it its own moral hazards. Moral hazard is one form of perverse incentive which insurance schemes can create, in which 'the provision of protection against risk…unintentionally promotes irresponsible or fraudulent risk-taking, and thereby perversely increases the likelihood of the undesired outcome' (Kuperman 2008: 50).

On the one hand, it might be thought that incorporating the principle of asylum as reparation into international burden-sharing initiatives would *reduce* moral hazard in refugee policy. Under the current system, external states can irresponsibly generate refugees while knowing that, unless those refugees happen to arrive on their borders, they can be protected by other states. In one sense, the principle of *non-refoulement*, coupled with the discretionary nature of resettlement schemes, already acts as another

form of 'refugee insurance'; that is, having signed up to the 1951 Refugee Convention, external states can generate refugees in the knowledge that the principle does not imply any special obligation to protect those refugees unless they happen to arrive at its borders, which in any case is an eventuality that they can often largely avoid through the imposition of non-arrival measures. According to the principle of *non-refoulement*, the responsibility for protection will fall on the state at which the refugees arrive, which will then have a responsibility to protect them regardless of any outcome or moral responsibility for their flight that they may have. In contrast, an international system of asylum as reparation would remove, or at least reduce, this particular moral hazard – as states would be required to protect any refugees they create, and would be held accountable for any irresponsible refugee-generating behaviour. It may, therefore, have a positive deterrent effect.

However, on the other hand, a system of asylum as reparation might potentially create a new and *different* moral hazard, for it is conceivable that, if it were used as a form of insurance, then states might see themselves as being able to 'purchase' the right to generate refugees by offering compensation to them following their displacement (Akhavan and Bergsmo 1989: 254; Lee 1986: 541). However, this would emphatically *not* be permitted by my theory of asylum as reparation, for it would effectively instrumentalise refugees, by seeing the unjust harms of displacement as something that can be bought, when the goods which are often lost upon being displaced – such as security, homes, livelihoods, professions and relationships, and the well-being these goods create – are priceless.[281]

[281] Lee's own objection to this possibility is that 'the notion of the inalienability of fundamental human rights precludes the balancing of such human rights interests against economic interests' (Lee 1986: 540).

Incentive 2: The 'Blame Game'

A second potentially negative incentive which asylum as reparation may create is that a system purportedly aimed at responsibility-sharing could degenerate into an exercise in responsibility-*shifting* or buck-passing, and provide grounds for continuing a dehumanising exercise of 'pass-the-parcel' (Miller 2011a: 2033), which may have the effect of depriving refugees from protection (Hathaway and Neve 1997: 121).[282] This could potentially occur in one of two ways. First, the notion of asylum as reparation sets up an incentive to downplay or deny one's reparative obligations so as to avoid having to fulfil them. This is because a system of asylum as reparation would create various winners and losers (taken from the perspective of states' interests), with states who bear strong and extensive outcome or moral responsibility for refugees' flight standing to lose the most, and with those with little responsibility having an opportunity to resist their humanitarian duty to refugees by insisting on other states' reparative obligations to them. In the hands of states, the notion of asylum as reparation could slide into an insistence that a state owes asylum *only* to those refugees for whose flight it is responsible. The corollary of this insistence would of course be a refusal to protect any refugees for whose flight that state is not responsible. This would be effectively to see humanitarian duties and reparative obligations as standing in a *zero-sum* relationship: if you bear one, then you do not bear the other.[283] Perhaps implicit here would be a *monistic* conception of responsibility ('only one actor can bear responsibility') and a *disjunctive* one ('*either* one actor bears responsibility *or* another does'). At the non-ideal level, there is a danger that the notion of asylum as reparation would be mobilised in conjunction with these erroneous conceptions of responsibility in tow, leading to

[282] Of course, responsibilities for refugees already are routinely shirked and shifted by states. However, it would provide another excuse for states to continue to do this.
[283] This might act as a reflection on the international level of the individual tendency, as Goodin (1985: 2) has observed, for our special obligations to 'blind us to our larger social responsibilities'.

highly unjust results in practice. States have themselves already appealed to this kind of argument: as I discussed in Chapter 6, states which were initially generous in their responses to Iraqi refugees generated since 2003, such as Syria and Sweden, upon becoming weary of protecting large numbers of Iraqis, began to appeal to the special responsibility of the United States in order to justify their restrictionist policy turns towards Iraqi refugees.

The second way in which an international system of asylum as reparation could encourage a slide from responsibility-sharing to responsibility-shifting is due to the fact that states would be highly likely to contest vigorously the assignments of responsibility to them by other states or by the hypothetical international body discussed above. This could be motivated by their own self-interest, or by virtue of the probability that, in Miller's words, there will be 'reasonable disagreement about what a "fair share" would mean' (Miller 2011a: 2033). The process of assigning, appealing and contesting assignments of responsibility would risk dragging out already protracted refugee situations yet further, which could ultimately result in a stalemate in which assignments of responsibility were unheeded in the absence of any enforcement mechanism.[284]

It should be made clear that this incentive is *not* warranted by my theory of asylum as reparation, given that I have emphasised the moral force of humanitarian duties towards refugees throughout. Reparative obligations and humanitarian duties are emphatically *not* zero-sum, but rather must be incorporated into an overall moral system. As I argued in the previous chapter, humanitarian duties are sufficiently weighty that, if a refugee for whose flight an external state is responsible is in sufficiently urgent need, then they may outweigh reparative duties. This provides the basis of a response to the potential problem that the process of negotiating and

[284] I owe this point to Megan Bradley.

assigning responsibility may render refugees' state of limbo even more protracted: if the responsible state resists its obligation to offer asylum as reparation to a refugee, then other states may have to take up the slack and offer asylum on humanitarian grounds to that refugee in the interim, while still pushing for that state to offer asylum or an alternative form of reparation to that refugee. In this way, taking up the slack on humanitarian grounds need not necessarily mean letting responsible states off the hook, so to speak, for asylum can be offered in such a way as to highlight the responsible states' negligence and unfulfilled responsibility, and can be accompanied by firm attempts to persuade that state to discharge its special reparative obligations towards those refugees.

Incentive 3: Refusing Humanitarian Intervention

A third possible incentive – or *dis*incentive, to be precise – which asylum as reparation may create concerns humanitarian intervention. If states have a humanitarian duty of rescue in cases of gross human rights abuses, crimes against humanity or genocide, then the creation of a system of asylum as reparation may make them reluctant to act on this duty, given that they would be seen as being obliged to offer asylum as reparation to any refugees created unjustifiably by their intervention. This kind of argument is already implicit in popular arguments against military interventions in other states, as pundits sometimes warn that the intervening state will become sucked into a quagmire from which it cannot extricate itself for many years, implicitly given the obligations that such an intervention generates. A system of asylum as reparation may, then, potentially encourage a self-protective isolationism in which states refuse to prevent atrocities.

This outcome is, however, not inevitable. States, if assumed to be rational, utility-maximising actors, would presumably weigh up the benefits of isolationism or interventionism against their costs, which would potentially, from states' perspectives, include bearing a responsibility to protect refugees. The state in question might find that, all things considered, it is in its own interest to intervene even if this means shouldering a special obligation towards refugees.

Moreover, we need not see this potential incentive as entirely negative in its implications for humanitarian intervention or the protection of refugees. It could potentially be positive insofar as it would create an incentive for states to abide by a key standard of *jus in bello* and to take all 'due care' (Lee 2012: 157) not to cause displacement in its interventions in other states. Knowing that they would be obliged to offer asylum as reparation to any refugee whom they have unjustifiably generated, it may incentivise more detailed planning and careful military execution. Just as domestic tort law and the imposition of strict liability can function as 'an important technique for lessening undesirable conduct' (Honoré 1999: 72), an international system of asylum as reparation – if enforced – may potentially encourage vigilance in the context of military interventions. Indeed, one of the aims of reparation is often recognised to be deterrence and the prevention of wrongdoing (e.g. Akhavan and Bergsmo 1989: 253; Garry 1998: 100; Lee 1986: 552). If reparations are secondary duties which arise from the violation of negative duties not to harm, then the obvious way of legitimately avoiding reparative obligations is not to violate these negative duties and to refrain from causing unjustified harm in the first place.

It might be thought that, given my argument in Chapter 4 that responsibilities for refugees created as part of justifiable humanitarian interventions should not be allocated to the intervening state on reparative grounds but rather shared among states

more widely, this problem does not arise; for, if states ensured that they create refugees only justifiably, then they would not find themselves bearing reparative obligations towards those refugees in the first place. However, even if this were accepted and well understood by states, an international system of asylum as reparation could nevertheless disincentivise humanitarian intervention in two ways. First, there is highly likely to be controversy over whether any given war is justified; to which the heated debates over the latest invasion of Iraq attest. If an international consensus emerged that a state *had* created refugees unjustifiably, then that state could find itself under pressure to accept those refugees without assistance from the international community, even if it had in fact produced refugees with justification given the circumstances. Second, given that I have consciously chosen to set the bar for justified displacement very high in recognition of the typical severity of the harms associated with displacement, the sheer difficulty of producing refugees in a justifiable manner could well make states reluctant to try to do so.

It does, however, appear that this incentive is not warranted by my theory either. On the question of whether it is permissible to avoid responsibility-generating actions, this depends on whether there is a prior obligation to enter that scenario or not. On the one hand, to use examples on the interpersonal level, we do not normally consider ourselves obliged to enter into intimate relationships or to have children if we do not want them, and feel justified in not doing this if we find the idea of the responsibilities that these relationships would entail to be excessively burdensome. The same can be said in relation to supererogatory actions: we are under no duty to go "above and beyond the call of duty" to help more people beyond our fair share, if this might lead us to form burdensome responsibility-generating relationships with these people that we would rather avoid. On the other hand, if a state has a strong obligation to enter a

particular scenario – to prevent a genocide, say – then it cannot resist this obligation by simply asserting its desire not to be drawn into a web of further responsibilities; that is, unless those responsibilities would be so burdensome, or even paralysing, that it could legitimately resist them. If a state bears an obligation to involve itself in a given situation, then it cannot resist that obligation by pointing to its own reluctance to shoulder further responsibilities which would arise as a result of this involvement.

Incentive 4: Selectivity

One frequent criticism of contemporary putative humanitarian interventions is that they are selectively undertaken, and only when intervening appeals to the intervening states' self-interest. It is likely that states would be similarly selective in their implementation of a system of asylum as reparation. Indeed, states could seek to "have it both ways", by claiming the right to intervene, but also seeking to resist the responsibilities that may be created by virtue of that intervention. For instance, in a related context, 'the US sought exemptions from the jurisdiction of the rulings of the emergent International Criminal Court on the grounds that its own military were more likely to be involved in [humanitarian interventions]…on behalf of the international community, and therefore should not be subject to the same rules as the rest: special responsibilities entailed special rights for their implementation' (Bukovansky *et al.* 2012: 18).

Moreover, states may be far more willing to shoulder an obligation to offer asylum as reparation to refugees if those refugees would, in their eyes, be an asset to their society. It might even be argued that an offer of asylum to refugees who would provide great benefits to the receiving state may not constitute a form of reparation at

all. If reparation is conceived in retributive or punitive terms, as I briefly discussed in Chapter 2, then it would seem that offering asylum as reparation to refugees whose residence would be highly beneficial to the host state would indeed *not* constitute a form of reparation.[285] Indeed, as Bradley (2013: 116) has put it in a slightly different context, '[r]eparations should attempt to remedy violations suffered by victims, not reap benefits for the perpetrators'. This retributive conception of reparation, however, would – if it were applied to asylum – implicitly conceive refugees as burdens which, as I argued above, is not necessarily the case. An analogy with the doctrine of 'double effect' within just war theory, that I briefly discussed in Chapter 4, may be of some use in seeking to resolve this issue. The doctrine of double effect in the context of war asserts, in its simplest form, that the deaths of civilians in wartime can be justified if they are the foreseeable result of a justified military campaign but were not brought about intentionally. Applying this kind of reasoning to the issue at hand, it could be argued that if the intention of the offer of asylum as reparation is to do just that – offer reparation – then the act does indeed constitute a form of reparation, even if this brings about significant benefits to the receiving state as a by-product. If, on the other hand, the main reason a state has chosen to offer asylum as reparation is to accrue these benefits, then that state is instrumentalising the refugee and treating reparation as a means to an end in a way which does not respect the moral force of the principle of reparation.

Again, this incentive to apply the principle of asylum as reparation selectively is *not* warranted by my theory. Clearly, if a *pro tanto* obligation turns out to be genuinely an obligation all things considered, then one cannot pick and choose when to fulfil it. Moreover, if one accepts the hierarchy of reparative obligations and humanitarian duties

[285] I owe this point to an anonymous reviewer for the *Journal of Refugee Studies.*

that I discussed earlier, then it becomes clear that reparative obligations remain obligations even when the cost of meeting them is substantial, in comparison to humanitarian duties which are more easily overridden by appeal to the cost to the agent of fulfilling them.

Conclusion

In the introduction, I quoted perhaps the most famous philosophical assertion of a state's special obligation towards certain refugees: Michael Walzer's claim, from his perspective as an American citizen and political theorist, that '[t]he injury we have done them makes for an affinity between us: thus Vietnamese refugees had, in a moral sense, been effectively Americanized even before they arrived on these shores' (Walzer 1983: 49). In this thesis I hope to have developed a theory that lends support to, and nuances, Walzer's claim in a level of detail that Walzer himself did not attempt in his relatively brief treatment of refugees in his seminal work, *Spheres of Justice*.

I sought to flesh out Walzer's sentiment with my core claim that states bear a special obligation to offer asylum as reparation to refugees when they bear outcome or moral responsibility for the unjustified harms those refugees experienced as a result of their flight, or are at risk of experiencing as a result of it, and when asylum is the most fitting form of reparation that is available to those states. In Chapter 1, I laid out a particular conception of asylum and its moral functions. Indeed, my analysis suggests that, in the passage quoted above, Walzer himself effectively melds together a *reparative* moral claim (when he refers to 'the injury we have done them') and a distinct *solidarist* claim (when he writes of 'an affinity between us' that he believes was created as a result of this injury). In Chapter 2, I explained my conception of reparation, before laying out a basic and intuitive argument that asylum can constitute a form of reparation. In Part II, I unpacked the constituent parts of my basic contention, explaining and discussing the concepts of causality and outcome responsibility, unjustified harm, reparative fittingness, and capability. In Chapter 6, I applied the theory to a case which shares significant similarities with Walzer's example of

Vietnamese refugees: Iraqi refugees generated since 2003, insofar as both were generated by a major military intervention pursued by the US. I explored the ways in which the US and its coalition partners bear outcome and moral responsibility for the severe and unjustified harm that Iraqi refugees have experienced as a result of their flight, by examining the ways in which the invasion prompted the effective collapse of the Iraqi state, enabled the emergence of an insurgency, and the ways in which these outcomes can be partially attributed to a negligent lack of planning. I concluded that the US and, to a lesser extent, the UK, owe asylum as reparation to large numbers of Iraqi refugees.

In Chapters 7 and 8, I probed some of the implications of my reparative approach to asylum for the politics of asylum and refugee protection on both the domestic and international levels. I explored the question of how highly resource-constrained states should prioritise refugees for whose flight they are morally responsible vis-à-vis refugees for whose flight they are not responsible; and analysed the implications of the notion of asylum as reparation for political debates over asylum and the ways in which refugees' rights are framed and articulated. Finally, I examined the ways in which the incorporation of the norm of asylum as reparation into international refugee responsibility-sharing schemes might affect the prospects for greater international cooperation on refugee protection, identifying some of the incentives that may be set up for states.

In developing this theory, I have aimed to grapple honestly with, rather than conveniently gloss over, the theoretical and practical objections that can be levelled against my approach, and to engage openly with the countervailing moral considerations that may ultimately weigh against the assignment of reparative obligations to states towards refugees in any given case. I have sought to follow

Bradley (2013), in her recent work on just refugee returns, in forthrightly exploring the challenges inherent in any attempt to translate an abstract moral notion such as asylum as reparation into the practical realm, to ascertain whether it could survive the various rigours to which it would inevitably be subjected in the political sphere. Situating my approach within a broader pluralist conception of justice has allowed me to develop an account which, I hope, has given the moral complexity of ethical issues surrounding asylum and reparation their due, insofar as that is genuinely possible, rather than somewhat reductively seeking to argue that my approach applies in all circumstances.

In presenting this reparative approach to asylum, I have sought to make several scholarly contributions to debates over the ethics of asylum. First, I have engaged in a systematic and thorough examination of an idea that has often been unreflectively invoked, but less frequently subjected to careful analysis. Looking beneath the veneer of self-evidence that may surround the notion, I spelt out its neglected normative presuppositions, background commitments and practical implications in detail, and aimed to bolster intuitions concerning special responsibilities for refugees that may otherwise be unstable and defeasible. Second, by forging a novel theoretical link between two concepts that are ordinarily considered separately, I hope to have shed light on both phenomena in a way that is of value to scholars of both asylum and of reparations; showing how asylum may possess a distinct moral function, by identifying an additional means through which reparation may be provided to certain individuals who have been unjustifiably harmed, and demonstrating how the context in which the principle of reparation is applied may affect its applicability.

Third, I hope to have offered a fuller understanding of the full range of asylum's moral functions, and to have worked towards a deeper overall account of states' reparative obligations towards refugees, which has hitherto been largely preoccupied

with repatriation and refugees' states of origin, at the expense of attention to asylum's potentially reparative function. I have sought greater analytical clarity by disentangling the frequently overlapping assertions of special responsibilities towards refugees, both in the abstract and in relation to the popular and political discourse surrounding Iraqi refugees generated in the last decade.

Fourth, I have offered in this thesis what is, to my knowledge, the first in-depth application of this moral idea to a case study which, I hope, has led to more theoretically grounded and nuanced conclusions regarding special obligations to Iraqi refugees since 2003 than have been offered to date. Lastly, ideally my approach would be of practical value to those engaged in the important task of clamouring for refugees' rights in the highly restrictionist policy environments in 'Northern' states today. My discussion of the potential role of the principle of reparation in asylum politics sought to identify the strengths of a reparative approach to asylum, such as its motivational force and its framing of asylum as a matter of justice rather than discretion, as well as its potential limitations.

In making my overall case for asylum as a potential form of reparation, I have also sought to make other scholarly contributions. For instance, in contrast to the synchronic focus of much work in this area, I developed a diachronic approach that looks not only to refugees' current situations, but also the origins of these situations. I aimed to bring a more nuanced conception of humanitarianism to bear on discussions of asylum, in comparison to scholars who have used the term as a monolithic concept in their work on asylum. I also pointed to the need for a greater integration of considerations pertaining to forced migration into just war theory, which often focuses on the protection of civilians more broadly, and the need to minimise death and destruction, rather than displacement *per se*.

The approach taken in this thesis raises a range of questions for future reflection and research. First, with a theory of asylum as reparation to supplement Bradley's account of the reparative potential of voluntary repatriation in hand, so to speak, there is scope for extending this reparative approach to refugees and migrants yet further to ask in more detail, as I briefly suggested in Chapter 2 of this thesis, whether *immigration* or *citizenship* might also potentially function as forms of reparation for past injustices, and building on preliminary explorations in this area by scholars such as Wilcox (2007).[286] Just as I hope to have shown that the forging of a theoretical link between asylum and reparation can yield a more nuanced understanding of both concepts, it could be expected that a conception of citizenship as reparation could shed further light on the potential nature of citizenship as well as that of reparation. Such an investigation would also allow for the theory of asylum as reparation advanced in this thesis to be situated and contextualised within a broader account of states' reparative obligations to outsiders.

Moreover, further work is required to apply the theory developed herein to a wider range of case studies, and potentially to make further refinements to my theoretical framework in light of the challenges associated with applying it to different instances. More detailed discussion of refugee movements rooted in the colonial legacy and the effects of climate change than I have undertaken here, as well as an application of the theory to other conflicts and refugee crises such as that currently engulfing Syria, would allow for a greater understanding of the *scope* of the theory's applicability to past and present cases of displacement. Whereas, in my choice of case study, I have followed the trend of focusing on military interventions pursued by Western powers, there is also room for an application of the theory to refugee crises *within* the global

[286] Indeed, Miller (2013b: 31-35) has already made use of my notion of asylum as reparation as the starting point of his brief discussion of how opportunities for immigration may also function as a form of reparation.

'South', in which one developing state bears outcome or moral responsibility for the unjustified harms of displacement experienced by citizens of another developing state; for instance, the recent alleged role of Rwanda in supporting the M23 rebel group within the Democratic Republic of Congo, which has contributed to its refugee crisis (IRIN 2012).

Third, there are a number of empirical questions raised by this thesis, which merit social attention by social scientists. For instance, future work might consider in more depth how the notion of asylum as reparation might fit into a wider 'reparations politics' identified by Torpey (2006), and whether it reflects the strengths and weaknesses of such a politics.[287] Moreover, as I commented in the introduction, further research is required in order to ascertain the conditions under which states come voluntarily to shoulder reparative responsibilities to refugees, and the conditions under which they refuse any acknowledgement of their role in prompting refugee movements. This research, while also potentially shedding light on the conditions under which norms gain influence on the domestic and international levels, would also be of value to advocates as they seek to determine the potential utility of deploying reparative arguments in any given context of asylum politics, and to 'replicate' positive responses to refugees that have occurred in the past (Gibney 1999: 30).

Lastly, my brief discussion in Chapter 6 of some of the preferences of Iraqi refugees for one particular form of reparation over another leaves open the question of how far the notion of asylum as reparation has genuine resonance for different refugee populations, and whether it is potentially a normative resource on which they could valuably draw when claiming their rights to both asylum and reparation, or whether it is

[287] More broadly, as Bradley and Duthie (2014: 169) have observed, '[c]onsidering questions of accountability and redress for the injustices of displacement may be particularly beneficial in prompting productive reconsideration and deepened accounts of what "rights-based approaches" to displacement entail, in theory and in practice'.

ultimately a concept that is fruitful largely from an academic perspective. Although it would be expected that the resonance, if any, of the notion would vary from refugee population to population, and from individual refugee to refugee, research that gave some sense of its wider resonance for refugees themselves would also be of value in gaining a deeper understanding of how the concept might be applied in practice.

Ultimately, it might be thought that the notion of asylum as reparation is something of a side-issue as far as matters of justice for refugees are concerned, especially when the fact that it holds only under certain contingent conditions is compared to the lifelong remedial responsibilities that refugees' states of origin bear towards their estranged citizens. Yet, while the theory of asylum as reparation advanced in this thesis by no means applies to *all* refugees, a clear understanding of the concept is nevertheless important given its potential applicability to large numbers of refugees in the contemporary world, potentially amounting to – if my conclusions in Chapter 6 are sound – millions of Iraqi refugees. While not applying to the bulk of the world's refugees, the theory thus has highly significant implications for states' existing asylum policies.

As I observed in the introduction, the theory presented in this thesis is clearly *non-ideal* in character, given that the attainment of a just world, in which the scourge of displacement and other injustices would have been eradicated, would obviate the need for asylum, reparation, and any notion of asylum as reparation in the first place. Nevertheless, both refugee movements more broadly, and states' propensity to engage in potentially refugee-producing interventions abroad, seem to show no sign of abating in the long-term. Although the appetite for such interventions may have temporarily diminished in states such as the UK in the wake of its participation in the Iraq War, which contributed to the abortive attempt at military strikes in Syria during 2013, other

interventions – from NATO's mission in Libya in 2011 to the recent French deployments in Mali and the Central African Republic – show the ongoing potential relevance of the notion of asylum as reparation, given that the possibility that such interventions may produce their own refugees cannot be discounted. The concept may also go on to acquire an even greater pertinence as the twenty-first century progresses, as the world hurtles towards environmental stresses as a result of climate change which are partly the outcome and moral responsibility of developed states, and which may well contribute to future patterns of displacement; most clearly in the case of island states threatened by rising sea levels. Until the unlikely day when external states cease engaging in actions and interventions that produce refugees, some account of asylum as reparation will be of significant value to all concerned with the welfare of refugees. Of course, while we should work towards such an outcome, and minimise the numbers of refugees generated in external interventions or desist from engaging in them entirely, the notion of asylum as reparation is important in the interim, as a partial response to the thoroughly non-ideal and unjust conditions we face in the world today. Although states' frequently hostile attitudes towards refugees, and their selective adherence to international norms are unlikely to wane anytime soon, it is strongly to be hoped that the notion of asylum as reparation might ultimately strengthen attempts at achieving accountability for many of the unrepaired and unjustified harms of displacement.

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