

# **Towards a Theory of Asylum as Reparation for Past Injustice**

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## **Abstract**

In this article, I contend that asylum should at times act as a form of reparation for past injustice. This function, I argue, stems from states' special obligation to provide asylum to refugees for whose lack of state protection they are responsible. After suggesting that the development of a theory of asylum as reparation necessitates a diachronic approach, I outline the conditions under which asylum should function reparatively, and draw on the reparations framework within international law to suggest that asylum can provide refugees with meaningful restitution, compensation and satisfaction. In particular, I seek to identify the conditions under which asylum constitutes the most fitting form of reparation for the harm of refugeehood that is available to states. Finally, I explore the question of how direct the causal link between a state's actions and a refugee's flight must be for the former to owe asylum to the latter.

**Keywords:** asylum; refugees; reparation; past injustice; harm

Towards 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 (Walzer, 1983, p. 49).

How should the institution of asylum operate? Asylum is often viewed as having one of two core moral functions. Firstly, asylum is frequently conceived as a response to a fundamental humanitarian imperative: to meet refugees' pressing need for protection against serious harm. A second position, which enjoyed its heyday during the Cold War, emphasises asylum's political function as an expression of moral condemnation of the persecutory or otherwise illegitimate actions of refugee-producing states (Price, 2009).

In this article, I contend that asylum should at times also assume a third important moral function: as a form of reparation for past injustice. This potential function, I argue, stems from a special obligation on the part of states to provide asylum to refugees for whose lack of state protection they are morally responsible, whether through their military interventions, support for oppressive regimes, or imposition of damaging economic policies. Asylum should be conceived not only as playing a 'palliative' humanitarian role or as expressing condemnation (Price, 2009, p. 7), but also as potentially providing a means by which states can rectify the harm they caused to individuals by turning them into refugees.

In a restrictionist era marked by strong hostility towards asylum-seekers, the task of partly re-conceptualising asylum in light of such an intuitive and widely

accepted moral idea as reparation is both timely and important. Indeed, recognition of asylum's reparative capacity has 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, p. 16; Tan, 2007, p. 286), such that concern for refugees is more easily generated when individuals feel somehow connected to their plight. For instance, Matthew Gibney (1999, p. 29) has shown how the huge popularity of Kosovan refugees in Western European states compared to non-European refugees can be at least partially explained by a sense of being implicated in their situation, given the intervention of these states in the Balkans.

My main goal in this article is to develop a provisional account of the conditions under which asylum should function as a form of reparation for past injustice. I begin this process by arguing that, in contrast to the synchronic focus of much existing work on the ethics of asylum, this task necessitates a diachronic approach. After presenting working definitions of asylum and reparation, and providing key clarifications, my exposition of the conditions under which asylum should act reparatively involves discussion of the principle of reparation, the external causes of forced migration, reparative responsibility for the unjust harm of being turned into a refugee, and the ways in which asylum might act as a form of restitution, compensation and satisfaction. In particular, I seek to identify the conditions under which asylum constitutes the most fitting form of reparation for the harm of refugeehood that is available to states, considering factors such as refugees' choice of reparation and the efficiency of asylum as a form of refugee protection. Finally, I address the question of how direct the causal link between a state's action

and refugees' lack of state protection must be for the former to owe reparative asylum to the latter. In making my argument, I aim to show how the forging of a conceptual connection between asylum and reparation raises important broader questions on how asylum is accessed, and the various ways in which past injustices can be remedied.

### **The Need for a Diachronic Approach**

The notion of a special obligation to provide asylum to refugees for whose lack of state protection an external state is responsible has received relatively brief scholarly treatment,<sup>1</sup> with some viewing it in passing merely as a potential voluntary motivation for states to provide asylum to certain refugees (Carens, 2003, p. 100; Hathaway and Neve, 1997, p. 195; Miller, 2007, p. 227) or as one important consideration for refugee burden-sharing schemes (e.g. Gibney, 2007, p. 66). This may stem from the fact that much work on the ethics of asylum and migration tends to be primarily synchronic in character,<sup>2</sup> focusing largely on the *current* needs and rights of refugees and migrants on the one hand, and citizens of receiving states on the other, rather than considering how pre-existing relationships between them may generate moral obligations to allow entry. This synchronic focus reflects the character of the moral theories that have typically been applied to this issue, which tend to adopt an impersonal perspective from which historical relationships are largely discounted. Utilitarianism recommends weighing up the current interests of those affected by asylum policy (Singer and Singer, 1988), while liberals evaluate such policy in light of whether it treats all concerned as 'free and equal moral persons' (Carens, 1987, p. 255), whereas humanitarian approaches ground the duty

to provide asylum in, for instance, a ‘right of hospitality’ (Kant, 2006 [1795], p. 82) or a ‘principle of mutual aid’ (Walzer, 1983, p. 45). Although communitarian approaches take account of pre-existing relationships within particular communities, they tend in practice to ignore the ethical relevance of harmful past relationships between the state and outsiders (Gibney, 2004, p. 51).

From this synchronic perspective, the idea that asylum should act reparatively makes little sense, for it focuses solely on the fact of refugees’ current plight, rather than the processes which caused it. This leads to analysis of the strength of refugees’ claims for protection to be undertaken in isolation from historical considerations. A diachronic approach, which recognises not only the current fact of displacement but also its provenance, is therefore vital for the development of a theory of asylum as reparation.

Despite such discussions of a special obligation to provide asylum to refugees whom a state has caused to flee, there appears to be a dearth of work which explicitly links asylum to reparations. In contrast, the extensive literature on reparations focuses on proposed reparations for crimes such as slavery, colonialism and genocide, focusing especially on transitional justice.<sup>3</sup> Moreover, work on reparations within refugee studies has focused strongly on refugees’ states-of-origin (see Bradley, 2006). Bradley (2008) has analysed refugee reparations in the context of repatriation, while legal scholars have proposed that states-of-asylum should be able to claim compensation from refugees’ states-of-origin for providing asylum to them (Garry, 1998; Lee, 1986). If, as Bradley (2006, p. 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.

### **Definitions and Clarifications**

Before proceeding, it is necessary to sketch my understanding of key terms and to make important clarifications. Firstly, my understanding of the term 'refugee' goes beyond the legal definition within the 1951 Refugee Convention, and follows Shacknove (1985) in viewing the refugee broadly as an individual whose protective link with his or her state-of-origin has been severed. This definition covers not only those with 'well-founded fear of persecution', as the Convention has it, but anyone facing serious harm while lacking state protection. It also transcends the standard legal distinction between refugees and internally displaced persons, with the latter ordinarily only being seen as such after having crossed an international border.

My understanding of asylum is closely related to this view of the refugee. Fundamentally, modern asylum is 'the sanctuary or refuge given to foreigners, usually refugees, by any sovereign state' (Gibney, 2005, p. 23). This minimal definition raises the question of what asylum provides refuge *from*. Applying Shacknove's approach, we can add that asylum's primary function is to provide refuge from the threat of serious harm, by creating a new protective link between the refugee and the state-of-asylum. However, there appears to be no reason in principle why we should limit ourselves to the prevailing Western image of asylum as encompassing only those who have already fled to another state, or why we should see a refugee's crossing of an international border as affecting the strength of his or

her reparative claim for asylum. If asylum fundamentally consists of surrogate protection, 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 to whom, despite being located outside its territory, a state might offer residence. This could take the form of current resettlement programmes – in which some third states provide residence to refugees who are at risk in their states of first asylum (United Nations High Commissioner for Refugees [UNHCR], 2011, p. 3) – but could also potentially be broadened so as to include refugees remaining within their states-of-origin. Resettlement, on this broader conception, can justifiably be seen as a form of asylum itself.

Thirdly, I understand reparations broadly as 'the entire spectrum of attempts to rectify historical injustices' (Barkan, 2000, p. xix). I follow the standard division within international law which sees reparations as having three components: restitution, compensation and satisfaction (International Law Commission, 2001, p. 52). Within this framework, while restitution refers to attempts to restore the *status quo* before a violation occurred, compensation is a monetary or material transfer, whereas satisfaction entails apologies or guarantees of non-repetition. Despite the breadth of the term 'past injustice', here I use it to refer solely to the past injustice which led to an individual being a refugee in the present.

It is, however, important to note that 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. Without attempting to settle this issue here, I use the term in the latter sense, and follow Thompson (2002, p. 42) in distinguishing between *reparation*, which is provided by the perpetrator, and *remedy*, which can ‘result from the good will...of a third party’. 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.

Beyond these definitions, several key clarifications are in order. Firstly, my argument is not that states *only* have reparative duties to refugees. States 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 over those of any other individual. Secondly, in focusing on the special 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 may be shared. Thirdly, I do not argue that asylum should *only* be provided reparatively. Using asylum *purely* as a form of reparation would be highly unjust overall, as it would greatly weaken refugee protection by excluding all those refugees whose plight was caused by their own state alone. Indeed, I view the notion of reparative asylum, and reparative justice in general, as most plausible when embedded in a pluralist account of responsibility and, more widely, of justice, without which it would be incomplete (see Caney, 2005, p. 765). Consequently, reparative asylum must be, as far as is possible, made to be *complementary* to the current form of asylum. Furthermore, I recognise that there are occasions in which asylum would be a highly inappropriate form of

reparation. I aim to isolate the conditions under which asylum *can* function reparatively, not to claim that it invariably does so as a general rule.

Moreover, my focus in this article is on the reparative obligations of Northern liberal democratic states to refugees. While my theory applies *in principle* to any state, the drastic differences in state capacity between ‘North’ and ‘South’ are such that an application of my theory to the ‘South’ would raise some very different issues, which stretch beyond the confines of this article. While I focus here on the *individual* provision of asylum across the global ‘North’, such an application to the ‘South’ would require discussion of whether and how reparative asylum could and should be offered when this individualistic approach is impracticable, due to factors such as situations of mass influx from which such states are unable to insulate themselves effectively. These important questions must be deferred for future discussion.

Finally, my decision to focus specifically on *asylum* as a reparative tool requires some justification. Indeed, other forms of refugee protection – such as the three ‘durable solutions’ of voluntary return, resettlement and local integration pursued by UNHCR – may also potentially act reparatively, by restoring refugees’ loss of state protection. That said, it is important to note that, on my view, two of these durable solutions are closely linked to asylum. Conceptually, I have already indicated that resettlement can be conceived as providing asylum whereas, practically, the provision of asylum can constitute a step towards refugees’ local integration. While Bradley (2008, p. 300) has already convincingly argued that ‘return itself can be seen as a form of redress’, an account is also needed of when

asylum can function reparatively, particularly in light of the fact that refugees have an *immediate* need of protection and reparation which asylum can meet, whereas such return is contingent on typically longer-term improvements in their states-of-origin.

### **The Conditions of Asylum as Reparation**

The claim that a state owes asylum as reparation for the harm of refugeehood is not an argument open to every refugee. It follows that there are certain conditions under which this special obligation to provide asylum obtains. In order to identify these conditions, it is necessary first to outline the basic moral claim underpinning my argument:

When an agent bears outcome responsibility<sup>4</sup> for causing another agent unjust harm, the first agent bears a special obligation to provide the second agent with the most fitting form of reparation for that harm available.

My intention is not to defend this principle of reparation fully – which would constitute a full philosophical project in itself – but to take for granted its moral force, and to apply it to the ethics of asylum. It does, however, require some general explanation, if only briefly. As a species of special obligation, it fits within the ethical paradigm of partialism (see Gibney, 2004, ch. 1), which includes moral norms concerning only certain individuals on account of pre-existing relationships among them. This principle fundamentally concerns the assignment of responsibility, stating that it is the responsible party who must provide redress.

If the principle of reparation formulated above is applied to the case of a refugee seeking asylum in another state, the basic conditions under which asylum should function reparatively flow relatively simply. They can be stated as follows:

- (1) The refugee's lack of state protection must have been caused by the actions of an external state;
- (2) That state must bear outcome responsibility for causing this lack of protection;
- (3) That refugee must either have been unjustly harmed, or be at risk of unjust harm, as a result of this lack of protection;
- (4) The provision of asylum by that state must be the most fitting form of reparation for that harm available.

This list is not designed to be exhaustive, but rather to identify some of the most salient conditions under which asylum should function reparatively. It is also a simplification for the purposes of initial exposition given that, in cases in which multiple states bear joint responsibility for refugees' predicament, the word 'state' would have to be pluralised. I now discuss and defend each of these conditions in turn, identifying in the process some of the key premises of my account.

### *The Externalist Approach to Refugees*

The first condition states that the refugee's lack of state protection must have been caused by the actions of an external state. This could occur when an external state

either causes a refugee-producing situation that the state-of-origin is unable to halt, or when it causes or otherwise enables the state-of-origin to produce refugees. Evidently, this condition assumes that states 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 a surprisingly prevalent internalist approach to refugees within both the political and academic arenas.<sup>5</sup> The basic internalist assumption is that the primary driver of refugees' movements is the actions of refugees' states-of-origin. If internalism is correct, then the development of a theory of asylum as reparation would be fruitless, as reparative responsibility would lie exclusively, or at least predominantly, with refugees' states-of-origin. Demonstrating the inadequacy of internalism is therefore a crucial step in developing this theory.

Nevertheless, various scholars have shown that many refugee movements indeed have exogenous causes. Some have argued that although internal persecution may be the immediate precipitant of flight, this can be often merely 'epiphenomenal' (Schuck, 1997, p. 261), that is, a manifestation of deeper structural ills for which external states bear primary responsibility. Others view international economic developments as a trigger for flight, tracing certain refugee movements back to the effects of externally imposed structural adjustment programmes (Betts, 2009, p. 140; Marfleet, 2006, pp. 44-56). Castles (2003, p. 18) has gone as far as arguing 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'. However, it appears that the most accurate view of

the causes of forced migration lies between the poles of internalism and externalism. While extreme internalism disregards clear examples of recent internationally-driven displacement, full externalism – which would imply that responsibility for refugees *always* lies with external states – overlooks the fact that, ‘even in our globalised world, some injustices are simply local’ (Gibney, 2004: 235).

### *State Responsibility*

The second condition asserts that, as well as having *caused* refugees’ lack of state protection, the external state must also bear *outcome* responsibility for it. In formulating this condition, I draw on David Miller’s careful distinctions between *causal*, *outcome* and *remedial* responsibility (Miller, 2007, ch. 4). For Miller, causal responsibility concerns ‘why something happened’, whereas outcome responsibility relates to ‘whether a particular agent can be credited or debited with a particular outcome’. Unlike causal responsibility, outcome responsibility exists only when there is a ‘foreseeable connection between...action and...result’ (Miller, 2007, pp. 87-90). Remedial responsibility, in contrast, denotes ‘the responsibility we may have to come to the aid of those who need help’ (Miller, 2007, p. 81). For our purposes here, we can add to this typology the notion of *reparative* responsibility, which combines Miller’s distinctions to claim that it is the agent who is outcome responsible for a situation who also bears remedial responsibility for it.

What implications does this condition have for cases in which external states generate refugees? Firstly, note that this condition does not include any requirement that, in addition to being outcome responsible for refugees’ flight, the refugee-

producing state must also bear specifically *moral* responsibility for it, in the sense of deserving moral praise or blame for its actions (Miller, 2007, p. 89). This is not to deny that such states often bear great moral responsibility for causing individuals to become refugees. Rather, I have not built the notion of moral responsibility into my theoretical framework in order to ensure that it accommodates the intuition that, in Miller's words, 'A may...have been acting in a way that is morally innocent or even admirable, and yet may owe compensation to P since he is outcome responsible for a loss to P' (Miller, 2007, p. 90).

Secondly, however, this condition does imply that if a state bears only causal but not outcome responsibility for producing refugees, then it bears no specifically reparative responsibility to provide the refugees in question with asylum. This could be the case, for instance, if it were genuinely not reasonably foreseeable that a state's course of action would produce refugees. For instance, the rapidly industrialising states of the nineteenth century may bear some causal responsibility for setting in motion the processes which have led to climate change, which is often regarded as a potential catalyst of significant future displacement. However, assuming that this future displacement was not reasonably foreseeable given the lack of scientific understanding of the likely environmental impacts of industrialisation at the time, it would be difficult to argue that they bear any retrospective outcome or moral responsibility for it (see Caney, 2005, p. 761).

### *The Unjust Harm of Refugeehood*

The third condition requires that the refugee must either have been unjustly harmed, or be at risk of unjust harm, as a result of the actions of an external state. It may seem obvious that all stages of displacement are typically harmful and unjust, given the suffering and turmoil which refugees so often experience both as a result of the forces provoking their flight and the adjustment subsequently required in their new locations. Indeed, it can be strongly argued that causing individuals to become refugees violates a putative ‘right not to be displaced’ (Stavropoulou, 1994) or ‘right to stay’ (Oberman, 2011). Moreover, 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 [1948], p. 293) – aptly highlights the vulnerability which refugeehood so frequently engenders. Even if refugees are only at *risk* of harm, this risk alone can create additional harms in itself, for instance, by preventing movement to their country-of-origin and creating insecurity. Nevertheless, it is worth briefly clarifying the notions of harm and injustice underlying my argument here.<sup>6</sup>

As Feinberg (1987, ch. 1) has argued, ‘harm’ can be profitably understood as entailing a setback to one’s basic interests. This process can be characterised either objectively or subjectively, as the impairment of basic human capabilities (Sen, 1993), or in terms of suffering. While the task of characterising the idea of justice fully goes far beyond the scope of this article, it is closely related to notions of fairness and desert. Now, it is conceivable that harm may be inflicted justly. The

paradigmatic case may be that of retribution, when an offender is deemed to deserve the harm suffered as punishment. It is also conceivable that an individual may be harmed by being caused to be a refugee, but not unjustly so. One potential case of ‘just displacement’ is the flight of a dictator, such as that of Colonel Gaddafi in 2011.

### **The Fittingness of Reparative Asylum**

The fourth condition, outlined above, is based on the conviction that states have an obligation to provide the most fitting form of reparation to refugees for whose plight they are responsible that is available. I understand fittingness here in terms of the extent to which a particular measure is able to repair a particular harm for all who have suffered from it. In order to ascertain fittingness, it is necessary to examine not only the features of the harm and the benefit offered as reparation for it, but also the wishes of the beneficiaries in order to ensure sensitivity. It might be thought that this notion of fittingness should include concern for whether the reparation provided is proportionate to the gravity of the harm caused. However, I set aside considerations of proportionality in this context on the grounds that the harms of refugeehood, which often entail gross violations of human rights, typically are sufficiently severe to render proportionality unattainable, even if the relatively ‘munificent’ act (see De Greiff, 2006, p. 12) of providing asylum in the rich ‘North’ is undertaken.

My discussion of asylum’s reparative fittingness will proceed in two steps. Firstly, I ask whether asylum can be a fitting form of reparation at all, before

addressing the fourth condition directly, seeking to identify the circumstances under which asylum can constitute the *most* fitting form of reparation *available*.

### *The Ongoing Threat of Harm*

To begin, there is one clear circumstance which must obtain for asylum to constitute a fitting form of reparation at all. While I have already provisionally defined asylum as refuge from the threat of serious harm, we can add to this that asylum provides refuge 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 his or her state-of-origin, the individual is not, or is no longer, a refugee, properly understood. It follows from this that asylum will only remain a fitting form of reparation for the harm of refugeehood if 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 provide the refugee with other forms of reparation, such as compensation, in his or her current place of residence once the risk has lapsed. Alternatively, if the responsible state has already provided reparative asylum 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 *settlement* or perhaps *citizenship* as reparation. It would be an open question in each case as to whether the period of asylum offered would constitute 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.

## *Asylum and the Various Forms of Reparation*

As I observed above, reparations have three main forms under international law: restitution, compensation and satisfaction. I now turn to the issue of whether asylum can provide these specific forms of reparation fittingly.

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, p. 3). However, a frequent criticism of this principle is that some crimes are so abhorrent as to be irreparable (e.g. Bradley, 2005, p. 2). It could be argued from this that, while asylum may provide future protection, it is emphatically incapable of rectifying the losses of displacement or erasing subsequent trauma. Furthermore, the ideal form of restitution for some refugees may be 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. After arguably 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 (Dodge, 2006). *Full* restitution, therefore, may be unfeasible.

Nevertheless, asylum can provide a meaningful 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 they previously had. Clearly, this is not an *exact* recreation of the *status quo ante*, for the refugees gain protection from a *different* state than the one by which they were

previously protected. However, to this extent, 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 less protection than both the state-of-asylum's citizens and refugees from stronger states, such as Iran. 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, p. 122).

Compensation, in contrast, is sometimes seen as required when full restitution is impossible (De Greiff, 2006, p. 455). Even if it were conclusively shown that asylum cannot provide restitution fittingly, it can nevertheless play a compensatory role. Indeed, gaining refugee status in the global 'North' typically entails access to a bundle of rights, perhaps including welfare provisions, which may

be monetary or material in form, thereby providing the kind of reparation described by Greiff (2006, p. 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. Matthew Price (2009, p. 70) has demonstrated the capacity of asylum to express and symbolise the state’s values and aims. However, while he focuses predominantly on asylum as an *outward*-looking expression of condemnation, there is no reason in principle why it cannot also be an *inward*-looking expression of contrition and apology, thereby acting as a form of satisfaction.

It can be argued that if this symbolic dimension is lacking, asylum cannot meaningfully function reparatively, with some arguing that material or monetary transfers constitute reparation *only* when they are accompanied by acknowledgement that they are playing a reparative role (see Lu, 2007, p. 209). This would preclude a form of *de facto* asylum as reparation, whereby asylum provides reparation without being acknowledged as doing so by the state-of-asylum. Although the provision of asylum to an Iraqi refugee by the United Kingdom might be reparative *in effect*, given its role in the last Iraq war, such effects remain steadfastly unacknowledged by the state.

Having established that asylum is capable of constituting a fitting form of reparation for the harms of refugeehood, I now turn to address the fourth condition directly: can asylum be the *most* fitting form of reparation for refugees *available*?

While recognising the limitations of asylum both as a form of refugee protection and a reparative tool, I answer affirmatively, suggesting further that asylum often has reparative advantages over alternative forms of refugee protection.

### **The Most Fitting Form of Reparation Available?**

Under what conditions does asylum constitute the most fitting form of reparation for the harm of refugeehood available? As several theorists have argued, the provision of permanent asylum is only one means of discharging a more general duty to protect refugees (and, by extension, to provide reparation to them), which may potentially be fulfilled through temporary asylum, safe havens, *in situ* aid, or even military intervention (Miller, 2007, p. 225; Price, 2009, p. 164; Wellman, 2008, p. 129). Indeed, I recognise that these alternatives may at times conceivably constitute the more fitting form of reparation. The reparative fittingness of any one form of refugee protection depends on at least two variables: the choice of the refugee, and the ability of states to provide it to all refugees to whom they owe it.

#### *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, p. 226), for instance, sees refugees' choice of protection as just one factor which can be outweighed by a number of more state-centric considerations. However, where reparation is concerned, refugees' choice must be given

considerable weight. 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. Having had their agency and freedom of movement so restricted by their displacement, special emphasis should be placed upon it when providing reparation. Indeed, after causing or contributing to their displacement, heeding refugees' wishes is the least that responsible states can do. Moreover, reparative fittingness cannot be evaluated solely in terms of whether the harm is *actually* rectified, but must also take into account how the reparation is experienced by the victim. It may be that asylum is the refugee's preferred form of reparation, or that another form of redress would be more sensitive. As Bradley (2005, p. 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 the enemy. However, Miller's approach is justified insofar as it recognises that refugees' choice, despite its great importance, can conceivably be overridden by other considerations, such as the need to provide a more efficient form of reparation in order to provide reparation to many in a climate of scarce resources.

It could be objected here 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 reparative asylum on its territory. However, two replies can be made here. Firstly, the obligation to provide reparative asylum is not absolute and can be outweighed by the force of refugees' choice to be granted asylum elsewhere. Secondly, there may be ways in which the responsible

state can heed refugees' wishes for asylum in a different state while nevertheless providing them with reparation; for instance, either by providing another form of reparation, such as compensation, to refugees who have taken humanitarian asylum in another state, or conceivably by providing their alternative states-of-asylum with financial support for providing asylum.

### *Efficiency*

A further consideration relevant to asylum's reparative fittingness is that of efficiency. Some scholars, such as Price (2009, p. 12), have echoed recent arguments made by developed states that in-region protection is far more efficient than providing asylum in the 'North', freeing up resources which could then be channelled towards the maximisation of overall refugee protection (and, by extension, refugee reparation). Without attempting definitively to settle this issue here, several observations are in order. Firstly, as Alexander Betts (2006, p. 159) has shown, it is not clear that this is invariably the case: if efficiency is theorised so as to encompass social and political, rather than merely financial, considerations, then asylum in the 'North' may at times be more efficient than in-region protection. Secondly, the concept of efficiency has been invoked in debates over refugee protection often without identifying what good is to be maximised, and in whose interests (Betts, 2006, p. 153). 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.

## *Reparative Alternatives to Asylum*

Beyond the identification of these two broad conditions under which asylum can act as the most fitting form of reparation, can anything more general be said? It might be thought that asylum, at least as it currently operates, is in fact a poor candidate for the most fitting form of refugee reparation in practice. De Greiff (2006, p. 6) views ‘completeness’ as a desideratum for any reparations programme, which he defines as ‘the ability of a program to cover, at the limit, the whole universe of potential beneficiaries’. However, the dominant Western model of asylum – which is taken to encompass 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, p. 164). By protecting only those able to reach another state, this model arguably offers protection arbitrarily, creating unfair gendered, generational, disability and class dimensions to asylum, as many refugees able to flee are young, able-bodied men able to pay smugglers’ fees (Gibney, 2000, pp. 315-316). 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.

While recognising these limitations, it is important 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 these biases and to strengthen asylum's reparative capacity. While resettlement is currently viewed as discretionary and operates on a small scale, with states being criticised for 'selecting the "best and the brightest" refugees' (Pressé and Thomson, 2007, p. 49), an expansion of such programmes according to the criterion of need rather than desirability would allow those least able to flee to secure reparative asylum.

Moreover, while cautioning against any general claim that one or another form of refugee protection is invariably more reparatively fitting than the alternatives, there are some grounds for believing that asylum *tends* to constitute a more fitting form of reparation for displacement than either in-region aid or development. This is so for two reasons. Firstly, 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. Secondly, asylum is often more targeted to the individual than in-region assistance. As de Greiff (2006, p. 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.

Asylum also has one reparative advantage over both in-region 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). Drawing on de Greiff's distinction between 'reparations in their strict sense, and the reparative *effects* of other programs' (Grieff, 2006, p. 471), while aid may be reparative in effect, it does not itself constitute a strong form of reparation. Viewing attempts at 'exporting justice' (Wellman, 2008, p. 129) as a reparative alternative to asylum must, therefore, be viewed with caution.

### **Potential Objections**

Having presented this case for asylum's potential to be the most fitting form of refugee reparation available, it must be recognised that there are various objections that could be made against my approach as developed so far, or implications which require discussion. For instance, it could be argued that, in the event of a just war, any refugees displaced as a result of it are not owed reparative asylum by the intervening state (see Blake, 2007), that the special obligation to provide reparative asylum can be outweighed by other more pressing moral considerations or that, in the context of 'scarce entry places' (Gibney, 2004, p. 83), reparative asylum would inevitably prioritise refugees who are not necessarily most in need of protection. It is a moot point, given the frequent reluctance of states to admit their own wrongdoing, how they could be compelled in practice to provide reparative asylum, and which actors are best placed to assign reparative responsibility for refugees. In an era in which refugees are shuttled between different states-of-asylum, in practice the

question would surely arise of whether reparative justice could permit one state to pay a poorer state to provide asylum to refugees it has harmed. Given lack of space, however, here I focus on only one potential objection: that the special obligation to provide reparative asylum only holds when the causal link between the state's action and refugees' lack of state protection is at least fairly strong.

### *The Question of Directness*

The paradigmatic examples in which states have a special obligation to provide asylum are cases in which they have *directly* created refugees, due to clearly identifiable actions such as military intervention. Often, however, such a direct causal link either does not exist or cannot be identified. Firstly, external states may create the 'predisposing factors' which generate refugees, but not the 'precipitating events' (Richmond, 1994, p. 62). It has often been argued, for instance, that European colonial rule 'set the stage' for many post-independence refugee movements (Anthony, 1989, p. 574), and was thereby a necessary, albeit insufficient, condition for their occurrence.

Secondly, many refugees are generated by extremely complex chains of events which are embedded in similarly convoluted social, political, economic and cultural systems in which a large number of diverse actors are implicated to various extents. Refugees can be created by the simultaneous actions of various agents, whether coordinated or not, creating the somewhat formidable epistemic problem of pinpointing individual degrees of responsibility, especially once counterfactual considerations are taken into account. Matters of causality are of course open to

reasonable disagreement among equally informed observers, and the assignment of responsibility may ultimately come down to calls of judgement.<sup>7</sup> Given that the huge complexity of causal chains far outstrips human ability to discern and comprehend them fully, contestation and uncertainty when assigning reparative responsibility is almost inevitable.

### *Locating a Threshold*

In existing treatments of reparative obligations to refugees, some scholars have implicitly accepted that there is some threshold of causal directness below which the state's reparative responsibilities evaporate (e.g. Gibney, 2004, p. 56). For instance, Price (2009, p. 3) states 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 fixing 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 *them* to be obliged to provide asylum reparatively. Such a threshold is required because, if refugees' lack of state protection can only be tenuously linked to a state's actions, then providing them with asylum reparatively 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 reparation 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). Overall, then, the objection is justified and a fifth condition should be introduced, stating that ‘the causal link between the state’s action and the refugee’s lack of state protection must be at least fairly strong’.

If some threshold of directness is needed in order to ensure proportionality, the question arises of where this threshold should be fixed, and what ‘fairly strong’ really means here. Indeed, Price (2009, p. 3) does not explain why ‘making a foreigner’s homeland uninhabitable’ crosses the threshold, while the effects of ‘destabilizing structural adjustment programs’ do not. Certainly, there is no simple algorithm for determining this threshold or for deciding whether each case meets it. Nevertheless, a scalar approach to the question of directness may be useful here. As Miller (2007, p. 88) suggests, as ‘the [causal] chain becomes longer and more tortuous, responsibility dissipates’. This means that the weaker the causal link between the refugees’ plight and the state’s actions, the lower the reparative capacity of asylum in that state. We may not be able to specify exactly where to draw the line, but we can distinguish, at least roughly, between the varying *strength* of refugees’ different reparative claims for asylum. For instance, an Iraqi refugee claiming asylum in the United States since its invasion appears to have a stronger

reparative claim than a Rwandan seeking asylum in Belgium on account of its past colonial rule.

### *Assigning Responsibilities*

Moreover, although we may not be able to attribute external responsibility for the production of refugees precisely, we may nevertheless be justified in continuing to claim that certain states bear a special obligation to those refugees. Here Miller's distinction between *identifying* and *assigning* responsibility is useful. While *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'. While identifications of responsibility can be 'correct or incorrect', assignments of responsibility can only be 'justified or unjustified' (Miller, 2007, p. 84).

Now, responsibility can be assigned to any agent, whether or not they played any part in causing the harm. However, assignments of specifically *reparative* responsibility can also be justifiably made. For instance, we may be unable to disaggregate the contributions of each state to a refugee movement accurately, yet nevertheless institute a system which assigns responsibility for a proportion of those refugees to all those which had at least some role.<sup>8</sup> Such assignments would, for instance, implicate the world's largest polluters in the event of those fleeing the effects of climate change.

## Conclusion

In this article, I have sought to develop a provisional theory of asylum as reparation for past injustice, which explains when a state has a special obligation to provide asylum reparatively. I have shown that this obligation obtains when: (1) the refugee's lack of state protection has been caused by the actions of an external state; (2) that state bears outcome responsibility for causing this lack of protection; (3) the refugee has either been unjustly harmed, or is at risk of unjust harm, as a result of this lack of protection; (4) the provision of asylum by that state is the most fitting form of reparation for that harm available; and (5) the causal link between the state's action and the refugee's lack of state protection is at least fairly strong.

As I indicated earlier, my argument has left various issues unresolved which require further attention. In particular, given that, as I commented earlier, any theory of asylum as reparation for past injustice raises wider questions of how asylum should be accessed and how asylum claims should be decided, it requires a convincing account of how states with an obligation to provide reparative asylum would prioritise refugees, especially given the currently limited political space for fashioning inclusive asylum policies in many Northern states (Gibney, 2004, pp. 244-246). After all, although states should strive to make humanitarian and reparative forms of asylum work together in a complementary fashion, it could be argued that refugees with reparative claims are nevertheless *doubly* deserving: not only are they at risk of serious harm and thereby entitled to asylum on humanitarian grounds, but they are also deserving of reparative asylum *specifically* from a particular state. There is, therefore, a possibility that an incorporation of the

principle of reparation into refugee status determination could result in a two-tier asylum system. Developing a response to this problem of prioritisation would partly require a switch from the ‘idealistic approach’ to the ethics of asylum which has largely guided this article to a ‘realistic approach’ which also takes account of such practical problems of implementation (Carens, 1996). This would allow the theoretical considerations which have dominated this article to be translated into proposals for workable improvements to current asylum systems worldwide.

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<sup>1</sup> See Blake (2007); Mark Gibney (1986, pp. 79-108); Matthew Gibney (2004, pp. 48-57); Lennox (1993); Price (2009, p. 3); Shacknove (1988, pp. 140-141); Walzer (1983, pp. 48-51); and Wilcox (2007).

<sup>2</sup> For instance, see Boswell (2005); Carens (1987); Dummett (2001); Gibney (2004); Price (2009).

<sup>3</sup> For instance, see Barkan (2000); De Greiff (2006); Miller and Kumar (2007); Thompson (2002); Torpey (2006).

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<sup>4</sup> I provide an explanation of the term ‘outcome responsibility’ below.

<sup>5</sup> For critiques of internalism, see Chimni (1998, p. 360); Zolberg *et al.* (1989, p. vi).

<sup>6</sup> My emphasis on refugees’ vulnerability might be thought implicitly to cast them as helpless victims; a characterisation much criticised as demeaning. However, the centrality of justice to my argument equally casts them as political actors bearing rights rather than as passive objects of humanitarian aid.

<sup>7</sup> Even in established procedures such as refugee status determination, such judgement calls are routinely required, leading Goodwin-Gill and McAdam (2007, p. 54) to characterise it as ‘essentially an essay in hypothesis’.

<sup>8</sup> For truly *reparative* responsibility to be assigned, however, the assignments of responsibility will still have ‘to track identified responsibility’ to some extent (Miller, 2007, p. 85), as reparation – on my definition outlined earlier – can only be provided by perpetrators.